

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

% Judgment reserved on : 19.02.2013
Judgment pronounced on : 26.02.2013

+ **LPA No.73/2007**

GOVT. OF NCT OF DELHI & ORS. Appellants

Through : Ms. Rachana Srivastava and Mr.
Utkarsh Sharma , Advs.

versus

MOOL CHAND SHARMA Respondents

Through : Mr. Rahul Gupta and Mr. Shekhar
Gupta, Advs.

CORAM:

**HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V.K. JAIN**

V.K. JAIN, J.

1. Shop No.7, Kalyan Vas, Delhi was allotted to Shri Arjun Das Khattar for running a vegetable shop on payment of license fee of Rs.450/- per month. He was later allowed to include one Mr. P.S. Oberoi as his business partner. On dissolution of partnership between Mr. Arjun Das Khattar and Mr. P.S. Oberoi, the aforesaid shop came to be occupied solely by Mr. P.S. Oberoi. At this request, Mr. P.S. Oberoi was permitted to use the additional area measuring 204 sq. mtrs on the rear side of the

Shop on payment of license fee fo Rs.321/- per month for the purpose of storage and cleaning of wheat. At the request made by Mr. P.S. Oberoi, he was permitted to include respondent Mr. Mool Chand Sharma as his partner in his business. Mr. P.S. Oberoi later left the said partnership business after executing a Power of Attorney in favour of respondent Mr. Mool Chand Sharma. In the year 1995, three semi-permanent shops and one tin shed were constructed by Mr. P.S. Oberoi behind shop no.7, Kalyan Vas, Delhi which was initially allotted to Shri Arjun Das Khattar. Vide letter dated 10.4.1997, Under Secretary (Allotment), Land & Building Department wrote to SSW-I, MSO Building, New Delhi to fix the license fee of the aforesaid three shops and a shed. In the letter it was stated that the aforesaid shop and shed had been allotted to Mr. Mool Chand Sharma and Mr. P.S. Oberoi. A copy of the aforesaid communication was endorsed to the respondent Mr. Mool Chand Sharma, though no letter of allotment was issued to him. In reply to the letter dated 10.4.1997, SSW-I intimated the license fee, but also stated that the license fee would be fixed by calling tender as per the procedure laid down by the Directorate of Estates, Ministry of Urban Development, New Delhi.

Mr. Mool Chand Sharma filed W.P(C) No.4306/2000, seeking implementation of the letter dated 10.4.1997 by handing over possession of the aforesaid three shops and tin shed to him. He also sought declaration that he was the lawful licensee in respect of the aforesaid three shops and one shed constructed behind the shop no.7, Kalyan Vas, Delhi.

2. Vide order dated 9.10.2002, the learned Single Judge of this Court allowed the writ petition after recording statement of the counsel that there was no document cancelling the said allotment. A writ of mandamus was issued directing the appellants to implement the letter dated 10.4.1997. The appellants filed a Letters Patent Appeal against the order dated 9.10.2002. The appeal was withdrawn on 10.1.2003 with liberty to file a review application before the learned Single Judge. Vide order dated 3.11.2006, the learned Single Judge dismissed the review application and directed implementation of the letter dated 10.4.1997. During the course of hearing of the review application, the learned counsel for the respondents gave a concession whereby the respondent gave up his claim in respect of two out of the three shops in question, in case one shop was allotted to him. He also offered to pay the license fee

at the market rate. The learned Single Judge, while dismissing the review petition, directed that in case the appellants implement the letter dated 10.4.1997 to the extent of allotting and giving possession of one semi-permanent and tin shed to the respondent within one month at the license fee at market rate, the respondent would abide by his earlier offer to forego the claim in respect of the remaining two semi-permanent structure shops as per the allotment letter. He further directed that if the appellants fail to allot one semi-permanent shop and one tin shed to the respondent, the writ of mandamus as ordered was issued and the respondent shall be entitled to all the consequential benefits that ensue. The present appeal has been filed questioning the order dated 9.10.2002 as well as the order dated 3.11.2006.

3. A preliminary objection has been taken by the learned counsel for the respondent that since the earlier appeal against the order dated 9.10.2002 was withdrawn without any liberty to file a fresh appeal; a second appeal questioning the said order is not maintainable. It is also the submission of the learned counsel for the respondent that in view of the provisions contained in Order 47 Rule VII of the Civil Procedure Code,

no appeal against an order of dismissal of a review application is maintainable.

