
(2008) 07 AHC CK 0092
In the Allahabad High Court

M.K. Bajpai

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 29-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 104, 117, 122, 125, 2
Constitution of India, 1950 — Article 225, 226, 227

Citation : (2008) 4 AWC 3851 : (2009) 1 UPLBEC 752

Hon'ble Judges : Ashok Bhushan, J;Arun Tandon, J

Bench : Division Bench

Judgement

Ashok Bhushan and Arun Tandon, JJ.—Heard Sri R.K. Ojha, assisted by Sri Alok Dwivedi, learned Counsel for the appellant and Sri P.S. Baghel. learned Counsel for the respondent No. 6 as well as learned standing Counsel representing the respondents No. 1 to 4.

2. This is an appeal against the order dated 25.6.2008, passed by the learned single Judge in writ petition filed by the appellant petitioner. The brief facts giving rise to this appeal are; that L.P. Inter college, Kanpur Nagar is a recognised aided Intermediate College. The Principal of the institution retired on 30.6.2003. The appellant was appointed as Officiating Principal of the institution being senior-most Lecturer and started functioning. The District Inspector of Schools passed an order dated 13.1.2004, declaring the respondent No. 6 as senior-most Lecturer and directing that respondent No. 6 will function as Officiating Principal. The appellant filed Writ Petition No. 1979 of 2004, which was allowed by this Court on 27.2.2004, declaring the appellant senior to respondent No. 6 and holding the appellant to be entitled to work as Officiating Principal. The appellant was thereafter permitted to function as Officiating Principal. However, the Committee of Management in the year 2006 suspended the appellant and initiated disciplinary proceedings. The suspension was subsequently withdrawn by the Committee of Management and it was resolved that appellant shall not function as Officiating Principal but will function as Lecturer. The District Inspector of Schools passed an order dated 2.3.2007, directing the Committee of

Management to permit the appellant to function as Officiating/ad hoc Principal. The Committee of Management filed Writ Petition No. 14860 of 2007, challenging the order of the District Inspector of Schools, which writ petition was dismissed by this Court vide its judgment and order dated 15.6.2007, holding that till the resolution of the Committee of Management relieving the appellant from the post of Officiating/ad hoc Principal was approved by U.P. Secondary Education Service Selection Board, the appellant was entitled to function as Officiating Principal of the institution. The date of birth of appellant is 8.7.1947. Normal age of retirement of a teacher is 62 years provided, a teacher whose date of birth falls during an academic session, is entitled to continue till the end of academic session. The Government orders including the Government order dated 17.2.1999 provides an option for those teachers who want to retire at the age of 60 years so as to be entitled to gratuity, may submit option one year before the retirement by 1st July of the academic session in which date of retirement falls. The appellant made an application on 24.5.2007, opting for retirement at the age of 60 years as Officiating Principal of the institution. The option was forwarded by the Committee of Management which was countersigned by the District Inspector of Schools on 13.7.2007. The appellant wrote a letter on 16.7.2007, praying for withdrawal of his option so as to permit him to continue till 62 years, i.e., till 30.6.2010. An order was passed by the District Inspector of Schools on 23.4.2008, taking the view that since the appellant's option of retirement at the age of 60 years has been accepted and further the resolution of reversion of appellant has been sent to the U. P. Secondary Education Service Selection Board, the respondent No. 6 is approved as Officiating Principal of the institution. The order dated 23.4.2008 was challenged by the appellant by means of Writ Petition No. 23150 of 2008 which was disposed of by this Court on 8.5.2008 directing the Deputy Director of Education to decide as to whether the option of the appellant for retirement at the age of 60 years was accepted in accordance with law and in accordance with the judgment of the Full Bench of this Court in the case of Prabha Kakkar (Smt.) Vs. Joint Director of Education and Others, In pursuance of the order of this Court dated 8.5.2008, the Joint Director of Education after hearing the parties passed an order on 5.6.2008, holding that the option of the appellant having been accepted by the District Inspector of Schools on 13.7.2007, the said option is acceptable and appellant is to retire at the age of 60 years and the representation of the appellant was rejected. Against the said order of the Joint Director of Education, Writ Petition No. 28602 of 2008 was filed by the appellant in which an interim order was passed on 25.6.2008, against which order the present special appeal has been filed.

