

GUJARAT HIGH COURT

Madhusudan Vegetable Products Co. Ltd.

Vs.

Rupa Chemicals

Letters Patent Appeal No. 255 of 1985

(P.R. Gokulakrishnan, C.J. and S.B. Majmudar, JJ.)

08.08.1985

JUDGMENT

S.B. Majmudar, J.

1. In this Letters Patent Appeal under Clause 15 of the Letters Patent, the appellant, original plaintiff, of Civil Suit No. 1 of 1985 in the District Court of Panchmahals at Godhra has brought in challenge the judgment and order of learned single Judge of this Court, M. B. Shah, J. in Appeal from Order which was dismissed by the learned single Judge of this Court in exercise of his powers under Order 43, Rule 1 of the Civil Procedure Code, 1908. The appellant-plaintiff had moved an interim injunction application Ex. 5 under Order 39, Rules 1 and 2 read with Section 151 of the Civil Procedure Code praying for interim injunction pending the suit against the respondents defendants. After hearing the concerned parties, the learned Joint District Judge of Panchmahals at Godhra dismissed the application Ex. 5 for interim injunction and vacated the ad interim relief. Being aggrieved by the said order of the learned trial Judge, the appellant preferred Appeal from Order as miscellaneous appeal under Order 43, Rule 1. That appeal came to be dismissed by our learned brother M. B. Shah, J. on 1st July 1985. It is in these circumstances that the present Letters Patent Appeal has been preferred by the appellant being dissatisfied with the said order.

2. Pursuant to the notice issued in this appeal to the respondents, Mr. Mehta, the learned counsel appearing for the respondents has taken a preliminary contention as to the maintainability of this Letters Patent Appeal. He submitted that this appeal is barred both under Section 104, sub-section (2) as well as under Section 100A of the Civil Procedure Code Consequently, we have heard the learned Advocate for the appellant as well as the learned Advocate for the respondents on this preliminary point about the maintainability of the appeal. Having heard them on this point, we have come to the conclusion that this Letters Patent Appeal is not maintainable. The reasons which weighed with us are as under.

3. It is not in dispute that the order of the learned single Judge is an appellate order passed in exercise of the powers under Order 43, Rule 1 whereby miscellaneous appeal was dismissed by him. In these circumstances, Section 104 of the Civil Procedure Code squarely gets attracted. The said section reads as under :

'104.(1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders -

(a) to (f) (Omitted by Arbitration Act, 1940)

(ff) an order under Section 35A,

(ffa), an order under section 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92, as the case may be;

(g) an order under Section 95,

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

Provided that no appeal shall lie against any order specified in Clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section "

It is not in dispute that the appeal heard by the learned single Judge was filed before him under Section 104(1)(i). Therefore, further question survives as to whether any further appeal can be entertained despite Section 104, sub-section (2).

4. Mr. R. R. Shah, the learned counsel for the appellant, placing strong reliance on a Division Bench judgment of this Court in the case of *Nahan Foundry (A Limited Company in Himachal Pradesh) v. Mohanlal Khimjibhai and Sons, reported in¹* submitted that such an appeal would not be barred under Section 104, sub-section (2) of Civil Procedure Code. It is true that in that case S. H. Sheth, J. speaking for the Division Bench has taken the view that appeal under Clause 15 of the Letters Patent is not barred by sub-section (2) of Section 104 firstly, because the Civil Procedure Code does not deal with appeals within the High Court from the decision of a single Judge to two Judges but deals with appeals only from one Court to another and secondly, because the bar which sub-section (2) of Section 104 would probably have otherwise attracted to appeal under Clause 15 of the Letters Patent, is removed by sub-section (1) of Section 4 of the Civil Procedure Code. For taking the aforesaid view, the Division Bench speaking through S. H. Sheth, J. has relied upon series of Bombay Judgments, amongst others, being the Division Bench judgment of the Bombay High Court in the case of *Vaman Ravji Kulkarni v. Nagesh Vishnu Ashy reported in²*. The consistent earlier view of the Bombay High Court was that despite what is stated in the Civil Procedure Code, internal appeals governed under Clause 15 of the Letters Patent are not affected, meaning thereby that between the provisions of the Civil Procedure Code and clauses of the Letters Patent, the clauses of the Letters Patent would prevail. That earlier