4. The first question, which comes up for consideration is as to whether in view of the withdrawal of the earlier appeal filed by the appellants against the order dated 9.10.2002, a second appeal challenging the said order is maintainable or not. Admittedly, while withdrawing the earlier appeal, the appellants did not see any permission from the Court to file a fresh appeal against the order dated 9.10.2002, in the event of the review petition which they were proposing to file before the learned Single Judge being dismissed. The only liberty taken from the Court, while withdrawing the appeal, was to file a review application before the learned Single Judge. Order 23 Rule 1 of Civil Procedure Code, to the extent it is relevant for our purpose provides that where the plaintiff withdraws from a suit or part of a claim without the permission of the Court, he shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. The provisions contained in Order 23 Rule 1 of the Civil Procedure Code equally apply to the appeals preferred in terms of the said Code.

5. In C.S. Agarwal Vs. State and Ors. [2011 VIII AD (Delhi) 265], a Division Bench of this Court, *inter alia*, narrated the following four categories for constituting appellate jurisdiction of this Court:

- “a. Firstly, appeals under Section 10 of the DHC Act but they are limited only to those judgments referable to Section 5(2) thereof.
- b. Secondly, appeals under the Code of Civil Procedure.
- c. Thirdly, appeals under different statutes, which itself provides for an appeal.
- d. Fourthly, appeals under Clause 10 of the Letters Patent.”

6. The appeals to a Division Bench of this Court against the order passed by the learned Single Judge of this Court in exercise of his jurisdiction under Article 226 of the Constitution is governed by Clause 10 of Letters Patent Appeal. Though the provisions contained in the Civil Procedure Code have not been expressly made applicable to the Letters Patent, the principle contained therein would certainly apply inasfar as the effect of withdrawal of an earlier appeal is concerned. Therefore, once the appeal preferred against the order dated 9.10.2002 was withdrawn by the appellants on 10.1.2003, without obtaining liberty to file a fresh

appeal against the said order, the second appeal challenging the very same order would not be maintainable.

7. As regards the order passed in the review petition on 3.11.2006, Order 47(7) of Civil Procedure Code, expressly provides that an order of the Court rejecting such an application shall not be appealable. Since the provisions of Civil Procedure Code have not been expressly made applicable to the Letters Patent, the next question which comes up for consideration is as to whether the appeal against the order dismissing a review petition is maintainable under Clause 10 of Letters Patent or not. The said Clause 10 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 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 the 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 said High Court or one Judge of any Division Court, pursuant of 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 the 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.”

8. The expression ‘judgment’ used in the Letters Patent came to be interpreted by the Supreme Court in **Shah Babulal Khimji vs. Jayaben**, AIR 1981 SC 1786 as under:

“113. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by sub-sec. (2) of Section 2 cannot be physically imported into the definition of the word „judgment“ as used in Cl. 15 of the Letters Patent because the Letters Patent has advisedly not used the term „order“ or „decree“ anywhere. The intention, therefore, of the givers of the Letters Patent was that the word „judgment“ should receive a much wider and more liberal interpretation than the word „judgement“ used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a trial Judge would amount to a judgment; otherwise

there will be no end to the number of orders which would be appealable under the Letters Patent. It seems to us that the word „judgment“ has undoubtedly a concept of finality in a broader and not a narrower sense. In other words, a judgment can be of three kinds:-

(1) A final judgement- A judgment which decides all the questions or issues in controversy so far as the trial Judge is concerned and leaves, nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench.

(2) A preliminary judgment – This kind of a judgment may take two forms – (a) where the trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the trial Judge would be a judgment finally deciding the cause so far as the trial Judge is concerned and, therefore, appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g. bar of jurisdiction, res judicata, a manifest defect in the suit absence of notice under Sec. 80 and the like, and these objections are decided by the trial Judge against the defendant, the suit is not terminated but

continues and has to be tried on merits but the order of the trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to a larger Bench.

(3) Intermediary or interlocutory judgment –Most of the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43, Rule 1 and have already been held by us in the judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not corrected by Order 43, Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote.

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120. We might, however, at the risk of repetition give illustrations of interlocutory orders which may be treated as judgments:

(10) An order granting review.

122. We have by way of sample laid down various illustrative examples of an order which may amount to judgment but it is not possible to give such an exhaustive list as may cover all possible

cases. Law with its dynamism, pragmatism and vastness is such a large ocean that it is well-nigh impossible for us to envisage or provide for every possible contingency or situation so as to evolve a device or frame an exhaustive formula or strategy to confine and incarcerate the same in a straitjacket.

9. It would thus be seen that though the order granting the review was held to be judgment, no such view was taken with respect to an order refusing a review, the necessary implication being that an order refusing the review is not a judgment under Letters Patent.

