
(1975) 01 CAL CK 0019

In the Calcutta High Court

Case No : Letter Patent Appeals Tender Nos.1020-21 of 1974 and 3924 of 1973 and 3867 of 1973

Shiba Pada Chowdhury

APPELLANT

Vs

Sudhansu Kumar Sen and Others

RESPONDENT

Date of Decision : 09-01-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 4, 47
Government of India Act, 1935 — Section 107, 108

Citation : (1975) 01 CAL CK 0019

Hon'ble Judges : B.C. Ray, J;Anil Kumar Sen, J

Bench : Division Bench

Advocate : Ranjit Kumar Banerjee, Nirmal K. Ghosal and Tarun Chatterjee in L.P.A.T. No. 1020-21/74, Hari Narayan Mukherjee in L.P.A.T. No. 3924/73 and S.B. Bhuniya in L.P.A.T. No. 3867/73, for the Appellant;H.P. Mukherjee, Sib Kumar Majumdar, in L.P.A.T. No. 1020-21/74 and D.N. Lahiri in L.P.A.T. No. 3924/73, for the Respondent

Final Decision : Dismissed

Judgement

1. In each of these appeals preferred under Cl. 15 of the Letter Patent, on an objection taken by the Stamp Reporter of this Court which is being supported by the respondents in each case, a preliminary issue as to whether such an appeal is maintainable in the absence of any certificate of fitness from the learned Single Judge from whose orders of the appeals were preferred arises for consideration.

2. Letters Patent Appeals Tender Nos. 1020-21 of 1974 arise out of the following facts. One Nalini Bhusan Roy Chowdhury, the predecessor-in-interest of the present appellant, preferred a second appeal being Second Appeal No.1524 of 1964 to this Court against an appellate decree arising out of a suit for eviction. The appellant not having appeared when the appeal was called on for hearing, the appeal was dismissed for default by one of the learned Judges of this Court on January 25, 1971. The appellant Nalini Bhusan too died on January 13, 1973.

The present appellant who is one of the heirs and legal representatives of the deceased Nalini filed two applications on August 14, 1973 namely (1) for restoration of the second appeal earlier dismissed for default and (2) the other for substitution upon setting aside the abatement. On these two applications two Rules were issued by this Court being C.R. 3004 and C.R. 3005 (S) of 1973. Both these applications failed on their respective merits at the final hearing and our learned brother A. K. De J dismissed those applications and discharged the Rules by his orders dated March 22, 1974. Against those orders the present two appeals have been preferred under Cl. 15 of the Letter Patent without however, obtaining any certificate of fitness from our learned brother A. K. De J. An objection has been raised by the Stamp Reporter that such appeals are not maintainable in the absence of any certificate of fitness from the learned single Judge. This objection is being supported by the respondents at the hearing before us. The Stamp Reporter relies on a decision of this Court in the case of Atul Chandra Das v. Haripada Singh in L.P.A.T. No.162 of 1973, dated February 20, 1974 though that was an ex parte order passed in the absence of the appellant.

3. Letters Patent Appeal Tender No. 3924 of 1973 arises out of a second miscellaneous appeal now pending in this Court being S.M.A.T. 2934 of 1972. That was an appeal against concurrent judgments and orders passed by the courts below dismissing the appellant's third objection under s. 47 of the CPC in an execution both by the trial court as also by the lower appellate court. Pending the said second miscellaneous appeal in this court, the appellant filed an application for stay of execution proceeding. Such stay was granted by our learned brother Amaresh Roy J by his order dated November 7, 1973 but subject to the fulfillment of certain conditions as to deposit of security money. The conditions not having been fulfilled, the application stood dismissed. Against that order of our learned brother Amaresh Roy J, the above appeal under Cl. 15 of the Letters Patent has been preferred but without any certificate of fitness from the learned single judge. An objection similar to the one raised in L.P.A.T. No.1020-21 of 1974 has been raised by the Stamp Reporter in these appeals also which is being supported by the respondents.

