

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 16.08.2012

+ **LPA 134/2011**

RAMESH JAISWAL

... Appellant

versus

SEMJEET SINGH BRAR & ORS

... Respondents

Advocates who appeared in this case:

For the Appellant : Mr J. M. Kalia

For the Respondents : Mr Sunil Satyarthi with Mr Raman Gandhi

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. The question which arises for consideration, at the outset, is whether this Letters Patent Appeal is maintainable or not. The appeal is directed against the order dated 10.09.2010 passed by a learned Single Judge of this Court in Crl. M. A No. 13306/2010, whereby the learned Single Judge rejected the application filed by the appellant / plaintiff under Section 340 read with Section 195 (b)(i) of the Code of Criminal Procedure, 1973 for setting the criminal law into motion against the respondent No.1/ defendant

No.1 and any other person/ persons for having committed the offences referred to in Section 195 (b)(i) Cr. P.C.

2. Some facts would be necessary for us to determine the question of maintainability of this appeal and they are as follows. The plaintiff had filed CS(OS) 809/2010 seeking specific performance of a contract dated 26.05.2007 executed by and between the appellant/ plaintiff and the defendant No.1/ respondent No.1. It is the case of the appellant that the respondent No.1 had filed a written statement wherein he had stated that he had sold the suit property bearing No. 284, Satya Niketan, Moti Bagh, New Delhi to one Pushpa Mittal by an alleged agreement to sell dated 14.02.2008. Reliance had been placed by the said respondent upon a general power of attorney allegedly registered by him in favour of the said Mrs Pushpa Mittal and one Mr Rahul Mittal vide Book No. IV, Vol. 29, Serial No. 201 to 218, Serial No. 435 dated 18.03.2008 registered at the office of the Sub-Registrar, Bingha, U.P. It was contended on behalf of the appellant / plaintiff that upon an enquiry from the office of the concerned Sub-Registrar, the appellant / plaintiff had been informed that no such document had been registered in that office. The original application dated 05.07.2010, whereby the

appellant/ plaintiff had sought the confirmation from the office of the Sub-Registrar, Bingha, U.P along with a copy of the receipt dated 05.10.2010 indicating the inspection fee deposited for the said purpose, was enclosed along with the said Crl. M. A. 11306/2010.

3. It was the case of the appellant/ plaintiff that respondent No.1/ defendant No. 1 had thereby committed an offence under Section 193, 196, 199, 200 and 209 of the Indian Penal Code in relation to the proceedings in the Trial Court hearing the said civil suit [CS(OS) 809/2010]. Consequently, a prayer was made under Section 340 Cr. P.C for an enquiry and for submitting a complaint in writing.

4. We may point out that that application had been dismissed by the impugned order dated 10.09.2010 by the learned Single Judge holding as under:-

“This application also pertains to alleged perjury in respect of property No. 284, First Floor, Satya Niketan, Moti Bagh, New Delhi, which is not the subject matter of the present suit. Hence, application is dismissed as not maintainable.

5. Before us, the learned counsel for the appellant submitted that the learned Single Judge had committed a gross error inasmuch as the said

property No. 284 was, indeed, the subject matter of the present suit as it was part of the contract dated 26.05.2007 executed by and between the appellant/ plaintiff and the respondent No.1/ defendant No.1 in respect of which the suit for specific performance had been filed. However, before we go into this aspect of the matter, a serious challenge has been made by the learned counsel for the respondent No.1/ defendant No.1 regarding the maintainability of the present appeal.

6. But, before we examine the question of maintainability, it would be appropriate to indicate that even when the appeal had come up for the first time before another Division Bench of this Court on 29.08.2011, that Bench had reserved orders on the question of admission. Thereafter, the order was delivered on 26.09.2011 whereby, the said Division Bench, after considering the contentions raised by the learned counsel for the appellant and after referring to Sections 340, 341 Cr. P.C and the decision of a Division Bench of the Calcutta High Court in the case of **Subir Kumar Ghosh v. Prasara Bharti Broadcasting Corporation of India: 2006 CRI .L J. 4109**, came to the conclusion that the issue needed to be examined. Therefore, the Division Bench was inclined to issue notice to the respondents on the question of

admission and final disposal. It is after issuance of notice that the respondents have entered appearance and the learned counsel for the respondent No.1 has now taken the plea, at the threshold, that the Letters Patent Appeal is not at all maintainable from an order of a learned Single Judge on an application under Section 340 Cr.P.C.