3. Learned single Judge considering the submission of the Counsel for the appellant that his option of retirement at 60 years has not been accepted in accordance with law laid down by the Full Bench in the case of Smt. Prabha Kakkar (supra) and he is entitled to continue till the age of 62 years. Learned single Judge accepting the submission has directed as an interim measure that the petitioner be permitted to work as Lecturer in the institution till 14th July,

2008. The appellant is aggrieved only with that part of the interim order which permitted the appellant to work as Lecturer. The submission of the learned Counsel for the appellant is that the appellant being senior-most Lecturer and having been found entitled to work as Officiating/ad hoc Principal by this Court in two earlier judgments, is entitled to continue as Officiating/ad hoc Principal till he attains the age of 62 years. It is relevant to note that in so far as the order of this Court dated 25.6.2008, directing continuance of appellant, none of the respondents have come up in appeal and the appeal has been filed by the petitioner-appellant himself who submits that his continuance till 62 years of age has to be as Officiating/ad hoc Principal and not as Lecturer.

4. Learned Counsel for the appellant submits that this Court in two writ petitions being Writ Petition No. 1979 of 2004, Mahendra Kumar Bajpai v. State of U.P. and Ors. decided on 27.2.2004 as well as in Writ Petition No. 14860 of 2007, Committee of Management L.P. Inter College, Kanpur Nagar and Anr. v. State of U.P. and Ors. decided on 15.6.2007, held the appellant to be entitled to work as Officiating/ad hoc Principal, the interim order dated 25.6.2008 deprives continuance of appellant as Officiating/ad hoc Principal to which he is entitled under law being senior-most Lecturer in the institution. Learned Counsel for the appellant submits that the option submitted by the appellant for retirement at the age of 60 years dated 24.5.2007 having not been accepted by the Deputy Director of Education, who is authority competent to accept option, the appellant has every right to withdraw his option of retirement which having been done on 16.7.2007, the appellant is entitled to continue till age of 62 years as Officiating/Add hoc Principal.

5. Sri P.S. Baghel, learned Counsel for the respondent No. 6, in whose favour the order has been passed by the District Inspector of Schools to work as Officiating/ad hoc Principal, refuting the submission of learned Counsel for the appellant contends that option of the appellant for retirement at the age of 60 years given on 24.5.2007, having been accepted by the District Inspector of Schools on 13.7.2007, it was not open for the appellant to withdraw the option on 16.7.2007. He further submits that the appellant's option of retirement at the age of 60 years having been accepted by the District Inspector of Schools, it is respondent No. 6 who is to function as Officiating/ad hoc Principal. Sri P.S. Baghel further contends that power to accept the option vests in the District Inspector of Schools according to the 1981 Rules.

6. Sri P.S. Baghel, learned Counsel for the respondent No. 6 further raised a preliminary objection regarding entertainability of the appeal. He submits that the impugned order in this appeal is only interim order hence, the special appeal is not maintainable under Chapter VIII, Rule 5 of the Rules of the Court. He further submits that the order dated 25.6.2008 is not a judgment within the meaning of Chapter VIII, Rule 5 of the Rules of the Court. He placed reliance on a Division Bench judgment of this Court in the case of Society of Madarsa Mazahir Uloom Mubarak Shah Saharanpur v. Muzaffar Hussain 1994 AWC 55 ,

and the case of Brijpal Sharma Vs. State of U.P. and Others, Learned Counsel for the appellant refuting the preliminary objection raised by learned Counsel for the respondent No. 6 contends that the order impugned deprives valuable right of appellant to continue as Officiating/ad hoc Principal of the institution hence, the appellant has every right to maintain this appeal. He further contends that special appeal under Chapter VIII, Rule 5 of the Rules of the Court against the impugned order is fully maintainable.

7. The preliminary objection raised by Sri P.S. Baghel, learned Counsel for the respondent No. 6, regarding maintainability of the appeal has to be first considered.