4. L.P.A.T. No.3867 of 1973 arises out of a second appeal being S.A.T.No.1170 of 1973. In that second appeal the present appellant filed an application for an interim order of injunction restraining the respondents from disturbing appellant's possession of the land in dispute pending the appeal. That application was dismissed by our learned brother Amaresh Roy J by an order dated November 19, 1973 against which order the present appeal under Cl. 15 of the Letters Patent had been preferred but without any certificate from the learned single Judge. An identical objection as in the other appeals has been raised by the Stamp Reporter which is being supported by the respondents.

5. The only question, therefore, that arises for consideration in these appeals is as to whether such appeals can be entertained even in the absence of necessary

certificate from the learned single judge against whose orders the appeals have been preferred. Mr. Banerjee, Mr. Mukherjee and Mr. Bhuniya appearing on behalf of the appellants in the three sets of appeals have all argued that the orders under appeal not being the judgment and decree disposing of the second appeal now pending in this Court, no certificate of fitness under Cl. 15 of the Letters patent is necessary for enabling the appellants to proceed with these appeals. The decision relied on by the Stamp Reporter has been sought to be distinguished by the learned Advocates on the ground that the decision was an ex parte one based on no reasons whatsoever. According to the learned Advocates the orders under appeal constitute judgment within the meaning of Cl. 15 of the Letters Patent and having been passed in independent proceedings all initiated on an application filed for that purpose are appealable under Cl. 15 without any certificate inasmuch as those orders do not come under the exception in respect of second appeals provided by the clause and as introduced by the 1928 amendment. Strong reliance is placed on several decisions of this Court in the cases of Chittaranjan Mondal Vs. Sankar Prosad Sahani, , Nurul Hoda and Others Vs. Amir Hasan and Another, , Sachindra Mohan Dey v. M. M. Chakraborti, 75 CWN 350 and Iswar Singh Kripal Singh & Company v. The Raiputana Trading Company Ltd. and anr. 77 CWN 326. Particular reliance is placed on the decision in Chittaranjan Mondal Vs. Sankar Prosad Sahani, . Reliance is also placed on a decision of the Madras High Court in the case of Abdul Nabhi Saheb Vs. Marti Ramalakshammah, .

6. I shall consider each of these decisions relied on by the learned Advocates hereinafter but it should be pointed out at the outset that in none of these cases no question as now under consideration by me did arise for consideration. Clause 15 of the Letters Patent as amended is on the following terms:

Appeal to the High Court from Judges in the Court - And we do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act or in the exercise of criminal jurisdiction of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act made on or after the first day of February one thousand nine hundred and twenty nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the of the said High Court, where the judge who passed the judgment declares, that the case is a fit one for appeal, but that

the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, our heirs or successors in Our or Their Privy Council, as hereinafter provided.

7. The question now under consideration is not whether the orders now under appeal in these appeals are judgments within the meaning of the term as in the clause, though there is some divergence of views in the different judicial decisions as to whether some of these orders are really judgments appealable as such under Cl. 15. The question which has arisen for consideration on the objection of the Stamp Reporter is as to whether these orders even if they are judgments within the meaning of the clause can be said to be judgments passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court subject to superintendence of the High Court. If they be so, then *ex facie*, they come within the exception incorporated by the 1928 amendment and no appeal could be entertained in the absence of a necessary certificate from the learned single judge whose orders are the subject-matter of challenge in the appeals. In my opinion, under the exception clause comes the judgment which is passed by a learned single judge in the High Court in exercise of appellate jurisdiction in respect of a second appeal. Two tests therefore, which are to be applied are (1) whether the judgment is passed in exercise of appellate jurisdiction and (2) whether it is in respect of a second appeal. On the terms of this clause there is nothing to limit the application of the exception only to the judgments in second appeals disposing of the second appeal itself. On the other hand, the clause is wide enough to include all orders amounting to judgments which are in respect of a decree or order made in exercise of appellate jurisdiction by a court subject to the superintendence of the High Court that is the second appeal. This being the position, I am unable to accept the construction suggested by the learned Advocates for the appellants namely that the exception only relates to the judgment disposing of the second appeal and does not include interlocutory orders amounting to judgments passed in second appeals. It does not also stand to reason why on the amendment the framers of this clause of the Letter patent should exclude merely the judgment disposing of the second appeal but not the other interlocutory orders ancillary thereto.