7. The learned counsel for the appellant submitted that the issue of maintainability had been gone into by the earlier Division Bench and it is only after the said Division Bench was convinced that the Letters Patent Appeal was maintainable that notice was issued in the appeal. We, however, do not agree with this contention of the learned counsel for the appellant inasmuch as the earlier Division Bench was clear in expressing its opinion that the issue needed to be examined and, therefore, notice was issued to the respondents on the question of admission as well as final disposal. There is no clear finding of the earlier Division Bench that the Letters Patent Appeal was maintainable. In fact, at that point of time, the said Bench had only heard the appellant and, obviously, there was no submission on the part of the respondents inasmuch as even notice had not been issued.

8. The learned counsel for the appellant submitted that the decision of a Division Bench of the Calcutta High Court in the case of **Subir Kumar Ghosh** (*supra*), whereby it had disagreed with an earlier view of that Court in the case of **Pashupati Nath De v. Murari Mohan: 81 CWN 762**, was clearly applicable to the facts of the present case. We may point out that in **Subir Kumar Ghosh** (*supra*), two decisions of the Supreme Court had been referred to. They were:-

- (i) **Vinita M. Khanolkar v. Pragna M. Pai: (1998) 1 SCC 500**; and
- (ii) **P. S. Sathappan v. Andhra Bank Ltd: AIR 2004 SC 5152**.

The Division Bench of the Calcutta High Court, after noticing the Supreme Court decision in **P. S. Sathappan** (*supra*), observed that the majority of the judges of the said Bench had held that in order to exclude the jurisdiction conferred by the Letters Patent to hear an appeal against an order of a learned Single Judge, there must be a specific provision in the relevant statute which explicitly excluded such jurisdiction. It was also noticed in the said decision that the Supreme Court in the case of **P. S. Sathappan** (*supra*), had approved the earlier decision of a Bench of two Hon'ble Judges of the Supreme Court in the case of **Vinita M. Khanolkar** (*supra*).

9. The learned counsel for the respondent No.1 placed before us two decisions – one of a Full Bench of the Madras High Court and another of a Division Bench of the Gujarat High Court. In **Muniswamy v. Rajaratnam: AIR 1922 Madras 495 (FB)**, the Full Bench of the Madras High Court held that no appeal lies to the High Court from the decision of a judge of the High Court in exercise of criminal jurisdiction. In **Abdul Karim Haji Zaveri v. District Magistrate, Junagadh and Others: 2005 CRI. L. J. 1651**, a Division Bench of the Gujarat High Court, while considering an appeal from an order passed under Section 340 Cr. P.C read with Section 195 (1)(b)(i) Cr. P.C, observed that the appeal was not maintainable under Clause 15 of the Letters Patent as Clause 15 of the said Letters Patent clearly barred an appeal against an order made by a Single Judge of the High Court in exercise of criminal jurisdiction.

10. It is in this background that we need to examine the question of maintainability of the present appeal. The relevant provision under which the present appeal has been filed is Clause 10 of the Letters Patent constituting the High Court of Judicature at Lahore, which is applicable to Delhi. Clause 10 of the said Letters Patent reads as under:-

“10. Appeals to the High Court from Judges of the Court – And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the of exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, **and not being a sentence or order passed or made** in the exercise of power of superintendence under the provisions of Section 107 of the Government of India Act, or **in the exercise of criminal jurisdiction**) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made on or after the first day of February, one thousand nine hundred and twenty-nine in the 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, but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided.”

(emphasis supplied)

On a plain reading of the said Clause 10, it is clear that there are certain matters which are excluded. Those matters fall within the brackets, which read as under:-

“(not being a judgment passed in the of exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the

superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction)”

(underlining added)

11. It will be seen that a sentence or order passed or made in exercise of criminal jurisdiction has been excluded. In other words, a sentence or order passed or made by a Single Judge of the High Court in exercise of criminal jurisdiction cannot be the subject matter of a Letters Patent Appeal under Clause 10 of the said Letters Patent. The question that arises is whether a proceeding under Section 340 Cr.P.C is in exercise of criminal jurisdiction or not? Section 340 Cr. P.C as also Section 341 Cr. P.C. read as under:-

“340. Procedure in cases mentioned in section 195. – (1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,—

- (a) record a finding to that effect;
- (b) make a complaint thereof in writing;
- (c) send it to a Magistrate of the first class having jurisdiction;

- (d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and
- (e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed,—

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court.

(4) In this section, “Court” has the same meaning as in section 195.

341. Appeal.— (1) Any person on whose application any Court other than a High Court has refused to make a complaint under sub-section (1) or sub-section (2) of section 340, or against whom such a complaint has been made by such Court, may appeal to the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 195, and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint, or, as the case may be, making of the complaint which such former Court might

have made under section 340, and if it makes such complaint, the provisions of that section shall apply accordingly.

