

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ FAO (OS) No. 269/2005

Date of Decision: May 25, 2009

ANIL KAPOOR

.....Appellant

Through : Mr. V.K. Makhija, Sr. Adv.
with Ms. Vandana Khurana,
Adv. for the appellant.

Versus

S.R. SHARMA THR. LRS

.....Respondents

Through : Mr. J.K. Seth, Sr. Adv. with
Mr. Bharat Bhushan Bhatia
and Ms. Saloni, Adv. for
the respondents.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

SANJAY KISHAN KAUL, J. (ORAL)

1. Admit.
2. Learned counsel for the respondents accepts notice.
3. At request of learned counsel for the parties, the appeal is taken up for final disposal.

4. The appellant filed a suit for specific performance of an agreement to sell in respect of property bearing No. E-386, Greater Kailash-I, New Delhi. The respondent entered appearance and defended the suit. On the completion of pleadings of the parties, issues were framed on 15.09.1998 as under:

- (i) Whether Shri S.R. Sharma, the defendant received Rs.4,00,000/- by way of friendly loan and not in pursuance to the agreements –Annexures A & B as alleged by him?
- (ii) Whether the defendant had not entered into agreements to sell as alleged by the plaintiff?
- (iii) Whether the plaintiff was always ready and willing to perform his part of the agreement?
- (iv) Relief.

5. It appears that thereafter the respondent passed away and his legal heirs were brought on record. The trial, however, did not commence for one reason or the other. At the stage when the trial was to finally commence, the appellant filed an application being IA No.5051/2005 seeking leave of the Court to file additional documents under Order XIII Rule 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the said Code'). The appellant claimed that these documents were sought to be produced for purposes of establishing that the appellant was ready, willing and able to purchase the suit property and in this behalf, the Bank passbook of Central Bank of India as well as documents registered

with the sub-Registrar were sought to be produced. This application was opposed by the respondents and in terms of the impugned order dated 29.07.2005, the application has been dismissed.

6. The impugned order reads as under:

“This an application under Order 13 Rule 2 of the CPC.

Apart from the fact that this provision has been deleted from the CPC, there is absolutely no reason, explanation or any suggestion given why these documents could not have been produced at a much earlier stage and have been sought to be produced only a couple of days before recording of evidence. In the absence of any explanation, I do not find any merit in the application. The same is dismissed. The documents sought to be produced by this application cannot be now taken into consideration for the purpose of the case.”

7. Learned counsel for the appellant rightly points out that the authority of the Court to bring on record such documents exists even after the amendment of the said Code in view of the provisions of Order VII Rule 14 of the said Code. The controversy thus is whether there was sufficient cause shown and it is the submission of the learned counsel for the respondents that mere inadvertence could not be a ground to bring on record the documents belatedly at this stage. Learned counsel in this behalf has referred to the observations in **Madan Lal v. Shyam Lal** AIR 2002 SC 100 though it is conceded that in that case trial had already begun.

8. We are of the considered view that since trial was yet to commence, these documents could have been brought on record specially as they came from some unimpeachable source and we

find them germane to the controversy in question. The respondents could have been compensated with costs.

9. Learned counsel for the respondents, however, points out that it is not within the purview of this Court to entertain the appeal as no appeal is maintainable against discretionary order declining documents to be taken on record belatedly.

10. Learned counsel for the appellant refers to the Full Bench judgment of this Court in ***Begum Aftab Zamani v. Shri Lal Chand Khanna*** AIR 1969 Delhi 85 to the following effect:

“It is not possible to lay down any definite rule which would meet the requirements of all cases and all that we may say is that in determining whether an order or decision constitutes a “judgment” or not the Court has to take into consideration the nature of the order and its effect upon the suit or the civil proceeding in which it is made. Each case would thus depend on its own peculiar facts and circumstances.

We have arrived at this conclusion on the plain reading of section 10 of the Act in the background of the statutory scheme. In our view, the drafts-man could neither have intended to restrict the right of appeal only to final judgments disposing of the entire suit, nor could he have intended it to extend to all orders made during the course of trial, however ministerial or procedural in their nature or ineffectual on the rights on the parties.”

11. Learned counsel for the respondents on the other hand submits that the subsequent judgment of the Supreme Court in ***Shah Babulal Khimji v. Jayaben D Kania*** AIR 1981 SC 1786 clearly specifies that no such appeal is maintainable against an order declining documents to be taken on record. Learned counsel

in this behalf has referred to the observations made in para 114, 115, 116 and 119 which are reproduced as under:

“114. In the course of the trial, the trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing to summon an additional witness or documents, an order refusing to condone the delay in filing documents after the first date of hearing, an order of costs, to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the trial Judge.

115. Thus, in other words every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide matters of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. Similarly, orders passed by the trial Judge deciding question of admissibility or relevancy of a document also cannot be treated as judgments because the grievance on this score can be corrected by the appellate court in appeal against the final judgment.

116. We might give another instance of an interlocutory order which amounts to an exercise of discretion and which may yet amount to a judgment within the meaning of the Letters Patent. Suppose the trial Judge allows the plaintiff to amend his plaint or include a cause of action or a relief as a result of which a vested right of limitation accrued to the defendant is taken away and rendered nugatory. It is manifest that in such cases although the order passed by the trial Judge is purely discretionary and interlocutory, it causes gross injustice to the defendant who is deprived of a valuable right of defence to the suit. Such an order, therefore though interlocutory in

nature contains the attributes and characteristics of finality and must be treated as a judgment within the meaning of the Letters Patent. This is what was held by this Court in Shanti Kumar's case (AIR 1974 SC 1719) (supra), ..."

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119. Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court:

(1) That the trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the trial Judge. The courts must give sufficient allowance to the trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice.

(2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

(3) The tests laid down by Sir White, C.J. as also by Sir Couch, C.J. as modified by later decisions of the Calcutta High Court itself which have been dealt with by us elaborately should be borne in mind."

12. Learned counsel has also referred to the Division Bench judgment of this Court in **Jai Prakash Goel v. O.P. Goel & Ors**

2006 (88) DRJ 182 (DB) wherein the scope of an appeal under

Section 10(1) of the Delhi High Court Act, 1966 read with Clause 15 of the Letters Patent has been examined and following the judgment in ***Shah Babu Lal Khimji case*** (supra), it has been held that an order which is not appealable under Order XLIII Rule 1 of the said Code may be appealable under the aforesaid provisions provided it possesses the characteristics and trappings of finality.

13. In view of the position set out aforesaid we are of the view that the matter is no more res integra in view of the judgment in Shah Babu Lal Khimji case (supra) where one of the illustrations given of an interlocutory order is a decision declining leave to permit additional documents to be brought on record belatedly. No doubt, it has been observed that there is no exhaustive list possible of all eventualities but illustratively some orders have been given from which appeal would lie though they are interlocutory while illustrations have been given of other orders where no such appeal would lie. In Begum Aftab Zamani case (supra) also the Full Bench only emphasized that it was not possible to make a list of the entire set of orders which constitute a “judgment” and thus each case would depend on its own peculiar facts and circumstances. We have thus no option but to hold that the appeal is not maintainable but naturally if the appellant fails in the suit, it is always open to him to raise all pleas as are available therein including the matter in question in the present appeal as observed by the Supreme Court in ***Shah Babu Lal Khimji case*** (supra) in para 114.

14. The appeal is accordingly dismissed as not maintainable.

CM No. 12558/2005 (Stay) in FAO (OS) No. 269/2005

Dismissed.

SANJAY KISHAN KAUL, J.

MAY 25, 2009
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SUDERSHAN KUMAR MISRA, J.