

M/S. NEW KENILWORTH HOTEL (P) LTD.

A

v.

ORISSA STATE FINANCE CORPORATION AND ORS.

JANUARY 20, 1997

[K. RAMASWAMY AND G.T. NANAVATI, JJ.]

B

Code of Civil Procedure, 1908 : Sections 2(9), 4(1) and 104(2)—Order 39 Rule (1)—Order 43 Rule (1)(r)—Appellate order—Letters Patent appeal against—Permissibility of—Suit filed by appellant seeking permanent injunction restraining respondents from disturbing its possession—Pending suit status quo granted by Trial Court—On appeal by respondents a single Judge of the High Court vacated the status quo order—Letters patent appeal preferred by appellant before Division Bench held not maintainable—Appeal before Supreme Court—Held Division Bench of the High Court was right in holding that Letters Patent Appeal would not lie against an order of the single Judge—Right of appeal is a creature of status—Filing of second appeal having been expressly prohibited under section 104(2) the right of appeal provided under clause 10 of the Letters Patent was not available to appellant.

C

D

Sukuri Ditya & Ors. v. Hemalata Panda, (1990) 32 OJD 431 (Civil) and Birendra Kr. Majhi v. Sitamani Bewa, (1992) 34 OJD 473 (Civil), disapproved.

E

Resham Singh Pyara Singh v. Abdul Sattar, [1996] 2 SCC 49, relied on.

Shah Babulal Khimji v. Jayaben D.C. Kania & Anr., [1981] 4 SCC 6, explained, and held inapplicable.

F

Madhusudan Vegetable Products Co. Ltd. Ahmedabad v. Bapa Chemicals Vapi & Ors., AIR (1986) Guj. 156 and Firm Chhunikal Laxman Prasad v. M/s Agarwal and Co. & Ors., AIR (1987) MP 172, approved.

G

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 350-352 of 1997.

From the Judgment and Order dated 16.12.96 of the Orissa High Court in A.H.O. Nos. 40-42 of 1995.

H

A Dr. A.M. Singhvi, Additional Solicitor General, Anil B. Diwan, H.N. Salve, Y. Das, C. Mukhopadhyay and Rakesh K. Sharma for the Appellant.

Santosh Hegde, N. Ganpathy, A.S. Bhasme and Bibek Mohanti for the Respondents.

B The following Order of the Court was delivered :

Leave granted.

C These appeals by special leave arise from the judgment and order of the High Court of Orissa, made on December 16, 1996 in A.H.O. Nos. 40-42/95.

D The admitted facts are that the appellant had filed a suit for declaration that the steps taken by the respondents under section 29 of the State Financial Corporation Act were illegal and sought permanent injunction restraining them from disturbing its possession. Pending suit, they sought *ad interim* injunction not to dispossess them from the hotel. The trial Court by order dated July 12, 1994 granted *status quo* whereby the appellant remained in possession of the suit premises. On appeal filed by the respondents, the learned single Judge vacated the *status quo* order by order dated May 18, 1995. Feeling aggrieved the appellant filed Letters Patent Appeal. E By the impugned order the Division Bench has held that the appeals are not maintainable. Thus this appeal by special leave.

F Shri A.M. Singhvi, learned Addl. Solicitor General appearing for the appellant, contends that under Clause 10 of the Letters Patent an appeal would lie against the judgment of the learned single Judge to the Division Bench. Though the order granted *status quo* by the trial court was vacated by the High Court, it is a judgment within the meaning of Section 2 (9) of the Code of Civil Procedure, 1908 (for short, the 'Code'). Therefore, the bar under Sec. 104 (2) of the Code is not attracted by operation of Sec. 4 (1) of the Code. In support thereof, he placed strong reliance on the judgment of the Division Bench of that Court in *Sukuri Dibya & Ors. v. Hemalata Panda*, [1990] 32 OJD 431 (civil) and a Full Bench Judgment of that Court in *Birendra Kr. Majhi v. Sitamani Bewa*, [1992] 34 OJD 473 (civil). He also contends that though this Court has considered the non-maintainability of an appeal by operation of Sec. 104 (2) of the Code read with Order XLIII Rule 1(r), the above distinction was not brought to the H

notice of this Court and that, therefore, the Full Bench judgment of the High Court still holds the field. We find no force in the contention. A

It is settled legal position that right of appeal is a creature of the statute. Against an interlocutory order, an appeal has been provided under Sec. 104 (1) of the Code read with Order XLIII Rule 1. In respect of interim injunction, it is covered by Order XLIII Rule 1 (r). In this case, the order of status quo was passed in an application filed under Order XXXIX Rule 1 of the Code. Therefore, it is not in dispute that it is an order passed by the civil Court under Order XXXIX Rule 1 appealable under Order XLIII Rule 1 (r) of the Code. Sub-section (2) of Section 104 specifically prohibits Second Appeal against such an order postulating that "No appeal shall lie from any order passed in appeal under this Section". In *Resham Singh Pyara Singh v. Abdul Sattar*, [1996] 2 SCC 49 a Bench of this Court consisting of K. Ramaswamy and B.L. Hansaria, JJ. has held that against an appellate order of a learned single Judge of a High Court passed by the Civil Court, a Letters Patent Appeal would not lie by reason of the bar created by sub-section (2) of Section 104 of the Code. B C D

