

(2010) 10 DEL CK 0005

In the Delhi High Court

Case No : CM No. 330 of 2010 (Review Application) in LPA No. 373 of 2010

N.G. Nanda and Others

APPELLANT

Vs

Shri Gurbax Singh and Others

RESPONDENT

Date of Decision : 18-10-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10A, Order 22 Rule 4, Order 22 Rule 9, Order 43 Rule 1, Order 47 Rule 1
Delhi High Court Act, 1966 — Section 10, 15
General Clauses Act, 1897 — Section 16, 3, 4, 4(1), 4(2)
Land Acquisition Act, 1894 — Section 54

Citation : (2010) 174 DLT 180 : (2010) 120 DRJ 63 : (2011) 161 PLR 15

Hon'ble Judges : Dipak Misra, C.J.; Manmohan, J

Bench : Division Bench

Advocate : Arvind K. Nigam, Sunil Mittal, Maldeep Sidhu and Aparna Saxena, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Misra, C.J.—This is an application for review u/s 114 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 (in short "the CPC") seeking review of the order dated 25th May, 2010 passed in LPA No. 373/2010.

2. To appreciate the grounds urged in the review, it is necessary to refer to the brief resume of facts. The appellants as plaintiffs had filed a suit for specific performance of agreement against the first respondent and late Gulzari Lal Nanda, who was the original defendant No. 2 in the suit. In the year 1983, Vivek Nanda, son of Gulzari Lal Nanda, filed an application for impleadment on the ground the said property belongs to the HUF. The learned trial judge, by order dated 29th August, 1984, allowed the application and he was impleaded as a party. The original defendant, G.L. Nanda, died on 15th January, 1998. Regard being had to the pecuniary jurisdiction, the matter was transferred to the district court where it was listed on 6th May, 2004. The plaintiffs could not appear before the court and the defendant No. 1, namely, N.G. Nanda, informed the court on

20th September, 2004 that G.L. Nanda had expired. The suit was dismissed on 26th October, 2004. The plaintiffs filed an application for restoration. On inspection of the record, the plaintiffs found that G.L. Nanda had passed away and, accordingly, an application under Order 22 Rule 4 of the CPC was filed for impleadment of his wife in his place. An objection was filed stating, inter alia, the suit had abated on 16th April, 1998. An application was filed by the plaintiffs under Order 22 Rule 9 of the CPC praying for setting aside of abatement and bringing Smt. Nanda on record in place of the original defendant, G.L. Nanda. The trial judge disallowed the application for setting aside the abatement.

3. Being dissatisfied with the aforesaid order, FAO No. 42/2008 was filed before this Court. It was contended that when the son of Late G.L. Nanda was on record, the suit could not have abated. The learned Single Judge referred to number of decisions on the effect of abatement or dismissal and eventually came to hold as follows:

31. In *Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma (Dead)* by LR's. and Others, , the Court observed;

Rule 10 A of Order 22 casts a duty on the counsel for the respondent to inform the court about the death of such respondent whenever he comes to know about it. When the death is reported and recorded in the order sheet/proceedings and the appellant is notified, the appellant has knowledge of the death and there is a duty on the part of the appellant to take steps to bring the legal representative of the deceased on record, in place of deceased. The need for diligence commences from the date of such knowledge.

32. Since, both defendants were party to the contract and one of the defendant died, the right to sue certainly survive to the surviving defendant. Even in the written arguments filed on behalf of respondent, it is stated that the effect of this abatement is limited to defendant No. 2 (Sh. G. L. Nanda). So far as defendant No. 1 is concerned, the rights to sue survive against him.

33. Thus, as per respondents' own case, right to sue survive to defendant No. 1. So, there was no cause for abatement of the suit. The impugned order passed by the trial court is contrary to the provisions of Order 22 of the Code, and is therefore set aside.

34. Present appeal filed by appellants is allowed and it is ordered that Smt. Laxmi Nanda, legal heir of defendant No. 2 (Sh. G. L. Nanda) be brought on record, in place of deceased (Sh. G. L. Nanda) and suit shall proceed in accordance with law.