Bombay view unfortunately for the appellant has been expressly set at naught by a decision of the Supreme Court in the case of *Shah Babulal Khimji v. Jayaben D. Kania*, reported in³ Therein the Supreme Court speaking through Fazal Ali, J. and A. Varadarajan, J. had to examine a short question whether a decision of the learned single Judge of the Bombay High Court in exercise of his original jurisdiction could be appealed against under Clause 15 of the Letters Patent as judgment While deciding that question, the Supreme Court considered Order 43, Rule 1, Section 104 of the Civil Procedure Code as well as the scheme of the Letters Patent

¹(1974) 15 Guj LR 897

³ AIR 1981 SC 1786

² AIR 1940 Bom 216

governing internal appeals in Bombay High Court. It is not in dispute that the same scheme of Letters Patent applies to this Court. While considering the scheme of Order 43, Rule I read with Section 104 and Clause 15 of the Letters Patent, Fazal Ali, J. speaking for the Supreme Court made the following pertinent observations in paras. 60, 61 and 62 of the judgment. It is profitable to extract what the Supreme Court has to say in the aforesaid judgment :

"60. With due respect, a close analysis of this decision would reveal that the Judges followed a fallacious process of reasoning. According to their opinion, the appeals under the Civil Procedure Code and those under the Letters Patent were, so to say two separate compartments having different spheres of their own. With due deference, we might point out that such a view is based on a total misinterpretation and misconstruction of the true nature and object of the Civil Procedure Code and the Letters Patent. In fact, as we have pointed out earlier, there is no inconsistency whatsoever between the Letters Patent and Section 104 read with Order 43, Rule 1. The first premise of the Court that internal appeals in the High Court were governed by the Letters Patent alone and not by the Code appears to be legally fallacious. We have already pointed out that a large number of decisions, including the Privy Council have clearly taken the view that although the Letters Patent is a special law certain provisions of the Civil Procedure Code in the matter of procedure do apply to appeals against the decision of the Trial Judge to a larger Bench or to quote the Bombay Judges to 'internal appeals'. Secondly, the Court completely overlooked the legal effect of Section 117 and Order 49, Rule 3 which completely demolishes the presumptuous process of logic adopted by the Court. Thirdly, the Court appears to have overlooked that far from excluding the Code there could be other special Acts which could and did confer additional jurisdiction even in internal appeals to the High Court, viz. from an order passed by a Trial Judge to a larger Bench, for instance, Section 39 of the Arbitration Act or Section 202 of the Companies Act and other similar local or special Acts. If these special Acts could without affecting the jurisdiction of the Letters Patent or overriding the same provided a supplementary or additional jurisdiction, there was no reason why the Civil Procedure Code also could not do the same particularly when the Trial Judge had to adopt the procedure contained in the Code, starting from the presentation of the plaint to the delivery of judgment. Fourthly, the Division Bench does

not seem to have considered the fact that what the Letters Patent did was merely to confer original civil jurisdiction on the High Court to be exercised by a single Judge, who would undoubtedly be a Trial Judge, but of an elevated status so that only such suits could be filed in the Court of the said Judge as are of a very high valuation which may differ from High Court to High Court. This was done in order that in heavy suits involving substantial questions of fact and law, the hearing of the suit by a senior Court of the status of a High Court Judge would repose, endear and generate greater confidence in the people. Thus, if interlocutory orders passed by District Courts in the mofussil could be appealable to the High Court, there was no reason why interlocutory orders passed by a Trial Judge could not be appealable to a larger Bench irrespective of the question whether or not they were judgments within the meaning of Clause 15 of the Letters Patent. This appears to us to be the cardinal philosophy of the Code in applying the provisions of Order 43, Rule 1, to the original suit tried by the single Judge (Trial Judge).

61. Further more, the concept of internal appeals in the High Court seems to be a legal fiction without any factual existence imported by some of the High Courts in order to get rid of some of the provisions of the Civil Procedure Code which is totally opposed not only to the aim and object of the Code but also to the very spirit of the Letters Patent. In a later judgment of the Bombay High Court in *Vaman Ravji Kulkarni v. Nagesh Vishnu Joshi*⁴, the following observations were made:-

"I am, with respect, of opinion that the view taken by the Full Bench of the Madras and Calcutta High Courts in the cases referred to above is correct, and that the question must be regarded as having been finally settled by the decision of the Privy Council in (*Hurrish Chunder Chowdhly v. Kali Sundari Debia*⁵) Section 104, Civil Procedure Code which refers only to appeals to the High Court from Courts subordinate to it, cannot apply to appeals filed under Clause 15 of the Letters Patent from a single Judge of the High Court to a Bench. (Wadia, J.)