8. The provision for filing special appeal against judgment of one Judge of the Court is contained under Chapter VIII, Rule 5 of the Rules of the Court. The provisions of intra-court appeal from the judgment of one Judge was contained in the letters patent dated 17.3.1866 constituting the High Court. Clause 10 of the letters patent provided that appeal shall lie to the said High Court from the judgment of one Judge of the said Court. The letters patent were amended from time to time and after enforcement of the Constitution of India by virtue of power vested in the High Court under Article 225 of the Constitution of India, Rules of the Court have been framed. The intra-court appeal which is called as special appeal in this Court, is continuance of letters patent appeal as initially granted. Chapter VIII, Rule 5 of the Rules of the Court as it exists today is as follows:

Special appeal.- An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction or in the exercise of the jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award - (a) of a Tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge.

9. The provisions as quoted above provides an appeal to the Court from Judgment of one Judge. The issue which has been raised in this special appeal is as to the meaning of the word "judgment" as used in Chapter VIII, Rule 5. The word "judgment" has been used in letters patent of other chartered High Courts also while providing an intra-court appeal. Right from when the letters patent appeal came to be filed there were divergence of opinion in different High Courts regarding scope and meaning of the word "judgment". It is not necessary to

refer to the different views taken by different High Courts regarding scope and meaning of word Judgment" since the controversy which was continuing for about 100 years came to be settled by the Apex Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, . The case before the Apex Court arose from Bombay High Court. Clause 15 of the letters patent of Bombay High Court provides for letters patent appeal against the judgment of one Judge. A suit was filed in the original side of the Bombay High Court for specific performance of a contract. An interim relief was prayed for appointing a receiver of the suit property and injunctioning the defendant from disposing of the suit property. Learned single Judge dismissed the application for appointment of receiver as also for interim injunction. An appeal was filed before the Division Bench, which was dismissed as not maintainable observing that order impugned of the learned single Judge was not a judgment as contemplated under Clause 15 of the letters patent of the High Court. Against the judgment of the Division Bench, the appeal was filed in the Supreme Court. Before the Apex Court contention raised was that against the order of one Judge letters patent appeal was maintainable since the order of one Judge squarely fell under Order XLIII, Rule 1, Code of Civil Procedure, therefore, the same was appealable to a larger Bench. It was further contended that even if Order XLIII, Rule 1 do not apply in terms, the order which has been mentioned as being appealable to a larger Bench could form valuable guidelines for the Court in arriving at conclusion that such orders amount to judgment of the single Judge as contemplated by the letters patent. The Supreme Court in the above case after considering the judgment of the different High Courts as also the earlier judgments of the Apex Court came to the conclusion that Order XLIII, Rule 1. CPC applies to proceeding before the trial Judge of the High Court and the letters patent appeal was held to be maintainable. This was clearly laid down by the Apex Court in the following paragraphs of the judgments:

26. Thus, a combined reading of the various provisions of the CPC referred to above leads 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. Unfortunately, this fact does not appear to have been noticed by any of the decisions rendered by various High Courts.

33. ...On a parity of reasoning, therefore, Section 104 read with Order XLIII, Rule 1 expressly authorises and creates a forum for appeal against orders falling under various Clauses of Order XLIII, Rule 1, to a larger Bench of the High Court without at all disturbing, interfering with or over-riding the letters patent jurisdiction....

46. Another important decision regarding the applicability of Order XLIII. Rule 1 to an order passed by the trial Judge was rendered by a Full Bench in Mathura Sundari Dassi v. Haran Chandra Shaha and Ors. where Sanderson, C.J. observed thus:

By the terms of Section 117, the Code is made applicable to the High Court, and

Order XLIII. Rule 1 gives a right of appeal in the very case under discussion. But it is said that this Code and the rules made under it do not apply to an appeal from a learned Judge of the High Court. I cannot follow that argument. It is part of the defendant's case that Order IX, Rule 8 applies. That order is in effect a part of the Civil Procedure Code. It seems to me strange that the plaintiff should be subjected to Order IX, Rule 8 and be liable to have his suit dismissed for want of appearance, yet when he has had his suit dismissed under one of the rules of the Code and wants to call in aid another of the rules which-when his application for reinstatement has been refused-gives him a right of appeal against that refusal, he is met with the argument that he cannot call in aid that rule because there is no appeal from the learned Judge of the High Court under the Civil Procedure Code. I think this is not a true view or a reasonable construction to put upon the Code and the rules made under it. In my judgment, the Code and the rules do apply and the plaintiff has a right of appeal.