4. Challenging the aforesaid order, the defendants preferred LPA No. 373/2010. This Court, on 25th May, 2010, passed the following order -

In this appeal preferred under Clause 10 of the Letters Patent Appeal, the challenge is to the judgment and decree dated 22nd January, 2010 passed by the learned Single Judge in FAO No. 42/2008. It is worth noting that the said appeal

was preferred u/s 96 of the Code of Civil Procedure. The question that emanates for consideration is whether after introduction of Section 100 to the Code of Civil Procedure, the appeal is maintainable.

Learned Counsel appearing for the Respondent has submitted that a Full Bench of this Court has held in *Avtar Narain Behal Vs. Subhash Chander Behal*, has put the controversy to rest by holding that such an LPA would not be maintainable.

In view of the aforesaid decision, the LPA stands dismissed being not maintainable.

5. In the present application for review, it is contended that the order of abatement as a whole is an appealable order as provided under Order 43 Rule 1(k) of the CPC and when the plaintiffs have assailed the same by way of FAO and the learned Single Judge has allowed the same by directing a remand, a further appeal is maintainable. It is urged that the appeal, though nomenclatured as a Letters Patent Appeal, is fundamentally an appeal provided for under Order 43 Rule 1(u) of the CPC and, hence, the appeal should not have been thrown overboard as not maintainable. Pyramiding the said contention, it is contended that Section 100A of the CPC, being differently couched, is not attracted to the case at hand and the Division Bench has erroneously come to hold that the appeal was not maintainable.

6. We have heard Mr. Arvind K. Nigam, learned senior counsel along with Mr. Sunil Mittal, learned Counsel for the appellants-petitioners, on the question of admission.

7. In support of the application for review, it is submitted by the learned senior counsel for the appellants that the Division Bench erroneously opined that the appeal was u/s 96 of the CPC though it was under Order 43 Rule 1(k) of the Code. It is his further submission that there is a distinction between an intra-Court appeal preferred against an adjudication order passed by the learned Single Judge u/s 96 of the CPC and against a decision rendered in an appeal preferred under Order 43 Rule 1 read with Section 104 of the CPC. The learned Counsel further submitted that Section 105 has to be kept in view while interpreting Section 100A of the CPC as Sub-section (2) of Section 105 commences with a non obstante clause and carves out an exception in respect of an order of remand. It is urged by him that if the correctness of the order of remand is not appealed against in an intra-Court appeal, it precludes the party from disputing its correctness and in the absence of exclusion in Section 100A, the intra-Court appeal should have been entertained.

8. To appreciate the submissions raised at the bar, it is apposite to refer to a Full Bench decision of Madhya Pradesh High Court in *Laxminarayan Vs. Shivilal Gujar and Others*, wherein the Full Bench, after referring to the decisions in *Rajendra Kumar Vs. Kalyan (D) by Lrs.*, *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, *Kolhapur Canesugar Works Ltd. and Another Vs. Union of India and Others*, *P.V. Hemalatha v. Kattamkandi Puthiya Maliackal Sacheeda and Anr.* (2002) 5 SCC

540, Colonial Sugar Refinery Co. Ltd. v. Irying (1905) AC 369 , Ambica Quarry Works Vs. State of Gujarat and Others, , Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, , District Mining Officer and Others Vs. Tata Iron and Steel Co. and Another, , Gurudevdatla VKSSS Maryadit and Others Vs. State of Maharashtra and Others, , Harbhajan Singh Vs. Press Council of India and Others, , D.R. Venkatachalam and Others Vs. Dy. Transport Commissioner and Others, and certain other decisions, dealt with the applicability of Section 100A to pending appeals and came to hold as follows:

38. Before we proceed to dwell into that aspect we think it appropriate to dissect whether Section 100 of the Code affects the pending appeals preferred under Clause 10 of the Letters Patent. Submission of Mr. Kale and Mr. Agrawal, the learned Senior Counsel is that the language employed in the said provision being quite clear, unequivocal and unambiguous, it can only have prospective application. To elucidate; submission of the learned Senior Counsel is that the prospective applicability would only encompass that the appeals which would arise out of the suits which are instituted after the cut-off date i.e. 1-7-2002 would be barred. It is contended by them that there is nothing in the said section to convey a different meaning or to expand the canvas. It is put forth by them that Section 16 of the Amending Act deals with "repeal and savings" and in Sub-section (2) use of the term "without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897" and the exception carved out in Clauses (a) to (c) have to be understood properly to appreciate that other aspects which do not find mention in the aforesaid clauses are to be governed by Section 6 of the aforesaid statute. 39-40. In this context we may profitably reproduce a passage from Bidie v. General Accident, Fire and Life Assurance Corporation (1948) 2 All ER 995 998 wherein Lord Greene in his inimitable style spoke thus:

The first thing to one has to do, I venture to think, in construing words in a section of an Act of Parliament is not to take those words in vacuo, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of prima facie meaning which you may have to displace or modify. It is to read the statute as a whole and ask oneself the question: In this state, in this context, relating to this subject-matter, what is the true meaning of what word?

41. Keeping in view the aforesaid principles of interpretations, now we shall proceed to discuss what exactly is postulated u/s 100A of the Code. The Sub-section (2) of Section 1 of the Code the Amending Act stipulates that the amending provisions shall come into force on such dates as the Central Government may by notification in the Official Gazette appoint and different dates may be appointed in respect of different provisions of the Act. This

provision is to be read contextually regard being had to the language employed therein. Section 100 of the Code employs the words that 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 from such single Judge. The words which are of immense signification in this provision are "is heard and decided". These words are used absolutely in praesenti. That apart the words "no further appeal shall lie" are also to be conjointly read with "is heard and decided".

42. As has been held in the cases referred to above, the words have to be understood in their context having purposive reference to the totality of surrounding features and the true and express meaning decipherable from the import of the text. The use of the term "is heard and decided" cannot be expanded to cover the vista that the appeals which arise from the suit instituted before 1-7-2002 are protected. Simultaneously its horizon cannot be cramped and limited to imply and connote that the appeals which have been filed prior to the cut-off date also would be reigned by the said provision. In that case the term "no further appeal shall lie" used in the provision would lose its intrinsic etymological kernel. To say that the aforesaid provision does not impair or erode the right of appeal vested in a suitor in respect of a suit instituted prior to 1-7-2002, would be reading the provision without giving the true and actual meaning to the term "is heard and decided". That would tantamount to, to put it euphemistically, making the provision achromatic. In this context we may profitably refer to the three Judge Bench decision rendered in the case of R. Rajagopal Reddy (dead) by L.Rs. and others Vs. Padmini Chandrasekharan (dead) by L.Rs., . In the aforesaid decision their Lordships were considering the operational sphere of Benami Transactions (Prohibition) Act, 1988 (Act 45 of 1988) and posed the question whether pending proceeding at various stages in the hierarchy can get encompassed by the sweep of Section 4(1) of the said Act and such suit would be liable to be dismissed as laid down by that Section. After referring to the report of the Law Commission, taking note of the preamble of the Act, considering Section 3 which is the heart of the said Act and further referring to the decision rendered in the case of Re Athlumney (1898) 2 Q.B. 547 and Garikapatti Veeraya Vs. N. Subbiah Choudhury, and the observations made in the book on Principles of Statutory Interpretation, 5th Edition, by Justice G.P. Singh, at page 351 their Lordships in paragraphs 19 and 20 held as under:

19. No exception can be taken to the aforesaid observations of learned author which in our view can certainly be pressed in service for judging whether the impugned section is declaratory in nature or not. Accordingly it must be held that Section 4 or for the matter the Act as a whole is not a piece of declaratory or curative legislation. It creates substantive rights in favour of benamidars and destroys substantive rights of real owners who are parties to such transaction and for whom new liabilities are created by the Act.

20. Qua reason No. 4, we may refer to our discussion earlier that the words "no

suit shall lie" as found in Section 4(1) and "no defence based on rights in respect of property shall be allowed" as found in Section 4(2) have limited scope and operation and consequently this consideration also cannot have any effect on the conclusion which can be reached in this case. As to reason No. 5, it is observed that even though the suit may include appeal and further appeals in the hierarchy, at different stages of the litigation. Sections 4(1) and 4(2) cannot be made applicable to these subsequent stages as already seen by us earlier. Otherwise, they would cut across the very scheme of the Act.

