
(1988) 03 BOM CK 0039

In the Bombay High Court

Case No : Letter Patent Appeal No. 17 of 1988

Pandey Mishra and Company

APPELLANT

Vs

Anil Upendra Pitale and others

RESPONDENT

Date of Decision : 23-03-1988

Acts Referred:

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

Citation : AIR 1989 Bom 72 : (1989) 2 BomCR 45

Hon'ble Judges : C. Mookerjee, C.J.;C.S. Dharamhikari, J

Bench : Division Bench

Advocate : Madhukar Soochak, for the Appellant; A.V. Savant and Saeed Akhtar, for the Respondent

Judgement

Mookerjee, C.J.—Mr. Savant appearing on behalf of the Respondents has raised a preliminary objection as regards the maintainability of this Appeal preferred against the order dt. 9th Mar., 1988 of Daud, J. allowing the Appeal under S. 104(I) of the Code of Civil Procedure, 1908. Preferred by the original Defendants 8 and 9 - Respondents 8 and 9 against the order under O.XXXIS, Rr. 1 and 2 of the Code passed by the learned Judge. City Civil Court, Bombay, upon the Plaintiffs"-Appellants" Notice of motion. In view of the Division Bench decision of this Court in Obedur Rehman and Another Vs. Ahmedali Bharucha and Others, and the recent Division Bench judgment in the case of Krishna Yeshwant Shirodkar v. Subhash Krishna Patil (Letters Patent Appeal No. 129 of 1987 disposed of on 10th Feb. 1988) reported Krishna Yeshwant Shirodkar Vs. Subhash Krishna Patil and Others, sitting in appeal, we are bound to take the same view that the present Appeal is barred under S. 104(2) of the Civil P.C. and. Therefore, the Appeal is liable to fail without entering into the merits of the order passed by the learned single Judge. The learned Counsel appearing for the Plaintiffs-Appellants has submitted that in view of the decisions of the Supreme Court in the case of Union of India (UOI) Vs. Mohindra Supply Company, and Gulab Bai and Another Vs. Puniya, , we ought to refer to a larger Bench the determination of the question as regards maintainability under Cl. 15 of the

Letters Patent appeals against orders passed by a learned single Judge in appeals provided under s. 104 read with O.XLIII, R. 1 of the Code. He has also relied upon several other decisions of other High Courts in support of the submission that notwithstanding the bar under sub-sec. (2) of S. 104 of the Code, right to prefer such an appeal under Cl. 15 has been preserved under s. 4 of the Code. In spite of very persuasive submissions made on behalf of the Appellants, we are unable to accept the contention of the learned Counsel for the Appellants that the Supreme Court decision in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, , was contrary to the earlier Supreme Court decisions in the cases of Union of India (UOI) Vs. Mohindra Supply Company, and Gulab Bai and Another Vs. Puniya, . In the present case before us, it is unnecessary for us to consider a situation in which the High Court is called upon to decide whether it ought to follow the later Supreme Court decision rendered by a smaller number of Judges or the earlier Supreme Court decision given by a larger Bench, because the Supreme Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, , among a very large number of cases and considered its earlier decision in Union of India (UOI) Vs. Mohindra Supply Company, . Fazal Ali, J., who delivered the judgment upon consideration of the judicial precedents and the various provisions of law at page 1807 of the report had recorded the conclusions of the Court. He inter alia held that there was no inconsistency between S. 104 read with O.XLII, R. 1 and the appeals under the Letters Patent and there was nothing to show that the Letters Patent in any way excluded or overrode the application of s. 104 read with O.XLIII, R. 1 or to show that these provisions would not apply to internal appeals within the High Court. Alternatively, by process of analogy, O. XLIII, R. 1 was held applicable to such appeals. Their Lordships further held that the concept of the Letters Patent governing only the internal appeals in the High Court and the CPC having no application to such appeals was based on a serious misconception of the legal position.

2. So far as this Court is concerned, the point as to whether the ratio of the Supreme Court decision in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, , would apply to appeals preferred to the Division Bench against orders passed by a single Judge in appeals taken under S. 194(I) of the Code is no longer res integral. Not only because they are binding upon us but also because we agree with the reasoning given by the Division Bench judgment of this Court. Vide Obedur Rehman and Another Vs. Ahmedali Bharucha and Others, , and the recent Division Bench judgment in the case of Krishna Yeshwant Shirodkar v. Subhash Krishna Patil (Letters Patent Appeal NO. 129 of 1987) delivered on 10th Feb., 1988 (reported in Krishna Yeshwant Shirodkar Vs. Subhash Krishna Patil and Others,), we hold that this Letters Patent Appeal is not maintainable against the order of the learned single Judge upon an appeal preferred under S. 104(I) read with O.XLIII, R. 1 of the Civil, P.C. In the case of Obedur Rehman and Another Vs. Ahmedali Bharucha and Others, , it was clearly held that so far as Cl. 15 of the Letters Patent was concerned, the provisions of S. 104 of the Code

