

(2014) 10 J&K CK 0034

In the Jammu And Kashmir High Court

Case No : LPA No. 148 of 2014 and I.A. No. 228 of 2014

Rouf Ahmad Zaroo

APPELLANT

Vs

Shafeeqa

RESPONDENT

Date of Decision : 28-10-2014

Acts Referred:

Citation : AIR 2015 JK 39 : (2015) 1 JKJ 208

Hon'ble Judges : M.M. Kumar, C.J.; Ali Mohd. Magrey, J.

Bench : Division Bench

Advocate : S.H. Thakur, for the Appellant

Final Decision : Dismissed

Judgement

Ali Mohd. Magrey, J.â?"The appellant has filed this Letters Patent Appeal against the order dated 21.07.2014 whereby the learned single Judge

has dismissed the appellant's Civil 1st Miscellaneous Appeal, CIMA No. 60/2014, arising from an order dated 01.02.2014 passed by the learned

1st Additional District Judge, Srinagar, in an application which had been filed by the appellant under Section 47 of the Guardians and Wards Act,

Smt. 1977. The short question that arises for consideration in the appeal is whether second appeal under the Guardians and Wards Act, Smt.

1977 (for short, the Act), in Letters Patent would be entertainable.

2. We have heard the learned counsel and considered the matter.

3. The learned counsel for the appellant cited and relied upon the decision of the Supreme Court in Subal Paul Vs. Malina Paul and Another, ,

wherein the question that arose for consideration before the Supreme Court was whether a letters patent appeal would lie against the judgment of a

learned single Judge of the High Court filed under Section 299 of the Indian

Succession Act, 1925 and the Apex Court answered the said question

in affirmative. In an endeavour to draw an analogy from the aforesaid decision of the Supreme Court, the learned counsel submitted that since

appeal is a vested right and it cannot be taken away, therefore, the present appeal under the Letters Patent applicable in the State would be

maintainable.

4. We have gone through the aforesaid judgment in Subal Paul Vs. Malina Paul and Another, . It may be observed here that an appeal is the

creature of a statute. This right can be taken away or curtailed by subsequent enactment. This is the settled position of law.

5. The issue raised by the learned counsel is not res integra. In this connection, it may be mentioned here that Section 100-A of the Central Civil

Procedure Code was amended by the Amendment Act 22 of 2002 with effect from 01.07.2002. The amended provision reads as under:

100-A. No further appeal in certain cases: Notwithstanding anything contained in any Letters Patent for any High Court or in any instrument

having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and

decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge.

6. The effect of Section 100-A, CPC, as introduced in the Central Code of Civil Procedure with effect from 01.07.2002, on the maintainability of

an LPA against the appellate order under a special Act fell for consideration before the Supreme Court in Kamal Kumar Dutta and Another Vs.

Ruby General Hospital Ltd. and Others, . In that case the appeals were preferred to the Supreme Court against the order passed by a single Judge

of the High Court of Calcutta in a matter under Sections 397 and 398 of the Indian Companies Act, 1956. A preliminary objection was taken to

the maintainability of the appeal on the ground that the appellants had an alternative remedy of approaching the Division Bench of the Calcutta High

Court under Clause 15 of the Letters Patent. It was, therefore, argued that the Court should not entertain the appeals and the same should be

dismissed as the appellants had alternative remedy under Clause 15 of the Letters Patent before the Calcutta High Court. Relying on the decision in

Garikapatti Veeraya Vs. N. Subbiah Choudhury, , it was submitted that the

appeal is a vested right and cannot be taken away. Alternative submission was also made that if Clause 15 does not apply, appeal would lie under Section 483 of the Companies Act. In this connection reliance was placed on a decision of the Supreme Court in *Arati Dutta Vs. Eastern Tea Estate (P) Ltd.*, , and of the Bombay High Court in *Maharashtra Power Development Corporation Limited Vs. Dabhol Power Company and Others*, . On the other hand, on behalf of the appellant reliance was placed on Section 100-A of the Code of Civil Procedure. It was urged that in view of the bar created under Section 100-A, CPC, no further appeal shall lie on the judgment or decree of such single Judge. Rejecting the preliminary objection, the Court held as follows:

21. But after the amendment the power which was being exercised under Sections 397 and 398 of the Act by the learned single Judge of the High Court is being exercised by CLB (Company Law Board) under Section 10-E of the Act. Appeal against the order passed by CLB, lies to the High Court under Section 10-F of the Act. Therefore, the position which was obtaining prior to the amendment in 1991 was that from any order passed by the single Judge exercising the power under Sections 397 and 398 of the Act, the appeal used to lie before the Division Bench of the High Court, but after the amendment, the power has been given to CLB and appeal has been provided under Section 10-F of the Act. Thus, Part I-A was inserted by the amendment with effect from 1-1-1964. But the constitution of the Company Law Board and the power to decide application under Sections 397 and 398 of the Act was given to CLB with effect from 31-5-1991 and appeal was provided under Section 10-F of the Act with effect from 31-5-1991. Therefore, on reading of Sections 10-E, 10-F, 397 and 398 of the Act, it becomes clear that it is a complete Code that applications under Sections 397 and 398 of the Act shall be dealt with by CLB and the order of CLB is appealable under Section 10-F of the Act before the High Court. No further appeal has been provided against the order of the learned single Judge. Mr. Nariman, learned Senior Counsel for the respondents submitted that an appeal is a vested right and, therefore, under clause 15 of the Letters Patent of the Calcutta High Court, the appellants have a statutory right to prefer appeal irrespective of the fact that no appeal has been provided against the

order of the learned single Judge under the Act. In this connection, learned counsel invited our attention to a decision of this Court in Garikapatti

Veeraya Vs. N. Subbiah Choudhury, and in that it has been pointed out that the appeal is a vested right. The majority took the view that the

appeal is a vested right. It was held as follows:

'...that the contention of the applicant was well founded, that he had a vested right of appeal to the Federal Court on and from the date of the suit

and the application for special leave should be allowed. The vested right of appeal was a substantive right and, although it could be exercised only

in case of an adverse decision, it was governed by the law prevailing at the time of commencement of the suit and comprised all successive rights of

appeal from court to court, which really constituted one proceeding. Such a right could be taken away only by a subsequent enactment, either

expressly or by necessary intendment.'

22. So far as the general proposition of law is concerned that the appeal is a vested right there is no quarrel with the proposition but it is clarified

that such right can be taken away by a subsequent enactment, either expressly or by necessary intendment. Parliament while amending Section

100-A of the Code of Civil Procedure, by amending Act 22 of 2002 with effect from 1-7-2002, took away the Letters Patent power of the High

Court in the matter of appeal against an order of the learned single Judge to the Division Bench. Section 100-A of the Code of Civil Procedure

reads as follows:

'100-A...'

23. Therefore, where appeal has been decided from an original order by a single Judge, no further appeal has been provided and that power which

used to be thereunder the Letters Patent of the High Court has been subsequently withdrawn. The present order which has been passed by CLB

and against that an appeal has been provided before the High Court under Section 10-F of the Act, that is, an appeal from the original order, then

in that case no further letters patent appeal shall lie to the Division Bench of the same High Court. This amendment has taken away the power of

the Letters Patent in the matter where the learned single Judge hears an appeal from the original order....

7. In paragraph 26 of the aforesaid judgment, the Supreme Court also referred

to and quoted the observations of the Constitution Bench decision in P.S. Sathappan (Dead) by Lrs. Vs. Andhra Bank Ltd. and Others, , which are reproduced hereunder:

From Section 100-A, CPC, as inserted in 1976, it can be seen that when the legislature wanted to exclude a letters patent appeal it specifically

did so. Again from Section 100-A, as amended in 2002, it must be stated that now by virtue of Section 100-A no letters patent appeal would be

maintainable in the facts of the present case. However, it is an admitted position that the law which would prevail would be the law at the relevant

time. At the relevant time neither Section 100-A nor Section 104(2) barred a letters patent appeal. The words used in Section 100-A are not by

way of abundant caution. By the Amendment Acts of 1976 and 2002 a specific exclusion is provided as the legislature knew that in the absence of

such words a letters patent appeal would not be barred. The legislature was aware that it had incorporated the saving clause in Section 104(1) and

incorporated Section 4, CPC. Thus now a specific exclusion was provided.

8. It is worthwhile to mention here that the earlier three-Judge Bench decision of the Supreme Court in Subal Paul Vs. Malina Paul and Another, ,

cited and relied upon by the learned counsel in the present case was also cited in the aforesaid matter before the Supreme Court and the Supreme

Court observed that in Subal Paul v. Malina Paul (supra) their Lordships observed as under:

Whenever the statute provides such a bar, it is so expressly stated as would appear from Section 100-A of the Code of Civil Procedure"".

