
(1997) 02 GAU CK 0026
In the Gauhati High Court
Case No : L.P.A. No. 8 of 1995

Modern Supply Agency (M/s.) and Another	APPELLANT
Vs	
Anwara Begum Borbhuiya and Others	RESPONDENT

Date of Decision : 13-02-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 1(4), Order 39 Rule 2, Order 43 Rule 1, 100A
Government of India Act, 1915 — Section 108

Citation : (1998) 4 GLT 150

Hon'ble Judges : V.K. Khanna, C.J.; B.N. Singh Neelam, J.; A.K. Patnaik, J

Bench : Full Bench

Advocate : N.M. Lahiri, B.K. Das, N. Choudhury, H.S. Thangkheiw, S.C. Kayal and B.W. Phira, for the Appellant; B.K. Goswami, A.M. Mazumdar, S.S. Dey and M. Nath, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Khanna, C.J.—The present Letters Patent Appeal has been filed against the judgment and order dated 19.7.95 passed by a learned single Judge of this Court in M.A. (sic) No 86/95 whereby the appeal filed by the Appellants was dismissed and the Trial Court was directed to dispose of the case at the earliest considering the urgency of the matter.

2. The present appeal came up for admission on 11.12.1995 and after hearing Mr. N.M. Lahiri, Senior Advocate assisted by Mr. N. Choudhury, learned Counsel appearing for the Appellants and Mr. B.K. Goswami, Senior Advocate, assisted by Mr. S.S. Dey and Mr. M. Nath, learned Counsel appearing for the Respondents, the Court was of opinion that a preliminary question arose in this case as to whether a Letters Patent Appeal would lie against an order passed in appeal by a learned single judge of this Court under Order 43 of the Code of Civil Procedure. The Court was also of the tentative opinion that the judgment rendered by a Division Bench of this Court in Azad Ali v. HOUSEFED (1994(1) GLJ 1) may

require reconsideration and for that reason Division Bench ordered the papers of the case to be laid before the Chief Justice for passing necessary orders. The case was there after referred to the Full Bench on 11.12.95 and it is in these circumstances that the appeal has come up before the Full Bench for consideration of the following question:

Whether Letters Patent lies against the judgment of single Judge passed in Miscellaneous First Appeal arising in respect of Order of the subordinate Court under Order 39, Rules 1 and 2, Code of Civil Procedure.

3. We have heard Mr. N.M. Lahiri, Senior Advocate, for the Appellants and Mr. B.K. Goswami, Senior Advocate, for the Respondents.

4. According to the arguments raised by Mr. Lahiri, the first criterion as to whether the decision of single judge given in an appeal arising out of Order 43, Rule 1(r) is a judgment has been decided by the Supreme Court in *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, There Lordships held in that case that an order refusing to appoint a receiver or to grant an injunction is undoubtedly a judgment. Reliance has also been placed on the case of *National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee)*, where it has been held that when the single Judge has exercised appellate jurisdiction under the statute, appeal shall lie before Division Bench under Letters Patent. Strong reliance has been placed on a Division Bench decision of the then Court in the case of *Ganapati Wadgo v. Pilaji Kothuji* (AIR 1956 Nag 211). On the basis of the aforesaid case, it has been argued that Section 104, CPC has application to appeals to High Court from Courts subordinate to it. It does not deal with appeals from single judge of the High Court to a bench under letters Patent. There is no provision under the Code or any right of appeal from the decision of Single Judge to a Bench and such appeals are provided by clause-10 of the letters Patent of Nagpur High Court which is analogous to clause-10 of Allahabad Court and Cause-15 of Calcutta, Bombay and Madras high Courts. The appeal cannot be said to be barred by Section 104 in the absence of a provision under the letters patent. It has been urged that this part of the judgment was not considered in *Azad Ali's* in case (*Supra*).

5. Mr. Lahiri has also placed reliance on the case of *P. Ranga Reddy and Others Vs. Golla Sambasivarao and Others*, where the point for determination before the aforesaid Court was as to whether a single Bench judgment in a Civil Miscellaneous Appeal against an appellate order of remand was appealable under Letters Patent. Strong reliance has been placed on the following part of the Judgment:

The intention of the Parliament in Section 100A, CPC seems to be discernible from the examination of the language employed therein to abolish all third appeals before a fourth Court. (Paragraph 19 and 30)

According to Mr. Lahiri, if the decision of the learned single Judge arises out of an appellate order of: Subordinate Court, the same cannot be assailed again before

the Division Bench. But when the decision of the single Judge relates to an order of subordinate Court passed in original jurisdiction, there shall not be any bar for appeal before Division Bench.

6. It has also been urged that the last and final test in this respect is whether such a right of appeal conferred under Clause 15 of the letters patent can be taken away and, if so, how? It has been argued that this matter has been dealt with by the Apex Court in the case of *Umaji Keshao Meshram and Others Vs. Radhikabai and Another*, wherein their Lordships have held:

91. The position which emerges from the above discussion is that under Clause-15 of the Letters Patent of chartered High Courts, from the judgment (within the meaning of the term as used in that clause) of a single Judge of the High Court and appeal lies to a Division Bench of that High Court and there is no qualification or limitation as to the nature of the jurisdiction exercised by the single judge while passing his judgment, provided an appeal is not barred by any statute (for example, Section 100A of the Code of Civil Procedure, 1908) and provided the conditions laid down by Clause-15 itself are fulfilled. The conditions prescribed by Clause-15 in this behalf are (1) that it must be a judgment pursuant to Section 108 of the Government of India Act. of 1915 and (2) it must not be a judgment falling within one of the excluded categories set out in Clause-15.