8. It was also suggested by the learned Advocates that the orders under appeal having been passed on independent applications cannot be considered to be orders passed in exercise of the appellate jurisdiction. Strong reliance is placed on the third test enunciated by White C.J in the madras Full Bench decision in the case of *Tuljaram Rao v. Alagapa* ILR 35 Madras in contending that the proceedings in which the orders under appeal had been passed must be considered to be independent proceedings and as such not in exercise of the appellate jurisdiction. Reliance is also placed on the Bench decision of this Court in the case of *Chitta Ranjan Mondal v. Sankar Prosad Sahani* (*supra*) for the purpose. But I am unable to accept this contention for the simple reason that neither of the two decisions relied on had laid down any proposition of law that

when a single judge of this Court disposes of an interlocutory application in a second appeal he is not exercising the appellate jurisdiction. In my considered opinion, when we sitting singly dispose of such applications we really exercise the appellate jurisdiction of this Court and the applications would not have been entertainable in the absence of those appeals. Therefore, in my view, there can be no doubt that the orders under appeal were orders passed really in exercise of appellate jurisdiction though they might have been passed on independent applications for ancillary relief.

9. In the case of *Chittaranjan Mondal v. Sankar Prosad Sahani*, (supra) this Court was considering whether an order by a single judge passed in a first appeal from a judgment and decree of the City Civil Court refusing to grant an injunction restraining execution of the ejectment decree under appeal was or was not appealable under clause 15 of the Letters Patent. Such a question was raised on the ground that the respondents contended the order to be not constituting judgment within the meaning of clause 15. It is only in that context, this Court entered into the question whether such an order constitutes judgments or not and relying on the third test of White C.J in ILR 35 Mad 1 held that the order having been passed in an independent proceeding which is ancillary to the appeal must be considered to be a judgment. In this case, therefore, the order was passed in a first appeal so that the exception provided by the clause 15 was in no way applicable and, therefore, no question as I am now considering did arise for consideration. For reasons already given I am unable to read this decision as any authority for an extended proposition, namely, that when the order is passed in an independent proceeding it is not passed in the appellate jurisdiction or is not passed in respect of the second appeal. I have already pointed out that in disposing of such interlocutory applications this Court exercises, if at all, the appellate jurisdiction and what is ancillary to the appeal is ex facie, in respect of the appeal. In the case of *Nurul Huda v. Amir Hossain*, (supra) this Court was only considering whether an order setting aside abatement constitutes judgment within the meaning of clause 15 and appealable as such when such an order is passed in a suit in the original side of this Court and it was held that such an order does not constitute a judgment within the meaning of clause 15. This decision therefore, is not authority for the principles contended for by the learned Advocates. In the case of *Sachindra Mohan Dey v. M. M. Chakraborti*, (supra) this Court was considering whether an appeal under clause 15 against a judgment and decree passed in a first appeal by a single judge of this court directed against a decree of a learned judge of the City Civil Court is maintainable in the absence of any certificate of fitness of the learned Judge. It was held that such a judgment does not come within the exception and no certificate is necessary for making the appeal maintainable. Patently this decision is clearly distinguishable inasmuch as it was not in respect of a second appeal.

10. In the other decision of this Court relied on by the learned Advocates in the case of *Iswar Singh Kripal Singh & Co. v. The Rajputana Trading Company Ltd.* and another, (supra) the question which arose for consideration was whether an

order passed by a single judge of this court in an original side suit striking out the defence under s. 17(3) of the West Bengal Premises Tenancy Act, 1956 constitutes a judgment within the meaning of Cl. 15 of the Letters Patent and appealable as such. It was held that it constitutes a judgment and as such is appealable. The fact, however, remains that it arose out of an original side suit and the order was passed by the learned single judge in exercise of his original jurisdiction so that the exception prescribed by the Cl. 15 had no application and no question of the nature now under consideration could arise or did arise for consideration in the said decision. This decision, therefore, in my opinion, is no authority for the principles contended for by the learned Advocates.

