

(1990) 10 OHC CK 0015
In the Orissa High Court
Case No : A.H.O. No. 5 of 1984

Smt. Sashikala Padhi

APPELLANT

Vs

Smt. Hiren Ghosh and Others

RESPONDENT

Date of Decision : 26-10-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, 104(2)

Citation : (1991) 71 CLT 197 : (1991) 1 OLR 57

Hon'ble Judges : V. Gopalaswamy, J; R.C. Patnaik, J

Bench : Division Bench

Advocate : A.B. Misra, S.B. Padhi and P.N. Mohapatra, for the Appellant;
Jagannath Das, K.K. Jena, (for R. 1) and Addl. Standing Counsel (for R. 2 and 3),
for the Respondent

Judgement

R.C. Patnaik, J.—The question that has been posed for answer in this appeal under the Letters Patent is: If an appeal from the judgment of a Single Judge passed in an appeal under Order 43, Rule 1 of the CPC (for short, "the Code") is competent having regard to Sub-section (2) of Section 104 of the Code.

2. To appreciate the question involved, the barest outline need be given.

Defendant No. 19 filed an appeal in this Court under Clause (d) of Rule 1 of Order 43 of the Code against an order passed by the trial Court rejecting her application filed under Order 9, Rule 13 for setting aside of an ex pane decree passed against her and other defendants. This Court accepted the appeal, vacated the order of dismissal of the application filed under Order 9, Rule 13 and allowed the same but left the matter to the trial Court to consider if on the facts and in the circumstances the decree should be set aside in its entirety or to the extent so far as that, related to defendant No. 19. Aggrieved by the order of the learned Single Judge allowing defendant No. 19's application under Order 9, Rule 13, the plaintiff filed this appeal under Clause-10 of the Letters Patent. Letters Patent constituting the High Court of Judicature at Patna was made applicable to this Court by the Orissa High Court Order, 1948;

3. At the hearing, the learned counsel for the respondents raised objection to the maintainability of the appeal. He urged that further appeal from an order passed by learned Single Judge in the appeal preferred under Order 41, Rule 1 shall not lie to a Division Bench having regard to the bar contained in Sub-section (2) of Section 104. Our attention was drawn to several decisions of the Supreme Court and the High Courts.

4. Mr. Misra, the learned counsel for the appellant, contended that Clause-10 of the Letter's Patent provided for an appeal from the judgment of one Judge 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 of this Court, subject to the superintendence of the said High Court, to the High Court; It was in absolute terms and the right of appeal was not controlled or regulated by Section 104 of the Code. In other words, he argued that Section 101 did not control the internal appeals in the High Court which are governed by the. Letters Patent. He relied upon the decisions in Board of Governors St. Thomas School and Others Vs. A.K. George and Another,), Shrichand Vs. Tejinder Singh and Others,) and V.T.V. Rangacharyulu and Another Vs. Sriram Ganeswar,). In the Calcutta case, the suit was filed on the Original Side Of the High Court of Calcutta. The appeal was filed under the Letters Patent against order passed by the learned Single Judge rejecting application filed by the defendants seeking the revocation of leave to sue granted u/s 92 of the Code. It was held that though appeal was not provided under Order 43-against an order of the nature:- passed by the learned Single judge, appeal lay under Clause 15 of the Letters Patent and was not barred by Section 104. There was no inconsistency between the Letters Patent jurisdiction and Section 104 read, with Order 41. Rule 1 of the Code. Reliance was placed upon the decision in Mathura Sundari Dassi v. Haran Chandra Saha AIR 1916 Cal. 361) where it was held that the effect of Section 104 was not to take away a right of appeal given under Clause-15) of the Letters Patent. Shrichand's case (supra) is the closest to the case on hand. There an application under Order 9, Rule 13 having been dismissed an appeal under Order 43, Rule 1(d) was filed in the High Court. The learned Single Judge accepted the appeal and set aside the order rejecting the application filed under Order 9, Rule 13 and the ex parte decree. An. appeal was carried to the Division Bench under the Letters Patent. The competency of the appeal was challenged with reference to Section 104 of the Code. The learned Judges relied upon a Division Bench decision of the Nagpur High Court in Ganpati v. Pilaji (AIR 1956 Nag. 211) where it was held that Section 104 applied to appeals to High Court from Courts subordinate to it. It did not deal with appeals from a Single Judge of the High Court to a Bench under the Letters Patent. The appeals under the Letters Patent could not, therefore, be barred by Section 104 in the absence of an express provision. The learned Judges of the Madhya Pradesh High Court negatived the objection to the competency of the appeal and held that the appeal lay under the Letters Patent. Rangacharyulu's case (supra) was not a case where appeal was filed against an order passed in an appeal under Order 43, Rule 1 but the order

appealed against was an original order passed by the learned Single Judge in an appeal. Hence, the said case is not an authority on the question.

5. We do not like to burden our decision with the other authorities relied upon, by the counsel for the appellant inasmuch as none of them was apposite.

6. The counsel for the respondents, however, has brought to our notice a catena of decisions. In *Firm Chhunilal Laxman Prasad Vs. Agarwal and Co. and Others*,), the trial Court having granted interim injunction an appeal was carried to the High Court under Order 43, Rule 1. A learned Single Judge having reversed the order, an appeal under the Letters Patent was filed. Objections were raised to the maintainability of the appeal..... In that context, relying upon a decision of the Supreme Court in *Shah Babulal Khimji Vs. Jayaben D. Kania and Another*,) where it has been held that there was no inconsistency between Section 104 read with Order 43, Rule 1 of the Code and the provision contained in the Letters Patent providing for appeals, the learned Judges of the Madhya Pradesh High Court observed that the provision of Section 104 read with Order 43, Rule 1 of the Code applied even to the internal appeals in the High Court under the provisions of the Letters Patent. It was held that in view of the observations of the Supreme Court that Section 104 applied to appeals under the Letters Patent, Sub-section (2) of Section 104 would operate as a bar to the institution of an appeal from an order passed in appeal u/s 104. In *Madhusudan Vegetable Products Co. Ltd. Vs. Rupa Chemicals, Vapi and Others*,), the learned Judges observed that Section 104 of the Code and the Clause under the Letters Patent providing for internal appeals can harmoniously co-exist. Hence, Sub-section (2) of Section 104 will have to be given its true effect. Once that is done, the appeal filed under the Letters Patent from -in order of the Single judge of the High Court passed in an appeal under Order 43, Rule 1 would not be maintainable being barred by Sub-sec (2) of Section 104 of the Cods. To the same effect are the decisions of the Bombay High Court in *Chedur Rahman v. Ahmedali Bharucha* (AIR 1988 Bombay 120) and of the Kerala High Court in (*Fr. Abraham Mathews and Another Vs. Illani Pillai and Others*,). Following the aforesaid decisions which have interpreted and followed the decision of the Supreme Court in *Babulal's case* (supra), we hold that the provisions contained in Section 104 of of the Code are applicable to the Letters Patent appeal also because it was not intended that Clause 10 of the Letters Patent would override Section 104, for the Supreme Court was categorical ;

"We are unable to accept the line of reasoning adopted by the aforesaid High Court in holding that Section 104 does not apply to the internal appeals in the High Court."

7. In the result, we sustain the preliminary objection raised on behalf of the respondents and hold that the appeal is incompetent and dismiss the same. In the circumstances, there would be no order as to costs.

V. Gopalaswamy, J.

8. I agree.