And Woodroff "J" made similar observations:

Whether or not as a question of jurisdiction an appeal lies under Clause 15 of the letters patent in a case in which an appeal is allowed under the Code, I think it may be said that there are prima facie grounds for holding that an appeal should be held to lie under the letters patent where it is allowed under the Code : for the fact that the Legislature has in the Code allowed an appeal in a particular case, affords to my mind prima facie grounds for supposing that case is of a class which this Court considers appealable under its letters patent. Looking at the nature of the order appealed from, I think I should hold that it is appealable as a "Judgment" under the letters patent.

And Mookerjee, J. observed thus:

The term "Rule" which finds a place in Section 117 is defined in clause 18 of Section 2 of the Code to mean "a rule contained in the First Schedule or made under s 122 or Section 125". Our attention has not been drawn to any such rule which makes Order XLIII, Rule 1, Clause (c) inapplicable. On the other hand, Order XLIX, Rule 3 which excludes the operation of other rules, lends support to the contention of the appellant that Order XLIII, Rule 1 Clause (c) is applicable to the present appeal....

"Section 104 of the Code of 1908 is materially different from Section 588 of the Code of 1882. It provides that an appeal lie from the orders mentioned in the first Clause of that Section and, save as otherwise expressly provided in the body of the Code or by any law for the time being in force from no other orders." The effect of Section 104 is thus, not to take away a right of appeal given by Clause 15 of the letters patent, but to create a right of appeal in cases even where Clause 15 of the letters patent is not applicable. I hold accordingly that this appeal is competent under Clause (c), Rule 1, Order XLIII of the Civil Procedure Code.

I am further of opinion that the appeal is competent also under Clause 15 of the

Letters Patent.

(Emphasis ours)

47. We find ourselves in complete agreement with the view taken and the reasons given by the three eminent Judges in the aforesaid case which furnishes a complete answer to the arguments of the respondents that Order XLIII, Rule I will have no application to internal appeals in the High Court under the provisions of the letters patent.

10. While considering the submission raised before the Apex Court that even if the Order XLIII, Rule 1, CPC does not apply, the appealable orders indicated in various Clauses of Order XLIII, Rule 1 are matters of moment deciding valuable rights of the parties and in the nature of final orders so as to fall within the definition of "judgment". Following was laid down in paragraphs 55 and 79:

55. This now brings us to the second limb of the argument of Mr. Sorabjee that even assuming that Order XLIII, Rule I does not apply to the High Court so far as the trial Judge of the said court is concerned, there can be no doubt that the orders indicated in various Clauses of Order XLIII, Rule 1 possess the attributes and incidents of a final order which conclusively decides a particular issue so far as the trial court is concerned. Thus, there can be no difficulty, even without applying Order XLIII, Rule 1 to hold by a process of analogical reasoning that the appeals and orders mentioned in the various sub-clauses would amount to a Judgment within the meaning of Clause 15 of the letters patent because they contain the traits, trappings and qualities and characteristics of a final order. In other words, the argument advanced was that we could still apply the provisions of Order XLIII, Rule 1 by the process of analogy. We fully agree with this argument because it is manifest that the word "Judgment" has not been defined in the letters patent but whatever tests may be applied, the order passed by the trial Judge appealed against must have the traits and trappings of finality and there can be no doubt that the appealable orders indicated in various Clauses of Order XLIII, Rule I are matters of moment deciding valuable rights of the parties and in the nature of final orders so as to fall within the definition of "judgment".

79. Thus, after considering the arguments of Counsel for the parties on the first two limbs of the questions, our conclusions are:

(1) That there is no inconsistency between Section 104 read with Order XLIII, Rule I and the appeals under the letters patent and there is nothing to show that the letters patent in any way excludes or overrides the application of Section 104 read with Order XLIII, Rule I or to show that these provisions would not apply to internal appeals within the High Court.