10. In **Basant Kharbanda vs. Punjab & Sind Bank** 1997 1 AD (Delhi) 398, the issue before the Division Bench of this Court was as to whether the order of the Court rejecting the review application shall be appealable or not. Holding that such an order is not a 'judgment' within the meaning of Section 10 Delhi High Court Act and, therefore no appeal lies, the Division Bench, *inter alia*, held as under:

“5. In *Shankar Motiram Nale Vs. Shilosing Gannusing Rajput* (1994) 2 SCC 753, an appeal was preferred against an order rejecting an application for review. Their Lordships held:

“This appeal is obviously incompetent. It is against an order of a Division Bench of the High Court rejecting the application for review of a judgment and decree passed by a learned Single Judge, who seems to have retired in the meantime. It is not

against the basic judgment. Order 47 Rule 7 of Civil Procedure Code, bars an appeal against the order of the court rejecting the review. On this basis, we reject the appeal.”

6. In *Shah Babulal Khimji Vs. Jayaben D. Kania & Anr.* [(1982) ISCR 187], their Lordships have held:-

“The concept of the Letters Patent governing only the internal appeals in the High Courts and the Code of Civil Procedure having no application to such appeals is based on a serious misconception of the legal position.

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8. *The test is that to be attained with the quality of judgment an order must decide directly and immediately a valuable right of a party. The impugned order does not determine directly and immediately any valuable right of the appellant. The impugned order merely refuses to interfere with an earlier order. What effects adversely directly and immediately the rights of the appellant is the original order dated 30.9.90 which was sought to be reviewed. The application for review having been dismissed the appropriate remedy of the appellant was to have filed an appeal against the order dated 30.8.90.”*

11. Order 47 Rule 1 of Code of Civil Procedure gives a discretion to the Court, to review a judgment/ order in the following circumstances:

- (a) a new and important matter or evidence has been discovered, which, despite exercising due diligence, was not within the knowledge of the review applicant or could not be produced by him when the judgment or order was passed;

- (b) there is some mistake or error apparent on the face of the record; and
- (c) for any other sufficient reason.

When the Court dismisses a review petition, it merely takes a view that no new important matter or evidence as contemplated in Rule 1 of Order 47 of the Code of Civil Procedure has been discovered, there is no mistake or error apparent on the face of the record and there is no other sufficient reason for reviewing of the judgment/order in question and, therefore, declines to exercise the jurisdiction vested in it to review its judgment/ decree or order. Such an order cannot be said to be an order deciding or adversely affecting, directly and immediately, any valuable right of the parties and, therefore, would not qualify as 'judgment' within the meaning of clause 10 of Letters Patent, in terms of the decision of the Supreme Court in **Shah Babulal Khimji** (supra). Consequently, no appeal against an order dismissing the review application is maintainable either under Code of Civil Procedure or under Clause 10 of Letters Patent.

12. In **Green View Tea & Industries Vs. Collector, Golaghat and** another [2002 1 SCC 109], the petitioner before the Supreme Court challenged the judgment of the High Court dated 24.6.1998 by filing a

Special Leave Petition (C) Nos.18020-22 of 1998] and withdrew the said petitions with liberty to file a review application in the High Court. Having lost in the High Court, he again sought leave to appeal against the very same judgment of the High Court by filing a Special Leave Petition No.18180-82/1999]. It was held that having withdrawn the earlier Special Leave Petitions No.18080-82/1999, he could not have been allowed to maintain Special Leave (C). Nos. 18180-82/1999.

In **Suseel Finance & Leasing Co. Vs. M. Lata and others** [(2004) 13 SCC 675, the Special Leave Petitions were withdrawn by the counsel with liberty to seek review of the order of National Commission. The Special Leave Petitions were dismissed as withdrawn after granting the requisite leave. Thereafter, the review applications were filed before the High Court which were dismissed. The Special Leave Petitions were then filed against the said order of the High Court passed in the review petition. Relying upon its earlier decision in **Shankar Motiram Nale Vs. Shiolalsing Gannusing Rajput** [(1994) 2 SCC 753], it was held that the Special Leave Petitions against an order rejecting an application for review is not maintainable. Thus, the view taken by the Supreme Court has been that when a Special Leave Petition is withdrawn with liberty to

file review petition, another Special Leave Petition challenging the very same judgment is not maintainable. This is also the view taken by the Court that Special Leave Petitions against the order passed in the review petition would not be maintainable, in such circumstances. As a corollary, the subsequent appeal against the orders dated 9th October, 2002 and 3rd November, 2006 is not maintainable.