43. It is appropriate to mention here their Lordships gave a limited retroactivity to the provisions in question.

44. Thus, in our considered view, though there is use of term "without prejudice to the generality of the provisions of Section 6 of the General Clauses Act" the same does not entirely save the vested rights of appeal in a suitor as that would defeat the very purpose of Legislation, scheme of the amending statute, and also would cause violence to the reading of Section 100 of the Code which is not allowable and we are not inclined to think that the said provision is totally prospective. It is so to a limited extent.

9. In this regard, we may fruitfully refer to the decision in *Avtar Narain Behal Vs. Subhash Chander Behal*, wherein a Full Bench of this Court was dealing with the ambit and sweep of Section 100A of the CPC. The Full Bench took note of Section 4 and Section 104 of the Code. The Bench also referred to the decision in *M/s. New Kenilworth Hotel (P) Ltd. Vs. Orissa State Finance Corporation and others*, wherein the question was whether LPA was maintainable or not and in that context, their Lordships, relying on the decision rendered in *Resham Singh Pyara Singh Vs. Abdul Sattar*, , opined that LPA would not lie by reason of the bar created by Sub-section (2) of Section 104 of the CPC. The Full Bench referred to the authority in *Chandra Kanta Sinha v. Oriental Insurance Co. Ltd.* (2001) 2 SCR 759 wherein the decision in *New Kennilworth Hotel (P) Ltd.* (supra) was held to be not applicable. Be it noted, reference was made by the Full Bench to the decision in *Subal Paul Vs. Malina Paul and Another*, . Thereafter, the Full Bench referred to the decision in *P.S. Sathappan (Dead) by Lrs. Vs. Andhra Bank Ltd. and Others*, wherein the Constitution Bench was called upon to resolve the conflict in *New Kennilworth Hotel (P) Ltd.* (supra) and *Gulab Bai and Another Vs. Puniya*, .

10. It is worth noting that in *Avtar Narain Behal* (supra), the Bench referred to the majority view in *P.S. Sathappan* (supra) in extenso and held thus:

The majority judgment also referred to Clause 44 of the Letters Patent and observed that Letters Patent is a special law vis-a-vis the Code and in case of conflict, the former would prevail except when there is an exclusion of the special law like the one made by Section 100A. In paragraph 32 of the judgment, the Court observed as follows: (AIR page 5177)

It was next submitted that Clause 44 of the Letters Patent showed that Letters

Patent were subject to amendment and alteration. It was submitted that this showed that a Letters Patent was a subordinate or subservient piece of law. Undoubtedly, Clause 44 permits amendment or alteration of Letters Patent, but then which legislation is not subject to amendment or alteration? CPC is also subject to amendments and alterations. In fact it has been amended on a number of occasions. The only unalterable provisions are the basic structure of our Constitution. Merely because there is a provision for amendment does not mean that, in the absence of an amendment or a contrary provision, the Letters Patent is to be ignored. To submit that a Letters Patent is a subordinate piece of legislation is to not understand the true nature of a Letters Patent. As has been held in *Vinita Khanolkar's* case and *Sharda Devi's* case, a Letters Patent is the charter of the High Court. As held in *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, , a Letters Patent is the specific law under which a High Court derives its powers. It is not any subordinate piece of legislation. As set out in the aforementioned two cases a Letters Patent cannot be excluded by implication. Further it is settled law that between a special law and a general law the special law will always prevail. A Letters Patent is a special law for the High Court concerned. The CPC is a general law applicable to all courts. It is well-settled law, that in the event of a conflict between a special law and a general law, the special law must always prevail. We see no conflict between the Letters Patent and Section 104 but if there was any conflict between a Letters Patent and the CPC then the provisions of the Letters Patent would always prevail unless there was a specific exclusion. This is also clear from Section 4 of the CPC which provides that nothing in the Code shall limit or affect any special law. As set out in Section 4 CPC only a specific provision to the contrary can exclude the special law. The specific provision would be a provision like Section 100.