were attracted and were applicable to Letters Patent Appeals also because Letters Patent Appeals could not be said to be exceptions to the overriding provisions of the Code of Civil Procedure. Relying upon the case of *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, , the Division Bench in paragraph 8 of their judgment had observed that the plain reading of S. 104(2) of the Code would show that no appeal shall lie from any order passed in appeal under the said provisions of the said Section under the general principles of interpretation of statute must be construed strictly. The order complained of in the Letters Patent Appeal was an order passed by the single Judge in appeal governed by S. 104 of the Code and therefore, the Letters Patent Appeal was certainly prohibited under sub-sec. (2) of S. 104 of the Code, Similar view was taken by Janagirdar and Sugla, JJ, in the case of *Krishna Yeshwant Shirodkar v. Subhash Krishna Patil* (supra), Qazi and Vaze, JJ. In *The charity commissioner, Maharashtra State, Bombay Vs. Rahandrasigh Anandrao Jadhao and Another*, , had followed the decision in *Obdedur Rehman v. Ahmedali Bharucha*, 1982 Mah LJ 283: AIR Bom 120 and had held that no Letters Patent Appeal lies against an order of the single Judge dismissing appeal preferred under O.XLIII, R. 1 and S. 104 of the Civil P.C.

3. The learned counsel appearing on behalf of the Appellate has relied upon the decision of a Division Bench of the Madras High Court in the case of *VS. Boopathi Vijayaraghavan Chettiar v. C.S.B.B. Radha Rukmani Ammal* (Letters Patent Appeal No. 6 of 1983) dt. 19 th Jan. 1984 which had upheld the maintainability of an appeal under CL 15 of the Letters Patent preferred against an order of the single judge passed in an appeal arising from the decision of the subordinate Court under O.IX. R. 13 of the Code. The Division Bench of the Madras High Court had declined to follow the Supreme Court decision in the case of *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, corresponding to *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, upon the view that the earlier Supreme Court decision in the case of *Union of India (UOI) Vs. Mohindra Supply Company*, , being by a larger Bench ought to be preferred later decision of the Madras High Court in the case of *Rukmani and Others Vs. H.N. Thirumalai Chettiar*, . Without practically giving any independent reasons had preferred to follow the earlier decision of the Madras High Court in the Letters Patent Appeal mentioned hereinabove. With respect , we are unable to follow the aforesaid two decisions of the Madras High Court not only because of the contrary view consistently taken by this Court on the question of maintainability of appeals under CL 15 of the Letters Patent against orders passed in appeals under S. 104(1) of the Code but also because there is really no conflict of views between the earlier and the later Supreme Court decisions . We have already maintained that the Supreme Court in the case of *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*, , had noticed and considered the decision in the case of *Union of India v. Mohindra Supply Co.* AIR 1982 SC 256. In the case of *Union of India (UOI) Vs. Mohindra Supply Company*, , the Supreme Court held that an appeal under CL 15 against an order of a single judge in arbitration proceedings was barred under S,39 (2) of the Arbitration Act . 1940. In *Mohindra Supply Co;s*

case, no doubt reference had been made to the language of S. 104 of the Civil P.C. but in the said case of Union of India (UOI) Vs. Mohindra Supply Company, . No maintainability or otherwise of an appeal against an order made under S. 104(1) of the Code.

4. In the case of Gulab Bai and Another Vs. Puniya, , the Supreme Court against had considered the scope and effect of Sc. 47 and 48 of Rajasthan High Court Ordinance vis a vis an appeal under the Guardians and Wards Act . Therefore, the scope and effect of sub-sects. (1) and (2) of S. 104 of the Code case of Gulab Bai and Another Vs. Puniya, and as has been stated the Supreme Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, , had directly considered the point and had answered the same against the Appellant.

5. The Full Bench decision of the Andhra Pradesh High Court in the case of Sattemma Vs. Vishnu Murthy, , which was relied upon by the learned Counsel for the Appellants, with respects of no assistance to us in deciding the point at issue in this decision at a point of time when the Supreme Court had not yet delivered their judgment in Shah Babulal Khimji Vs. Jayaben D. Kania and Another, explaining the scope and effect of their earlier decision in the case of Union of India (UOI) Vs. Mohindra Supply Company, , Secondly , the subject-matter of the appeal under CL 15 of the Letters Patent before the Full Bench of the Andhra Pradesh Court was an order passed under O. XLVII pf the Code. Therefore, it is unnecessary for us to consider whether the Full Bench of the Andhra Pradesh High Court had Bench of the Ahdhra Pradesh High Court had correctly held that a decision refusing to review an order is a judgment within the meaning of CL 15 of the Letters Patent.

6. For the foregoing reasons , we uphold the preliminary objection raised on behalf of the Respondents and dismiss this Appeal. There will be no order as to costs.

7. Prayer for a certificate under rt. 133 read with Art. 134A of the Constitution of India is made and we refuse the same.

8. Appeal dismissed.