There can be no doubt that the provisions of the Letters Patent have conferred special powers regarding appeals within the High Court. Those powers are not specifically taken away by Section 104, Civil Procedure Code and are not, therefore, affected by it.....Special enactments are not repealed by later general Acts unless there be some express reference to the previous legislation or a necessary inconsistency in the two Acts standing together, which prevents the maxim from being applied. Sub-section (2) of Section 104, Civil Procedure Code, does not refer to the Letters Patent and say that in spite of Clause 15 of the Letters Patent no appeal lies from any order passed in an appeal under sub-section (1). Sub-section (2) is in no way inconsistent with Clause 15 of the Letters Patent and the two can stand together, the former applying to appeals under the Code, and the latter to special appeals within the High CourtI am satisfied that Section 104, Civil Procedure Code, does not control Clause 15 of the Letters Patent, and in spite of the absence of a saving clause in sub-section (2) of Section 104 does not affect or cut down the right of appeal conferred by the Letters Patent." (Lokur, J.).

62. As regards the first part of the observations of Wadia, J. we are constrained to observe

that the learned Judge has not correctly construed the true ratio of the decision of the Privy Council in Hurrish Chunder Chowdry's case, (1882) 10 Ind App 4 (PC) (supra) where, as indicated, the Privy Council has in express terms held that Section 588 (which now corresponds to Order 43, Rule 1) clearly applies to appeals against orders of a trial Judge to a larger Bench of the High Court. Similarly, the observations made by Lokur, J. run against the plain interpretation of Section 104 by assuming that there is a conflict between Section 104 read with Order 43, Rule 1 and the Letters Patent when in fact, as pointed out, there is no such conflict at all-all that Section 104 does is to give an additional jurisdiction apart from the Letters Patent which is in no way unconstitutional with the Letters Patent. We may like to observe here that there is no non obstante clause in the provisions of the Letters Patent to indicate that the provisions of the Civil Procedure Code, particularly Section 104 would not apply either expressly or by

⁴ AIR 1940 Bom 216

⁵(1882) 10 Ind App 4 (PC)

necessary intendment. In this view of the matter, therefore, we are clearly of the opinion that the Bombay decisions are wrongly decided and must, therefore, be overruled."

In view of the aforesaid categorical pronouncement of the Supreme Court on Order 43, Rule 1, Section 104 of the Civil Procedure Code vis-a-vis Clause 15 of the Letters Patent, the earlier Bombay view that Clause 15 can prevail over the provisions of the Civil Procedure Code does not remain good law and all these decisions have been expressly overruled. It is pertinent to note that the observations of Lokur, J. extracted in para 61 which have taken the view that Section 104 of the Civil Procedure Code does not control Clause 15 of the Letters Patent have been expressly dissented from and overruled by the Supreme Court. It is also pertinent to note that as the Supreme Court did not detect any dichotomy between Section 104, C. P. Code, and Letters Patent, reliance placed on Section 4(1) of C. P. Code by the Division Bench in (1974) 15 Guj LR 897 is rendered otiose.

5. In view of the decision of the Supreme Court in AIR 1981 Supreme Court 1786 (supra), the reasoning of the Division Bench of this Court in (1974) 15 Guj LR 897 relying upon the earlier ruling of the Bombay High Court which has been expressly overruled by the Supreme Court cannot be held to be laying down good law. The said decision must, therefore, be treated as impliedly overruled by the Supreme Court by the decision in AIR 1981 Supreme Court 1786. The ratio of the decision in (1974) 15 Guj LR 897 does no longer remain legally operative for the additional reason that by amendment of Civil Procedure Code in 1976, Section 100A is brought on the statute book It expressly bars further appeals under Letters Patent from orders passed by single Judges of the High Court in miscellaneous appeals. Division Bench in (1974) 15 Guj LR 897 heavily relied upon Section 4(1) of the Civil Procedure Code to hold that it prevailed over Section 104, sub-section (2) of the Code. However, Section 100A is an express provision to the contrary. Hence Section 4(1) of the Civil Procedure Code can no longer be pressed in service for salvaging appeals under Clause 15 of the Letters Patent against orders in miscellaneous appeals under Section 104(1) read with Order 43, Rule 1 of the Civil Procedure Code.