11. What remains now to be considered is the decision of the Madras High Court in the case of Abdul Nabhi Saheb v. Marti Ramalakshammah, (supra). It is no doubt true that in this case the Madras High Court held that an order granting stay of an order of the lower appellate court pending disposal of the second appeal was a judgment within the meaning of Cl. 15 of the Letters Patent and appealable as such. It however, appears that such an appeal was preferred on a leave obtained and no question of this specific nature now under consideration by us did arise for consideration. Only question which was being considered was as to whether the order constitutes judgment within the meaning of Cl. 15 of and the learned judges relying on the third test laid down by White C.J in ILR 35 Mad 1 held that the order was appealable and the objection to the maintainability of the appeal on the ground that the order did not constitute a judgment was overruled. These are the only decisions relied on by the learned Advocates for the appellants in respect of their contentions that the present appeals under Cl. 15 are maintainable even in the absence of any certificate from the learned single judge.

12. The view which I have taken in coming to the conclusion that the objection raised by the Stamp Reporter must be upheld and these appeals must be held to be not maintainable in the absence of necessary certificate from the learned single judge is well supported by two decisions which I should now refer to. First of these decisions is in the case of Laxmi Narain v. Mohammad Akbar, 1938 (36) All LJ 1107. There the court was considering a question as to whether an appeal under Cl. 10 of the Letters Patent of that High Court was maintainable against an order passed by a single judge refusing to grant an application to set aside abatement of the second appeal and the conclusion that was arrived at was as follows:

We hold that the order of the learned single judge did not amount to a "judgment" within the meaning of Section 10 Letters Patent, and therefore no appeal lies. And further, if the order did amount to a "judgment", then the permission of the learned single Judge would have been necessary for an appeal or lie.

13. The last of the aforesaid conclusions well supports the view that an order on an interlocutory application in a second appeal like the one for setting aside

abatement of a second appeal can be appealed against under Cl. 15 of the Letters Patent only on a certificate when the original order is passed by a single judge.

14. The other decision is the decision of the Andhra Pradesh High Court in the case of Anamik Pedda Narasanna and Another Vs. Anamik Guda Dakanna, . A question of the specific nature now under consideration by us arose for consideration in that case before the Andhra Pradesh High Court and the conclusion that was arrived at is as follows:

There is another reason why the appeal could not be entertained. Undisputedly, this matter has arisen in the second appeal brought by the respondent against the decree and judgment of the District Judge confirming that of the trial Court. As such, in our opinion, this is an order made by a single judge of this court in the exercise of appellate jurisdiction in respect of the decree of order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court. All that the clause means is that it should be an order passed in the exercise of second appellate jurisdiction. The appellate jurisdiction exercised by the single judge should be in respect of judgments made in appeals by the Subordinate Courts.

15. That was an appeal which was sought to be preferred under Cl. 15 against an order passed by a learned single judge refusing to grant an interim injunction pending a second appeal and it was held that such an appeal is not maintainable in the absence of necessary certificate from the single judge. I am in respectful agreement with the views expressed in these two decision which fully support the view I have taken. Therefore I must overrule the contentions of the learned Advocates and hold that these appeals under Cl. 15 are not maintainable in the absence of necessary certificate from the learned single judge.

16. Before concluding, I must dispose of an incidental point sought to be raised by Mr. Banerjee learned Advocate for the appellants in the first two appeals. Relying on the provisions of 0.43, r. 1 cl. (t) of the CPC it was sought to be contended by Mr. Banerjee that at least the appeal against the order refusing to restore the second appeal would be maintainable on the provisions of the aforesaid clause. Mr. Banerjee has drawn my attention to a decision of this Court in the case of Mathura Sundari Dassi v. Haran Chandra Shaha & Ors., 23 Cal LJ 443 pages 449050 in contending that the provisions of the Letters Patent must be construed to supplement the provisions of the Code and not to override the same. Therefore it is contended by Mr. Banerjee that if not under Cl. 15, at least under the aforesaid provision of the Code the appeal is maintainable. In my opinion, this contention is somewhat misconceived; in view of the provisions of s. 4 of the Code the particular provision made by the Letters Patent would override the general provision of the Code.

17. For reasons aforesaid, these appeals must be held to be not maintainable. The objections raised by the Stamp Reporter are upheld. Memorandum of Appeal

in each case therefore stands rejected. All interlocutory applications filed in these appeals are dismissed.

B. C. Ray J.

18. I agree.