(2) That even if it be assumed that Order XLIII, Rule I does not apply to letters patent appeals, the principles governing these provisions would apply by process of analogy.

(3) That having regard to the nature of the orders contemplated in the various

Clauses of Order XLIII, Rule 1, there can be no doubt that these orders purport to decide valuable rights of the parties in ancillary proceedings even though the suit is kept alive and that these orders do possess the attributes or character of finality so as to be judgments within the meaning of Clause 15 of the letters patent and hence, appealable to a larger Bench.

(4) The concept of the letters patent governing only the internal appeals in the High Courts and the CPC having no application to such appeals is based on a serious misconception of the legal position.

11. The Apex Court further proceeded to observe that there may be large number of orders passed by the trial Judge which may not be covered by Order XLIII, Rule 1, the Apex Court proceeded further to examine after making following observations in paragraph 80.

80. This now brings us to the second important point which is involved in this appeal. Despite our finding that Section 104 read with Order XLIII, Rule I applies to letters patent appeals and all orders passed by a trial Judge under Clauses (a) to (w) would be appealable to the Division Bench, there would still be a large number of orders passed by a trial Judge which may not be covered by Order XLIII, Rule 1. The next question that arises is under what circumstances orders passed by a trial Judge not covered by Order XLIII, Rule 1 would be appealable to a Division Bench. In such cases, the import, definition and the meaning of the word "judgment" appearing in Clause 15 assumes a real significance and a new complexion because the term judgment" appearing in the letters patent does not exclude orders not falling under the various Clauses of Order XLIII, Rule 1.

12. After considering the view of the various High Courts and scope and meaning of word "judgment" following was held in paragraphs 103 and 106.

103. We might mention here that the observations of this Court completely demolish the arguments of some of the High Courts that Section 104 does not apply to internals in the High Court because this Court while referring to the Code made specific reference to Section 104 in the previous paragraph. Apart from this, there is no observation by this Court regarding essential requisites of a judgment. In *State of U.P. v. Dr. Vijay Anand Maharaj* (supra) the order impugned passed by the single Judge was an order dismissing an application filed by the applicant to review the order of the trial Judge. The question for determination was whether the order was a judgment so as to be appealable to the Division Bench. This Court referred to the observations of Hidayatullah, J., extracted in *Manohar v. Baliram* (supra) and though they did not expressly approve this decision they indirectly seem to have been impressed by the reasons given by Hidayatullah, J. Nothing further was said by this Court because it held that on the facts of that case the order of the trial Judge dismissing the application for review was appealable. We might mention here that under Clause (w) of Order XLIII; Rule 1 an order granting an application for review is appealable. On a parity of reasoning, therefore, an order dismissing an

application for review would also be appealable under the letters patent being a judgment though it is not made appealable under Order XLIII. Rule 1.

106. Thus, the only point which emerges from this decision is that whenever a trial Judge decides a controversy which affects valuable rights of one of the parties, it must be treated to be a judgment within the meaning of the letters patent.

13. In the end of the judgment delivered by Justice Fazal Ali on behalf of himself and Varadarajan, J., following conclusions were recorded in paragraph 113:

113. Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a Court. As a judgment constitutes the reasons for the decree it follows as a matter of course that the Judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined by the CPC seems to be rather narrow and the limitations engrafted by Sub-section (2) of Section 2 cannot be physically imported into the definition of the word "judgment" as used in Clause 15 of the Letters Patent because the letters patent has advisedly not used the terms "order" or "decree" anywhere. The intention, therefore, of the givers of the letters patent was that the word "judgment" should receive a much wider and more liberal interpretation than the word "judgment" used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the letters patent. It seems to us that the word "judgment" has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds:

(1) A final judgment-a judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial Judge indisputably and unquestionably is a Judgment within the meaning of the letters patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench,

(2) A preliminary judgment - This kind of a judgment may take two forms ? (a) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the trial Judge would be a judgment finally deciding the cause so far as the trial Judge is concerned and therefore appealable to the larger Bench, (b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res judicata, a manifest defect

in the suit, absence of notice u/s 80 and the like, and these objections are decided by the trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a Judgment so as to be appealable to larger Bench.