13. The learned counsel for the appellant has placed reliance on **Ghanshyam Dass and others Vs. Dominion of India & Ors.** [(1984) 3 SCC 46]; **Kailash Vs. Nankhu & Ors.** [(2005) 4 SCC 480]; **Sona Bala Bora and others vs. Jyotirindra Bhattacharjee** [(2005) 4 SCC 501]; **B.K. Narayana Pillai Vs. Parameswaran Pillai and another** [(2001) SCC 712]; **Rajesh Kumar Aggarwal and others Vs. K.K. Modi and others** [(2006) 4 SCC 385]; and **T. Madhava Kurup Vs. T.C. Madhava Kurup Vs. T.C. Madhava Kurup (dead) by Lrs. and others** [(2006) 4 SCC 399].

However, none of these judgments is applicable to the issue under consideration and, therefore, reliance upon these judgments is wholly misplaced. The learned counsel for the appellant has also relied upon **M/s M. Ramnarain Private Limited and another Vs. State Trading Corporation of India Limited** [(1983) 3 SCC 75]. In that case, the Single

Judge of the High Court dismissed the counterclaim filed by the defendant/ appellant. While the certified copies of the said judgment were still awaited, the defendant filed an appeal against the directions regarding payment in installment, before the Division Bench of the High Court, under Order 20 Rule 11 of the Code of Civil Procedure, paying court fee only of Rs.5/-. The said appeal was withdrawn on the very next day, without liberty to file a fresh appeal. After a week of withdrawal of the said appeal, another appeal was filed by the defendant before the Division Bench of the High Court on various grounds, a part of which related to the judgment and decree on merits and another part to the provisions as to installments. The respondent/plaintiff took a preliminary objection that in view of the withdrawal of the earlier appeal, the subsequent appeal was not maintainable. The objection was upheld by the Division Bench of the High Court. Being aggrieved, the defendant challenged the decision of the Division Bench of the High Court before the Supreme Court. Setting aside the decision of the Division Bench of the High Court, the Supreme Court observed that if the earlier appeal is considered to be an appeal against the order, it was clearly incompetent since the order providing for installment was not an appealable order and

was not a 'judgment' within the meaning of Clause 15 of the Letters Patent. It was further observed that if the said direction with regard to the installment is considered to be a part of the decree, an appeal will certainly be maintainable being an appeal from a decree. The Court accepted the contention of the learned counsel for the defendant/ appellant that until a decree incorporating the order regarding installment in terms of the provisions contained in Order 20 Rule 1 of the Code was not drawn up, the directions or order regarding installment retains a character of an order, in law. The Apex Court held that till the time directions regarding payment of the decretal amount in installment was incorporated in the decree, it retains a character of an order and, therefore, the earlier appeal should be considered an appeal against the order. The Apex Court further observed that even if it proceeds on the basis that the earlier appeal was an appeal against a decree, it would still be incompetent because the defendant/ appellant had not furnished the requisite stamps in respect of an appeal against a decree and therefore the said appeal would not be competent for want of payment of requisite court fee. The Supreme Court noted that yet another requirement for filing an appeal was to file a certified copy of the decree within a period

of limitation and unless a certified copy of the decree was filed, an appeal would not be competent. It was also noticed by the Apex Court that the High Court was not aware of the defect in the appeal and did not intend to dispense with the filing of the certified copy. The Court was of the view that the appeal without certified copy of the decree being incompetent appeal, withdrawal of such an incompetent appeal will not in any way prejudice the rights of the parties to file a proper appeal if such a right is not otherwise lost by lapse of time or for any other valid reason. It was held that withdrawal of the earlier appeal which was incompetent and was not an appeal in the eyes of law, did not in any way affect the validity of the second appeal.

However, in the case before this Court, it is not the case of any one that the appeal which was withdrawn on 10.1.2003 was a defective or incompetent appeal. Therefore, this judgment would not apply to the case before this Court.

14. For the reasons stated hereinabove, we are of the view that no appeal at the instance of the appellant is maintainable either against the order dated 9.10.2002 or against the order dated 3.11.2006. The appeal is accordingly dismissed. However, considering the concession which the

respondent had made before the learned Single Judge during the hearing of the review application and which came to be incorporated in the order dated 3.11.2006, we direct that the said concession shall remain binding upon the respondent for eight weeks from today and consequently if the appellant allots any one out of the three semi-structured shops and the tin shed in question to the respondent within eight weeks from today at the market rate to be determined by the appellant, that would be sufficient compliance of the orders passed by the learned Single Judge in this case. If, however, the appellant fails to do so, the order of the learned Single Judge dated 9.10.2002 would come into force and will be complied by the appellant.

The appeal stands disposed of.

V.K.JAIN, J

CHIEF JUSTICE

FEBRUARY 26, 2013
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