6. Consequently, it must be held that both Section 104 of the Civil Procedure Code and Clause 15 of the Letters Patent, can harmoniously co-exist as finally ruled by the Supreme Court in the aforesaid decision. If that is so, Section 104, sub-section (2) will have to be given its true effect. Once that is done, the appeal filed under Clause 15 of the Letters Patent on the facts of this case would not be maintainable as it is barred by sub- sec. (2) of Section 104 of the Civil Procedure Code.

7. In fact, following the decision of the Supreme Court, appeals preferred by the appellants under Clause 15 of the Letters Patent before the Bombay High Court under similar circumstances were held to be not maintainable. We may refer to two judgments of the Bombay High Court on this point. In *Obedur Rehman v. Ahmedali Bharucha*⁶, the Division Bench of the Bombay High Court relying upon the decision of the Supreme Court in AIR 1981 Supreme Court 1786 held that when the learned single Judge had decided an appeal under Order 43, Rule 1, the said decision could not be further appealed

⁶ AIR 1983 Bom 120

against under Clause 15 of the Letters Patent and the Letters Patent Appeal would be barred under Section 104, sub-section(2) of the Civil Procedure Code. Following the ratio of the decision of the Supreme Court which we have extracted above, Deshpande, J. observed as under:

"As far as Clause 15 of the Letters Patent is concerned, the provisions of Section 104 are attracted and it is applicable to the Letters Patent Appeals also because the Letters Patent Appeals cannot be said to be an exception and cannot override the provisions of the Civil Procedure Code."

The very same view is reiterated by a later Division Bench judgment of the Bombay High Court in *Charity Commissioner, Maharashtra State, Bombay v. Rajendrasingh Anandrao Jadhao*⁷, (Nagpur Bench at Nagpur). Qazi, J. speaking for the Division Bench following the ratio of AIR 1981 Supreme Court 1786 (supra) has held that the provisions of Section 104, Civil Procedure Code are applicable to the Letters Patent Appeals also, because the Letters Patent Appeals cannot be said to be an exception and do not override the provisions of the Civil Procedure Code. Consequently, the bar of Section 104, sub-section (2) would apply and the further Appeal under Letters Patent Clause 15 would not lie. We entirely concur with the ratio of the aforesaid decisions of the Bombay High Court and hold that no Letters Patent Appeal is maintainable on the facts of the present case as it is *ex facie* barred under sub-section (2) of Section 104 of the Civil Procedure Code.

8. Mr. Shah wanted to seek assistance from the decision in the case of *National Sewing Thread Co. Ltd., Chidambaram v. James Chadwick and Bros. Ltd.*⁸,. However, the said decision was rendered on the facts. The Supreme Court in that case was concerned with the question as to whether a decision given by a single Judge of the High Court in an appeal preferred under

Section 76, Trade Marks Act, constitutes a judgment within the meaning of Clause 15 of the Letters Patent.

9. Now, it is not in dispute on the facts of this case that the judgment rendered by our learned Brother M. B. Shah, J. is a judgment. The preliminary objection to the maintainability of the appeal is entirely different and, that is, to the effect that a decision rendered under Order 43, Rule 1 in miscellaneous appeal cannot be assailed in Letters Patent Appeal because of Section 104, sub-section (2). That question never arose before the Supreme Court in the aforesaid decision in AIR 1953 Supreme Court 357 and hence the Supreme Court had no occasion to consider the scheme of Section 104 of the Code of C. P. in context of Clause 15 of the Letters Patent. Consequently, that judgment cannot be of any assistance to Mr. Shah, the learned counsel appearing for the appellant.

10. Even apart from the aforesaid settled legal position, there is a further hurdle in the way of the appellant in connection with the maintainability of this appeal. In view of Section 100A referred to earlier which has been brought on the statute book by amending Civil Procedure Code by Amendment Act, 1976, the Letters Patent Appeals are expressly barred in cases contemplated by the said provision. The said provision reads as under:

"100-A. Notwithstanding anything contained in any Letters Patent for any High

⁷ AIR 1984 Bom 478

⁸ AIR 1953 SC 357

Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such single Judge in such appeal or from any decree passed in such appeal."