(3) Intermediary or Inter locutory Judgment-Most of the interlocutory orders which contain the quality of finality are clearly specified in Clauses (a) to (w) of Order XLIII, Rule 1 and have already been held by us to be judgments within the meaning of the letters patent and, therefore, appealable. There may also be interlocutory orders which are not covered by Order XLIII, Rule 1 but which also possess" the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the trial Judge in a suit under Order XXXVII of the CPC refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiffs case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the letters patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an Order passed by the trial Judge would not amount to a judgment within the meaning of Clause 15 of the Letters Patent but will be purely an interlocutory order.

14. Similarly, suppose the trial Judge passes an order setting aside an ex parte decree against the defendant, which is not appealable under any of the Clauses of Order XLIII, Rule 1 though an order rejecting an application to set aside the decree passed ex parte falls within Order XLIII, Rule 1 Clause (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of letters patent. The fact, however, remains that the order setting aside the ex parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the trial Judge setting aside the ex parte decree vitally

affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench.

15. The judgment of the Apex Court in the case of Shah Babu Lal Khimji (supra) has thus elaborately laid down the nature of the orders passed by one Judge of the High Court against which letters patent appeal are maintainable. There cannot be any dispute that appeal will be fully maintainable against a final judgment or a preliminary judgment. The maintainability of letters patent appeal was also accepted against the intermediary or interlocutory Judgment. From paragraph 113(3) of the judgment of the Apex Court in the case of Shah Babu Lal Khimji (supra), it is clear that interlocutory orders which contain the quality of finality are specified in Clauses (a) to (w) of Order XLIII, Rule 1. Thus, with regard to interlocutory orders passed by one Judge, appeals to which have been held to be maintainable, can be grouped in following categories:

(a) The interlocutory orders against which appeal is provided under any of the Clause of Order XLIII, Rule 1, C.P.C. are appealable under letters patent .

(b) There may be other interlocutory orders which are not covered by Order XLIII, Rule 1, C.P.C. but which possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding, against such orders appeal is also maintainable.

16. It is also useful to refer a recent judgment of the Apex Court in Midnapore Peoples" Co-op. Bank Ltd. and Others Vs. Chunilal Nanda and Others, , in which case also relying on the judgment of the Apex Court in Shah Babu Lal Khimji (supra), the Apex Court had an occasion to consider the word "judgment" in Clause 15 of the letters patent appeal. Paragraphs 15 and 16 of the judgment which is relevant in the present case is quoted below:

15. Interim orders/interlocutory orders passed during the pendency of a case, fall under one or the other of the following categories:

(i) Orders which finally decide a question or issue in controversy in the main case.

(ii) Orders which finally decide an issue which materially and directly affects the final decision in the main case.

(iii) Orders which finally decide a collateral issue or question which is not the subject-matter of the main case.

(iv) Routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment.

(v) Orders which may cause some inconvenience or some prejudice to a party, but which do not finally determine the rights and obligations of the parties.

16. The term "judgment" occurring in Clause 15 of the letters patent will take into its fold not only the judgments as defined in Section 2(9), C.P.C. and orders

enumerated in Order XLIII, Rule 1 of C.P.C., but also other orders which, though may not finally and conclusively determine the rights of parties with regard to all or any matters in controversy, may have finality in regard to some collateral matter, which will affect the vital and valuable rights and obligations of the parties. Interlocutory orders which fall under categories (i) to (iii) above, are, therefore, judgments" for the purpose of filing appeals under the letters patent. On the other hand, orders falling under categories (iv) and (v) are not "judgments" for purpose of filing appeals provided under the letters patent.

17. A perusal of the order under challenge in the present appeal indicates that the said order is an Interim order passed on the 1st day of hearing of the writ petition. As noticed above, the submission of the learned Counsel for the appellant is that by two judgments of this Court dated 27.2.2004 and 15.6.2007, the appellant was held entitled to continue as officiating/ad hoc Principal and further he being senior-most Lecturer by virtue of Section 18(4) of U.P. Act No. 5 of 1982, he was entitled to function as officiating/ad hoc Principal. Section 18(4) of U.P. Secondary Education (Services Selection Board) Act, 1982 is to the following effect:

(4) A vacancy in the post of a principal may be filled by promoting the senior-most teacher in the Lecturer's grade.