It has been urged that the Division Bench in *Azad Ali's* case (*Supra*) did not consider the aforesaid decision of the Hon'ble Supreme Court and the quotation from Paragraph-41 of *Babulal Khimji's* case (*Supra*) has no relevance for adjudicating on this point. The sum and substance of the argument raised by Mr. Lahiri is that the right of appeal conferred under clause-15 of the Letters Patent can not be taken away without any competent legislation for the aforesaid purpose. The provisions u/s 104(2) of the CPC cannot override the provisions of Letters Patent in as much as the right of appeal conferred u/s 104 of the Code of Civil Procedure has only been curtailed by the said Section 104(2) of the Code of Civil Procedure.

7. Mr. B.K. Goswami, learned Counsel for the Respondents, has strongly relied on Paragraph-41 of the judgment rendered by the Apex Court in the case of *Shah Babulal Khimji* (*Supra*) and on that basis it has been urged that in paragraph-41 it has been clearly held that-

...A further second appeal lying to a Division Bench from an appellate order of the trial. Judge passed under Order 43, Rule 1 is wholly foreign to the scope and spirit of the letters Patent. Unfortunately, however, the Allahabad High Court in *L. Ram Sarup Vs. Mt. Kaniz Ummehani*, refused to follow a Division Bench decision in *Piari Lal v. Madan Lal* ILR 39 All 191 : (AIR 1917 All 325 (2)) and also tried to explain away the Full Bench? Decision in *Ram Sarup's* case (*Piari Lal's* case?) (*Supra*) where it was clearly pointed out that in such cases no further appeal would lie to Division Bench under the Letters Patent. The distinction drawn by the

Allahabad High Court regarding the application of Section 104 is a distinction without any difference....

The Supreme Court considered a decision of the Allahabad High Court in *L. Ram Sarup Vs. Mt. Kaniz Ummehani*, and also two other decisions of the same High Court and in para-43 it was held:

...thus in these two cases it was clearly held that where a Trial Judge passed an order, in an appeal against an order passed by the District Judge under Order 43, Rule-1, a further appeal under Letters Patent was not maintainable. This view is fully supported by the express language in which clause-15 of the Letters Patent has been couched as referred to above, Thus the later decision of the Allahabad High Court in *L. Ram Sarup Vs. Mt. Kaniz Ummehani*, was clearly wrong in holding that an appeal under letters patent would lie even against an appellate Order of even though it was prohibited by Section 103(2).

8. However, in the latest decision of the Apex Court in the case of *Resham Singh Pyara Singh Vs. Abdul Sattar*, the controversy which has been decided by the Apex Court in the aforesaid case is precisely the controversy which has been raised before us. The Petitioner before the Apex Court claimed to have entered into an agreement on 21.6.1973 to purchase certain lands from A.H. Wadia Charity Trust. In 1975, when one Mohd. Amin and others attempted to construct a boundary wall in the said land, he claimed to have filed suit No. 298 of 1975 in the city Civil Court, Bombay and had an injunction against them restraining them from interfering with his possession and construction of the boundary wall. When the Petitioner had attempted to repair the existing road on the land and open drainage, the Respondent filed suit No. 493 of 1990 in the city Civil Court, Bombay for injunction. The Respondent claimed to be in possession of the land amending 1947 sq. metres. On its basis, the Petitioner claimed that they were attempting to trespass into his land. Consequently, the Appellant filed suit No. 3670 of 1994 and also sought an interim injunction to restrain the Respondent from committing trespassing into his land. Initially, interim injunction was granted on 28.6.1994. When the appeal was filed against that order, the learned single judge of the High Court directed the Commissioner to demarcate the lands in exclusive possession and enjoyment of the Petitioner within the compound by order dated 13.9.1995. Against that order, the Petitioner filed Letters Patent Appeal contending that the order of the learned single judge amounts to granting temporary mandatory injunction to break the compound wall and removing article etc. By the impugned order dated 13-(sic)-1995, the Division Bench rejected the same on the ground that LPA would not lie against the order of the learned single judge. Thus these S.L.Ps.

9. In the S.L.Ps. before the Apex Court, it was contended that as per the law laid down by the Apex Court in the case of *Shah Babtdal Khimji v. Jayaben D. Kania* (Supra). Letters Patent Appeal would lie to the Division Bench against the interlocutory order of the Single Judge and therefore, the view taken by the Bombay High Court was not correct. The Apex Court held that it is Order 43, Rule

1, Code of Civil Procedure, which provides an appeal from the orders passed under Order 39, Rule 1, as stated in Sub-rule (4), and that Section 104, Code of Civil Procedure, provides for an appeal from the orders provided in Order 43 save as otherwise expressly provided in the body of the Code or by any Law for the time being in force and from no other orders. Sub-section(2) envisages that "No appeal shall lie from any order passed in appeal under this section."

10. The Apex Court in para-6 of the aforesaid judgment held 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(1) 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 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.

11. The facts of the present case are exactly similar to the case before the Apex Court in the case of Resham Singh Pyara Singh (Supra). The appeal before the learned Single Judge was under the provisions of Order 43, Rule 1(r) and in view of the provisions of Sub-section(2) of Section 104 no further appeal would lie from any order passed in an appeal under this Section. In view of the law laid down by the Apex Court in the case of Resham Singh Pyara Singh (Supra), we are of the opinion that the Letters Patent Appeal will not lie before the Division Bench of High Court against the order of the learned Single Judge by virtue of Section 104(2) of the Code of Civil Procedure.

12. For the reasons stated above, the present Letters Patent. Appeal is dismissed as not maintainable. However, looking to the entire facts and circumstances of the case, we leave the parties to bear their own costs.