A mere look at the aforesaid provision shows that once a single Judge decides an appeal from an appellate decree or order, his decision will not attract the applicability of Clause 15 of the Letters Patent as such appeal would be expressly barred in view of the aforesaid legislative provision. It is obvious that from decisions in all appeals from appellate decree, that is second appeals, no further appeals under Clause 15 would be maintainable. Similarly, the decision rendered by single Judges of the High Court in appeals from orders also cannot be challenged in further appeals in view of the express bar under Section 100A.

11. Section 110A starts with a non obstante clause and rules out applicability of Clause 15 of the Letters Patent in connection with decisions rendered by learned single Judges of High Courts in second appeals as well as in appeals from orders under Section 104(1) read with Order 43, Rule

1, Civil Procedure Code As per this provision, once a learned single Judge of the High Court decides an appeal against appellate decree, that is, second appeal under Section 100, Civil Procedure Code or decides appeal against order, that is, under Order 43, Rule 1 read with Section 100(1), Civil Procedure Code, no further appeal under Clause 15 of the Letters Patent can survive. Mr. Shah wanted to submit that the words "where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court" employed by Section 100A may mean appeal from an appellate decree or appeal from appellate order and consequently appeal from original order may not be covered by this clause. It is not possible to accept this submission for the simple reason that the Civil Procedure Code does not contemplate any appeal before High Court from appellate orders passed by lower Courts. All further appeals from appellate orders under Section 104(1) read with Order 43, Rule 1 are expressly barred by Section 104, sub-section(2) and Section 105 of the Civil Procedure Code If any lower appellate Court decides a miscellaneous appeal under Order 43, Rule 1, only revision lies before High Court. There is no occasion for the High Court to exercise second appellate jurisdiction against appellate orders passed by subordinate Courts. Second appeal lies only against appellate decrees of subordinate Courts as per Section 100, Civil Procedure Code Hence the words "appellate decree or order" must mean appeal before learned single Judge of the High Court either against appellate decree as per Section 100, Civil Procedure Code or against original order of subordinate Court under Order 43, Rule 1, Civil Procedure Code We may make it clear that under certain other statutes like The Employees' State Insurance Act, 1948, further appeals do lie to the High Court against appellate orders passed by lower Courts under such Acts. For example, under Section 54A of the Employees' State Insurance Act, 1948, an appeal lies to the Employees' Insurance Court against decision of Medical Board, while second appeal lies to the High Court under Section 82(1) against orders of the Employees' Insurance Court. Similarly, first appeals lie to the High Court against original orders passed by lower Courts and authorities under special Acts like Workmen's Compensation Act, 1923, Land Acquisition Acts 1894, Bombay Public Trusts Act, 1950, etc. We should not be taken to have expressed any opinion on the question whether Section 100A bars Letters Patent Appeals against decisions of single Judges of the High Court while exercising appellate jurisdiction under such special statutes. All that we are concerned with in the present case is the short question whether Section 100A of the Civil Procedure Code bars Letters Patent Appeal against decision of the learned single Judge in exercise of his powers under Order 43, Rule 1 of the Civil Procedure Code In our view, Section 100A does expressly bar such a Letters Patent Appeal.

12. Even this position has been made clear by the decision of the Kerala High Court in *Fr. Abraham Mathews v. Illani Pillai*⁹, In that case, a learned single Judge of the High Court of Kerala had decided civil miscellaneous appeal. Question was whether further appeal under Clause 15 could lie in the face of Section 100A of the Civil Procedure Code. Taking the view that such an appeal would not lie and would be expressly barred, the Full Bench of the Kerala High Court speaking through George Vadakkal, J. observed as under :

"It should be remembered that appeals preferred under Section 104 of the Code are

appeals from orders and very often, from interlocutory orders. In most of the cases where such appeals are preferred, the concerned suit itself would be pending. A further appeal from the decision of a learned single Judge to a Division Bench would certainly contribute to delay in the final disposal of the suit or the main action.

The expression "appellate decree or order" would mean a decree passed by a Court in exercise of its appellate jurisdiction and any order passed by any Court in exercise of its original or appellate jurisdiction."

Under these circumstances, it was held that Section 100A expressly barred such further appeals from decisions in appeal from orders or miscellaneous appeals decided by single Judge of the High Court. We respectfully concur with the ratio of the aforesaid Full Bench judgment. This is an additional hurdle in the way of the appellant.

13. For all these reasons, Letters Patent Appeal is dismissed. Notice issued is discharged. No order as to costs.

Appeal dismissed.

⁹ AIR 1981 Ker 129 (FB)