18. The order of learned single Judge, directing the petitioner to continue as Lecturer affects the valuable right of the appellant and on the strength of law laid down by Apex Court in paragraph 113 (3) in the case of Shah Babu Lal Khimji (supra), the present appeal is maintainable.

19. Learned Counsel for the (respondent has relied on two judgments of this Court; one in the case of Society of Madarsa Mazahir Uloom Mubarak Shah Saharanpur (supra) in which judgment also the Division Bench has relied on the judgment of the Apex Court in Shah Babu Lal Khimji case. The order which was impugned in the said" appeal was only to the effect of staying the order of Deputy Registrar, Societies Chits whereas the order impugned in the present appeal is an order which permits the appellant to continue as Lecturer and deprives his valuable right to continue as officiating/ad hoc Principal which flows from Section 18(4) of U.P. Act No. 5 of 1982 as well as two judgments of this Court between the parties. That the said case is clearly distinguishable. Another case relied on by learned Counsel for the respondent is the case of Brijpal Sharma a State of U.P. (supra). In the aforesaid case, relying on an earlier judgment of the Division Bench that Special Appeal lay against interim order of learned single Judge, staying the transfer because transfer is exigency of service, the said judgment is clearly distinguishable since the ratio laid down in the said judgment was only with regard to a transfer order stayed by learned single Judge. In view of the foregoing discussions and following the law laid down by the Apex Court in the case of Shah Babu Lal Khimji (supra), this special appeal is held maintainable under Chapter VIII, Rule 5 of the Rules of the Court.

20. Now comes the submission of learned Counsel for the parties on the merits of the case. The main issue before the learned single Judge was as to whether the appellant had authority to withdraw his option of retirement of 60 years' age, which was submitted by him on 24.5.2007 countersigned by the District Inspector of Schools on 13.7.2007. The District Inspector of Schools countersigned the option on 13.7.2007 and passed an order on 23.4.2008 to the effect that option having been accepted, the respondent No. 6 is declared as officiating Principal which order was challenged by the appellant in Writ Petition No. 23150 of 2008. The appellant's case was that the District Inspector of Schools had no authority or jurisdiction to accept the option and the power to accept the option only lay with the Deputy Director of Education. The reliance was placed by the appellant on the Full Bench decision of this Court in the case of Smt. Prabha Kakkar (*supra*). The aforesaid case has laid down that it is the Regional Deputy Director of Education, who is an authority competent to accept the option and the countersignature by the District Inspector of Schools cannot be treated to be an acceptance. Following was laid down at paragraph 12 of the judgment page 208:

12. Thus, the Division Bench was not justified in saying that the countersigning of the option submitted by the teacher in prescribed form amounted to acceptance. The circular order dated 30th October, 1990 issued by the Director of Education in pursuance of the Government order dated 6th October, 1990, clearly provided that the acceptance/non-acceptance of the option exercised shall be communicated by the Regional Deputy Director of Education to the concerned employee within the specified time hence countersigning of the option by the District Inspector of Schools could not be taken as acceptance of the same. The purpose behind the requirement of countersigning by District Inspector of Schools was perhaps to ascertain that the option was exercised by the correct person and he satisfied other conditions which were necessary for exercise of the option. The obligation of the District Inspector of Schools was thus to authenticate the signature of executing of the option and information supplied by him in the prescribed proforma. Thus, our conclusion is that the act of acceptance of the option by the Deputy Director of Education and its communication to the employee was necessary in order to make it final. The countersignature of the District Inspector of Schools on such option could neither be taken as acceptance nor could it attach any kind of finality to it.