9. The issue again came up for consideration before a two Judge Bench of the Supreme Court in Mohd. Saud and Another Vs. Dr. (Maj.) Shaikh

Mahfooz and Others, . Proceedings in that case arose out of an interim order dated 09.09.2005 passed by the Additional District Judge, Fast

Track Court No. III, Bhubaneswar, in a civil suit. Against the aforesaid interim order, a first appeal under Order 43, Rule 1, CPC was filed before

a learned single Judge of the Orissa High Court who decided it on 06.08.2008. Against the judgment of the learned single Judge, an LPA was

filed. The LPA was heard and decided by the Full Bench of the High Court, holding that after the introduction of Section 100-A with effect from

01.07.2002, no letters patent appeal shall lie against the judgment or order

passed by a learned single Judge in an appeal. The Full Bench further held that no LPA shall lie against the order or judgment passed by a learned single Judge even in an appeal arising out of a proceeding under a special Act.

10. An argument was raised before the Supreme Court that there was a difference in the language of Section 100-A as initially inserted in 1976, and the language of the provision as substituted in 2002. While the former barred an LPA even against a judgment, decision or order of a learned single Judge which was not a decree, the latter bars only a judgment which is also a decree. The Supreme Court noted that there was some apparent contradiction in Section 100-A as amended in 2002. While in one part of Section 100-A it is stated ""where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court"" in the following part it is stated ""no further appeal shall lie from the judgment and decree of such single Judge"". Thus while one part of Section 100-A refers to an order, the latter part of the Section mentions judgment and decree. The Supreme Court in this connection observed and held as under:

15. To resolve this conflict we have to adopt a purposive interpretation. The whole purpose of introducing Section 100-A was to reduce the number of appeals as the public in India was being harassed by the numerous appeals provided in the statute. If we look at the matter from that angle it will immediately become apparent that the LPA in question was not maintainable because if it is held to be maintainable then the result will be that against an interlocutory order of the District Judge there may be two appeals, first to the learned single Judge and then to the Division Bench of the High Court, but against a final judgment of the District Judge there can be only one appeal. This in our opinion would be strange, and against the very purpose of the object of Section 100-A, that is, to curtail the number of appeals.

Holding thus, the Supreme Court observed that the Full Bench of the High Court had taken a correct view, and dismissed the appeals.

11. In the instant case, the appeal against the order dated 21.07.2014 passed by the learned District Judge in an application under Guardians and Wards Act was filed before the learned single Judge under Section 47 of the Act,

which provides for appeal under the Act. The learned single

Judge dismissed the appeal. The appeal before the learned single Judge was an appeal from an original order passed by the learned District Judge.

As in the Central Code of Civil Procedure, Section 100-A in the State Code of Civil Procedure was substituted by Act VI of 2009 dated

20.03.2009 by the following:

Notwithstanding anything contained in any Letters Patent of the High Court or in any instrument having the force of law or in any other law for the

time being in force in the State, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High

Court, no further appeal shall lie from the judgment and decree of such single Judge.

The aforesaid provision is *pari materia* with Section 100-A of the Central CPC. As is axiomatic, the Section starts with the non-obstante clause

that 'notwithstanding anything contained in any Letters Patent of the High Court or in any instrument having the force of law or in any other law for

the time being in force in the State'. Thus, under Section 100-A, CPC, no further appeal has been provided and the power which used to be there

under the Letters Patent of the High Court stands withdrawn by a legislative enactment and, thereby intra court appeals would not lie where a

single Judge of the Court has exercised appellate jurisdiction. The order dated 21.07.2014 passed by the learned single Judge, being an order

passed in an appeal from an original order under the Act, in terms of the settled position of law discussed above, no further appeal/intra Court

appeal would lie from such order under the Letters Patent.

12. In fact, a similar issue had previously come up before a Division Bench of this Court in *Union of India (UOI) and Others Vs. Ranjeet Kour and*

Others, , where it has been held that an appeal under the Letters Patent is not available from a decision of a single Judge rendered on an appeal

from original decree or order.

13. In the aforesaid case the Motor Accidents Claims Tribunal, Anantnag, constituted in terms of Section 165 of the Motor Vehicles Act, 1988,

made and published an award. The claimants before the Tribunal, being aggrieved by the award, preferred an appeal which was heard and

decided by a learned single Judge of this Court. The claimants-appellants, feeling

aggrieved of the decision of the learned single Judge, thereafter, preferred an appeal under the Letters Patent applicable to the Court. The question arose whether the same was entertainable or not. The Division Bench of this Court held that ""by reason of the substituted Section 100-A of the Code, an appeal under the Letters Patent is not available from a decision of a single Judge rendered on an appeal from original decree or order as well as on an appeal from appellate decree or order.

14. In view of the above, this Letters Patent Appeal is held to be not entertainable. It is dismissed as such along with the connected CMP. No order as to costs.