Clause 10 of the Letters Patent reads as under :

"An appeal shall lie..... from the judgment (not being a judgment passed in exercise of appellate jurisdiction in respect of a decree or order made in exercise of the appellate jurisdiction by a Court subject to the superintendence of High Court..... and not being an order made in exercise of revisional jurisdiction.....) of one Judge of the said High Court..... and in exercise of appellate jurisdiction in respect of a decree or order made in exercise of appellate jurisdiction by a court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal...." E F

It would, thus, be seen that Clause 10 of the Letters Patent consists of only two parts. In the first part, an appeal shall lie from a judgment of a learned single Judge to the Division Bench not being a judgment passed in exercise of the appellate jurisdiction or revisional jurisdiction. In other cases, where the learned single Judge exercises the appellate jurisdiction, if he certifies that it is a fit case for an appeal to the Division Bench. Notwithstanding the prohibition contained in the latter part of clause 10, an appeal would lie. It is seen that the Division Bench in *Sukuri Dibya's* H

A case (supra) has interpreted Clause 10 and stated that it consists of three components, namely :

"(i) Judgment of single Judge passed in exercise of original jurisdiction;

B (ii) Judgment of a single Judge passed in exercise of appellate jurisdiction against a judgment passed by a court subject to the superintendence of the High Court in exercise of its original jurisdiction; and

C (iii) against judgment of a single Judge passed in exercise of its appellate jurisdiction against the judgment passed by a Court subject to the superintendence of the High Court in exercise of its appellate jurisdiction;

D The above analysis of the learned Judges in that behalf is not correct as we have stated above, The same was repeated by the Full Bench in *Birendra Kr. Majhi's* case (supra).

E The question then is : whether notwithstanding such prohibition, though an order of injunction passed by the learned single Judge in the appellate jurisdiction under Order XXXIX Rule 1 is a judgment, as held by this Court in *Shah Babulal Khimji v. Jayaben D.C. Kania & Anr.*, [1981] 4 SCC 8, an appeal would lie on the basis thereof? It is contended that an appeal would lie to the Division Bench. We find no force in the contention. It is true that the learned Judges composing of the Division Bench as well as the Full Bench of the High Court construed that the ratio in *Shah Babulal Khimji's* case would attract item (ii) of the analysis of the learned Judges and, therefore, an appeal would lie to the Division Bench. We are of the view that the learned Judges, with due respect, have not understood the scope of the judgment in *Shah Babulal Khimji's* case in its proper perspective. Therein, the learned single Judge exercising the original jurisdiction of the High Court passed an order in applications filed under Order XL Rule 1 for appointment of a receiver and issue of injunction order under Order XXXIX Rule 1.

H The question, therefore, was : whether it was appealable? Since the learned Judge had exercised the original jurisdiction and an appeal would lie to the Division Bench under Order XLIII Rule 1, this Court considered

that the order of the learned single Judge was a judgment within the meaning of the Section 2(9) of the Code and, therefore, it was appealable. It is seen that the exercise of power by the learned single Judge was as a first Judge under the Code and, therefore, the order, though it is one passed under Order XLIII Rule 1, since it gives a finality as regards that Court is concerned, was held to be a judgment within the meaning of Section 2(9) of the Code. Section 4(1) of the Code does not apply because it envisages that "In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force." Since Section 104(2) expressly prohibits an appeal, against an order passed by the appellate Court under Order XLIII Rule 1 read with Section 104(1) no..... appeal would lie. As a consequence no Letters Patent Appeal would lie. The view taken in *Madhusudan Vegetable products Co. Ltd. Ahmedabad v. Bapa Chemicals Vapi & Ors.*, AIR (1986) Guj. 156 and *Firm Chhunilal Laxman Prasad v. M/s. Agarwal and Co. & Ors.*, AIR 1987 MP 172 by the two High Courts is correct in law. The view of the Division Bench in *Shashikala v. Hiren*, 71 (1991) CLT 197 is correct in law. *Sukuri Dibya's* case and the *Birendra's* case are not good law.

It is seen that the very object of introducing these amendments was to cut down the delay in disposal of suits and to curtail spate of remedial steps provided under the Code. As held earlier, the right of appeal is a creature of the statute and the statute having expressly prohibited the filing of second appeal under sub-section (2) of section 104, the right of appeal provided under Clause 10 of the Letters Patent would not be available. As already noted, the main part of Clause 10 clearly indicates that "an appeal would lie from the judgment not being a judgment passed in exercise of appellate jurisdiction". Thereby the judgment from an appellate jurisdiction stands excluded under the first part of Clause 10 of the Letters Patent itself. Therefore, the Division Bench of the High Court was right in holding that the Letters Patent Appeal would not lie against an order of the learned single Judge.

The appeals are accordingly dismissed. No costs.

T.N.A.

Appeals are dismissed.