21. Writ Petition No. 23150 of 2008 was decided on 8.5.2008, in which order dated 23.4.2008, passed by the District Inspector of Schools was challenged. This Court noted the submission of the learned Counsel for the parties that it is the Deputy Director of Education who is authority competent and the matter was remitted to the Deputy Director of Education to pass final order. Following observation was made by learned single Judge on 8.5.2008:

Learned Counsel for both the parties have agreed that since the Deputy Director of Education is the authority for acceptance, this matter may be relegated before

him so that the parties may place before him their grievances and in case it is found that the Deputy Director of Education has finally accepted the option of the petitioner, the impugned order would be held in the judgment of Smt. Prabha Kakkar (supra) have not been complied with, the Deputy Director of Education would be required to pass a reasoned and speaking order on the grievances raised by the petitioner before him.

22. In pursuance of the order of this Court dated 8.5.2008, the Deputy Director of Education, passed an order on 5.6.2008, rejecting the representation of the appellant. Although in this appeal learned Counsel for the respondent No. 6 contended that it is the District Inspector of Schools, who is authority competent to accept the option but the above observations made by learned single Judge clearly indicate that in Writ Petition No. 23150 of 2008. learned Counsel for the respondent No. 6 also admitted that it is the Deputy Director of Education, who is authority competent to accept the option more so the Full Bench judgment of this Court in the case of Smt. Prabha Kakkar (supra) has elaborately laid down that it is the Deputy Director of Education, who is authority competent to accept the option. Learned single Judge thus accepted the submission of learned Counsel for the appellant that his option of retirement at the age of 60 years, was not validly accepted and allowed the appellant to continue. It is again relevant to note that against the order permitting the appellant to continue, no one has appealed. The issue in this appeal is as to whether the appellant is entitled to continue as officiating/ad hoc Principal or as Lecturer. At this juncture, it is useful to refer to the orders passed in earlier writ petition being Writ Petition No. 1979 of 2004, which was filed by the appellant challenging the order by which the respondent No. 6 was declared senior and entitled to work as officiating Principal. This Court while allowing the writ petition ordered as follows at page 117:

For the aforesaid reason, the writ petition is allowed. The impugned order dated 13.1.2004 passed by District Inspector of Schools, is set aside. The petitioner is declared senior to respondent No. 4 and shall be entitled to take charge and work as officiating Principal.

23. Again in Writ Petition No. 14860 of 2007 filed by the Committee of Management against the order of the District Inspector of Schools directing the management to permit the appellant to function as officiating Principal, this Court held as under :

Consequently, in the present case on admitted position, as on date Committee of Management has chosen to withdraw the order of suspension and once order of suspension has been withdrawn, and as far as resolution of reversion, reverting Mr. M.K. Bajpai from the status of ad hoc Principal to the substantive status of Lecturer in Chemistry is concerned, without approval of the U.P. Secondary Education Service Selection Board, same is of no consequence, in this background, even though order has been passed by District Inspector of Schools on incorrect ground, but in law Mr. M.K. Bajpai cannot be prevented from

performing and discharging his duties as ad hoc Principal, unless and until resolution of reverting him is approved by the U.P. Secondary Education Service Selection Board.

24. Further the order dated 23.4.2008, which was also challenged in writ petition giving rise to this appeal, the District Inspector of Schools approved the respondent No. 6 as officiating Principal on the ground that option of appellant for retirement at the age of 60 years has been accepted. As observed above, prima facie, it cannot be said that option of 60 years was accepted and the appellant was entitled to continue at the age of 62 years. The order dated 23.4.2008 approving the respondent No. 6 to continue as officiating Principal also deserves to be stayed.

25. In view of the aforesaid, the interim order dated 25.6.2008 passed by learned single Judge is modified by providing that the order dated 4.6.2008 passed by the Deputy Director of Education as well as the order dated 23.4.2008 passed by the District Inspector of Schools shall remain stayed and appellant shall be allowed to continue as officiating/ad hoc Principal till any decision to the contrary is taken by the U.P. Secondary Education Service Selection Board. Learned Counsel for the parties have informed that although the Committee of Management was issued notice in the writ petition but till date the Committee of Management has not put in appearance in the writ petition. The Committee of Management having not appeared before us, we grant liberty to the Committee of Management to apply for vacation, modification of the interim order dated 25.6.2008 as modified by us before learned single Judge.

26. The special appeal is disposed of accordingly.