

SUPREME COURT OF INDIA

Hemlata Panda

Vs.

Sukuri Dibya

(B Kirpal and N S Hegde JJ.)

12.10.1999

ORDER

1. The Respondent had filed a suit for declaration of title and confirmation of possession and in the alternative for recovery of possession. The suit was dismissed by the Munsiff's Court on 12.12.1977.
2. The appeal filed against the said suit, thereafter, was dismissed in default on 9.5.1980 by the Subordinate Judge due to non-appearance of the Counsel for the Respondent. The Respondent then moved an application under Order 14 Rule 19 of the CPC for restoration of the appeal but the same was dismissed on 14.4.1981.
3. The Respondent then filed an appeal under Order 43 Rule 1 C.P.C. read with Section 104 challenging the correctness of the order dated 14.4.1981. This appeal was dismissed vide judgment dated 1.2.83. A Letters Patent Appeal was filed whereby the order of 1.2.1983 of the learned Single Judge was sought to be challenged. An objection was raised with regard to the maintainability of the said Letters Patent Appeal but the Division Bench came to the conclusion that the letters patent appeal was maintainable and, on merits, it set aside the order of the court below and restored the appeal of the Respondent before the Subordinate Judge.
4. We find that the judgment under appeal has been expressly overruled by this Court in *New Kenilworth Hotel (P) Ltd. v. Orissa State Finance Corporation* Notwithstanding this the learned Counsel for the Respondent submitted that the said judgment does not lay down the correct law and that we should refer the case to a larger Bench.
5. We are not convinced with the aforesaid submission and find that there is no merit in this contention of the learned Counsel. The Single Judge was exercising jurisdiction as an appellate

court under Section 104(1) C.P.C. Sub-section (2) of Section 104 clearly states that no appeal shall lie from any order passed in appeal under this Section. Therefore when the Single Judge hears an appeal in exercise of his jurisdiction under Section 104(1) no further appeal by virtue of Section 104(2) is maintainable. Learned Counsel for the Respondent sought to place reliance on a decision entitled *Shah Babulal Khimji v. Jayaben D. Kania*. This decision is not applicable. This was a case where a Single Judge of the High Court sitting on the original side passed an order against which a Letters Patent Appeal was filed. This Court held that the Letters Patent Appeal was maintainable. The reason for this is that an appeal from the order of the subordinate court can be entertained in those circumstances provided by Section 104(1). Where the original order is not passed by the subordinate court but is passed by the High Court exercising original jurisdiction, then, if appeal under Section 104(1) is not provided the letters patent may enable such a type of order to be appeal. This is exactly what was held in *Shah Babulal Khimji's* case and this is the reason why *New Kenilworth Hotel (P) Ltd.* case the said decision of *Shah Babulal Khimji* was distinguished.

6. Following the decision of this Court in *New Kenilworth Hotel (P) Ltd.* case we are of the opinion that the Letters Patent Appeal against the order dated 1.2.1983 of the Single Bench was not maintainable and on this ground alone judgment of the Division Bench of the High Court has to be set aside. Ordered accordingly. The appeal is allowed. No costs.