(2) An order under this section, and subject to any such order, an order under section 340, shall be final, and shall not be subject to revision.”

12. It is apparent that the power to proceed under Section 340 has been given to “any” Court, whether it is ordinarily exercising civil jurisdiction or criminal jurisdiction as per the roster. However, once Section 340 Cr. P.C is invoked, then that court, be it a civil court or criminal court, would be exercising criminal jurisdiction because it is in relation to an offence referred to under Section 195 (1)(b) Cr. P.C, which, in turn, *inter alia*, refers to offences punishable under Sections 193-196, 199, 200, 205-211 and 228 of the Indian Penal Code when such offences are alleged to have been committed in or in relation to any proceeding in any court. Therefore, we are of the view that a proceeding under Section 340 Cr. P.C is clearly a proceeding in exercise of criminal jurisdiction of a court. Consequently, an order passed on an application under Section 340 Cr. P.C would be an order passed or made in exercise of criminal jurisdiction and would, therefore, fall within the exceptions carved out in Clause 10 of the said Letters Patent. As a result, an appeal under the said Letters Patent would not lie.

13. Section 341 Cr. P.C which provides for an appeal when the court to which an application is made under Section 340 Cr. P.C. refuses to make a complaint thereunder makes it explicit that an appeal would lie only where the order under Section 340 Cr. P.C is made by a Court other than a High Court. In other words, no appeal would lie under Section 341 from an order refusing to make a complaint under Section 340 Cr. P.C when such order is passed by a learned Single Judge of a High Court.

14. The learned counsel for the appellant had placed, as pointed out above, reliance on the decision of the Calcutta High Court in the case of **Subir Kumar Ghosh** (*supra*), which, in turn, had relied upon the decisions of the Supreme Court in the case of **Vinita M. Khanolkar** (*supra*) and **P. S. Sathappan** (*supra*). We find that both the Supreme Court decisions were concerned with civil disputes and were not concerned with a case in which the criminal jurisdiction had been invoked. Therefore, the appellant cannot draw any support from those decisions. In any event, we find that there is nothing in those decisions which runs counter to the argument advanced by the learned counsel for the respondent. First of all, we may point out that in **Vinita M. Khanolkar** (*supra*), the Supreme Court observed as under:-

“3. Now it is well settled that any statutory provision barring an appeal or revision cannot cut across the constitutional power of High Court. Even the power flowing from the paramount charter under which the High Court functions would not get excluded unless the statutory enactment concerned expressly excludes appeals under letters patent. No such bar is discernible from Section 6(3) of the Act. It could not be seriously contended by learned counsel for the respondents that if clause 15 of the Letters Patent is invoked then the order would be appealable. Consequently, in our view, on the clear language of clause 15 of the Letters Patent which is applicable to Bombay High Court, the said appeal was maintainable as the order under appeal was passed by learned Single Judge of the High Court exercising original jurisdiction of the court. Only on that short ground the appeal is required to be allowed.”

It is obvious that the Supreme Court was considering an entirely different question. The question before the Supreme Court was where the Letters Patent provides for an appeal, would an appeal lie even though there is no specific provision of an appeal in the concerned statute. It is in that context that the Supreme Court held that the power flowing from the paramount charter under which the High Court functions (i.e. the Letters Patent) would not get excluded unless the statutory enactment concerned expressly excludes appeals under Letters Patent. The same view has been endorsed by the Supreme Court in **P. S. Sathappan** (*supra*). But the question before us is entirely different. In the case before us, the issue is whether the Letters Patent itself allows such an appeal or not. There is no dispute with regard to

the statutory provisions inasmuch as in terms of Section 340 Cr. P.C, no appeal lies from an order of a learned Single Judge of a High Court. The only question is whether the Letters Patent provides for an appeal in such a scenario. We have already explained that the order passed by the learned Single Judge, which is impugned before us, is an order passed and/ or made in exercise of criminal jurisdiction. That being the case, by virtue of Clause 10 of the said Letters Patent itself, no Letters Patent Appeal would lie to this Court. We fully endorse the view taken by the Madras High Court and the Gujarat High Court in the decisions referred above for the reasons expressed above. We, however, respectfully, do not agree with the view taken by the Division Bench of the Calcutta High Court in ***Subir Kumar Ghosh*** (*supra*) insofar as it relates to orders passed under Section 340 Cr. P.C.

15. As a result, the present appeal is not maintainable and, therefore, there is no occasion for us to examine the matter on merits. The appeal is dismissed as such.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

AUGUST 16, 2012
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