In the course of the judgment, the Bench also clarified the observations made in *Sharada Devi's* case (*supra*) to the effect that the letters patent was akin to the constitutional powers of the High Court and observed as follows: (AIR page 5175, para 27)

Thereafter in the case of *Sharda Devi's* case, the question again arose whether a letters patent appeal was maintainable in view of Section 54 of the Land Acquisition Act. A three-Judge Bench of this Court held that a Letters Patent was a charter under which the High Courts were established and that by virtue of that charter the High Court got certain powers. It was held that when a Letters Patent grants to the High Court a power of appeal, against a judgment of a Single Judge, the right to entertain such an appeal does not get excluded unless the statutory enactment excludes an appeal under the Letters Patent. It was held that as Section 54 of the Land Acquisition Act did not bar a letters patent appeal, such an appeal was maintainable. At this stage it must be clarified that during arguments, relying on the sentence - the powers given to a High Court under the Letters Patent are akin to the constitutional powers of a High Court - in para 9 of this judgment it had been suggested that a Letters Patent had the same status as the Constitution. In our view these observations merely lay down that the

powers given to a High Court are the powers with which that High Court is constituted. These observations do not put Letters Patent on a par with the Constitution.

After so stating, the Full Bench stated thus:

18. A plain reading of the above observations makes it clear that the right of appeal conferred by the Letters Patent can be taken away by the Parliament by enacting appropriate provision in the C.P.C. and the provisions contained in Section 100A of C.P.C. expressly barred a second appeal against a judgment and order in the first appeal passed by a single Judge.

(Emphasis supplied)

Thereafter, the Full Bench opined thus:

20. It is, thus, clearly held by the two Judge Bench that a Letters Patent Appeal against a decision rendered by the single Judge in an appeal arising under the special statute is also barred by Section 100A of the Code of Civil Procedure.

21. In Salem Advocate Bar Association Vs. Union of India (UOI), , the Supreme Court observed as follows:

Section 100 deals with two types of cases which are decided by a Single Judge. One is where the Single Judge hears an appeal from an appellate decree or order. The question of there being any further appeal in such a case cannot and should not be contemplated. Where, however, an appeal is filed before the High Court against the decree of a trial court, a question may arise whether any further appeal should be permitted or not. Even at present depending upon the value of the case, the appeal from the original decree is either heard by a Single Judge or by a Division Bench of the High Court. Where the regular first appeal so filed is heard by a Division Bench, the question of there being an intra-court appeal does not arise. It is only in cases where the value is not substantial that the rules of the High Court may provide for the regular first appeal to be heard by a Single Judge. In such a case to give a further right of appeal where the amount involved is nominal to a Division Bench will really be increasing the workload unnecessarily. We do not find that any prejudice would be caused to the litigants by not providing for intra-court appeal, even where the value involved is large. In such a case, the High Court by rules, can provide that the Division Bench will hear the regular first appeal. No fault can, thus, be found with the amended provision Section 100.

22. A plain reading of the provisions of Section 100A of the CPC makes it very clear that there is complete prohibition of filing a further appeal against a decree and order of a single Judge. The said legislative declaration prohibits preferring a further appeal against the judgment and decree of a single Judge if an appeal is provided in any other law for the time being in force.

Thus, as prohibited by Section 100A, preferring a further appeal to a Division

Bench against the judgment and decree of a single Judge is barred, not only under the Letters Patent of any High Court but also under any special enactment under which such appeal is provided. Section 15 of the Delhi High Court Act provides that the provisions of Act are subject to any provision that may be made on or after the appointed day with respect to the High Court by the legislature or other authority having power to make such provision. The non obstante Clause in 100A of the Code has the effect of taking away the right of appeal which is available u/s 10 of the Delhi High Court Act. The use of the expression "notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or any other law for the time being in force" is clearly indicative of the legislature intention to totally bar Letters Patent Appeal against the judgment rendered by a single Judge in an appeal arising from an original or appellate decree or order.

(Emphasis supplied)

11. In view of the aforesaid, there remains no scintilla of doubt that even an order which is appealed against Order 43 Rule 1 read with Section 104 CPC cannot be assailed in LPA in view of the prohibition contained u/s 100A of the CPC which in its ambit and sweep covers an appeal from an appellate decree or order.

12. In view of our preceding analysis, the application for review is devoid of merit and, accordingly, the same stands dismissed.