

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

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Judgment Reserved on: 10th April, 2015

Judgment Delivered on: 06th July, 2015

- + **FAO(OS) 8/2015 & CM No.324/2015**
- + **FAO(OS) 10/2015 & CM No.328/2015**
- + **FAO(OS) 13/2015 & CM Nos.335/2015, 336/2015**

PAMINDER GUJRAL & ORS.

.....Appellants

versus

KIRNAJIT GUJRAL & ANR.

.....Respondents

Advocates who appeared in this case:

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| For the Appellants: | Mr Y.P. Narula, Senior Advocate with Mr Abhey Narula, Advocate. |
| For Respondent No.1: | Mr Manoj Khanna with Mr Abhimanyu Kalsy, Advocates for respondent No.1. |
| For Respondent No.2: | Ms Sumedha Dua |

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. These appeals arise out of a common order dated 31.10.2014, whereby the transfer petitions filed by the appellants under Section 24

of the Code of Civil Procedure (hereinafter referred to as the 'Code') have been dismissed.

2. The controversy, at the present stage, is with regard to the maintainability of an appeal against an order dismissing a petition under Section 24 of the Code. A preliminary objection has been raised by the respondents that the order is not an appealable order and as such, no appeal is maintainable against the said order.

3. Without going into the merits of the matter, we have first examined the issue of maintainability of the appeals. The appellants had filed the transfer petitions seeking transfer of the following cases:-

- (i) *Probate Case No. 109/2012 pending in the Court of, Saket Court, New Delhi,*
- (ii) *Probate Case No.69/2012, pending before Additional District Judge, Saket Court, New Delhi, &*
- (iii) *Revocation Petition No.30/2012 filed in Probate Petition No.234/2006 pending before Additional District Judge, Tis Hazari Courts, Delhi to this Court.*

4. The merits of the contentions of either party are not relevant at this stage since we are only dealing with the maintainability of the appeals.

5. The learned counsel for the appellants has contended that the appeal is maintainable since the order is a final order on the transfer petitions filed by the appellants under Section 24 of the Code and as

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such, an appeal would lie under Section 10 of the Delhi High Court Act (hereinafter referred to as the 'Act').

6. It is however admitted that there is no specific provision of the Code or any other statute specifically providing for an appeal against an order either allowing or dismissing a petition under Section 24. As per the appellants, the impugned order amounts to a judgment since it finally decides the transfer petition and is thus appealable under Section 10 of the Act.

7. The learned Senior Counsel appearing for the appellants relied on the decision of a Full Bench of the Kerala High Court in **K.V.Balan & Anr. v. Sivagiri Sree Narayana Dharma Sanghom Trust & Ors:** AIR 2006 Kerala 58, to contend that when an application filed under Section 24 is decided by a Court, it is an adjudicated order in the original jurisdiction. He thus contended that an appeal would be maintainable under Section 10 of the Act.

8. The learned counsel for the respondent, on the contrary, contended that the provisions of Section 5(1) of the Kerala High Court Act are not *pari materia* to Section 10 of the Act and as such, reliance cannot be placed on the Full Bench decision of the Kerala High Court. The learned counsel for the respondent further contended that an appeal under Section 10(1) of the Act would lie only if the order is a judgment and satisfies the parameters as laid down by the Supreme

Court in *Shah Babulal Khimji v. Jayaben D. Kania and Another:* AIR 1981 SC 1786. The learned counsel further relied on the decision of the Allahabad High Court in *Amit Khanna v. Suchi Khanna:* II (2009) DMC 227(DB) to contend that order passed under Section 24 of the Code of Civil Procedure is only a discretionary order and is not an order that adjudicates on the merits of the case of either party or affects the substantive rights of the party and as such, is not an order which would amount to a judgment and is also not an order which decides a matter of moment.

9. To ascertain whether an appeal would lie against the impugned order, it would be necessary to examine the relevant provisions of the Act.

10. Section 5 & 10 of the Act lay down as under:-

“5. Jurisdiction of High Court of Delhi -

(1) The High Court of Delhi shall have, in respect of the territories for the time being included in the Union territory of Delhi, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of the territories by the High Court of Punjab.

(2) Notwithstanding anything contained in any law for the time being in force, the High Court of Delhi shall also have in respect of the said territories ordinary original civil jurisdiction in

every suit the value of which exceeds rupees twenty lakhs.

10. Powers of Judges-

(1) Where a single Judge of the High Court of Delhi exercises ordinary original civil jurisdiction conferred by sub-section (2) of section 5 on that Court, an appeal shall lie from the judgment of the single Judge to a Division Court of that High Court.

(2) Subject to the provisions of sub-section (1), the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and Division Courts of the High Court of Punjab and with respect to all matters ancillary to the exercise of those powers shall, with the necessary modifications, apply in relation to the High Court of Delhi.”

11. Historically, the Delhi High Court has two kinds of original jurisdiction; one which is exercised under Section 5(1) of the Act in respect of territories included in the Union Territory of Delhi, as was being exercised in respect of the said territories by the High Court of Punjab.

12. Additionally, under Section 5(2) of the Act, the Delhi High Court has inherited ordinary original civil jurisdiction in respect of every suit, the value of which exceeds a particular pecuniary limit, and below the said pecuniary limit, the jurisdiction is exercised by the District Courts.

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13. The effect of the two separate jurisdictions is that if an order is passed by a Single Judge in exercise of the ordinary civil jurisdiction exercised under Section 5(1) of the Act, and if the order is appealable, then a Letters Patent Appeal under the Letters Patent would lie and no appeal would lie under Section 10(1) of the Act, whereas if an order is passed in exercise of the original civil jurisdiction under section 5(2) of the Act and if the order were appealable, then an appeal in the form of FAO(OS) under Section 10 of the Act would lie.

14. The present is an appeal filed by the appellant under Section 10(1) of the Act, so, the examination is restricted to whether an appeal would lie under Section 10(1) of the Act from the impugned order passed dismissing the petitions under Section 24 of the Code.

15. Section 10(1) provides for an appeal from a judgment passed by the Single Judge in exercise of ordinary civil jurisdiction, therefore, the examination is whether the impugned order qualifies as a judgment in terms of the test as laid down in *Shah Babulal Khimji (supra)*.

16. In *Shah Babulal Khimji (supra)*, the Supreme Court has laid down the test as to which order would be regarded as a judgment. The Supreme Court has laid down that whenever a trial Judge decides a controversy which affects the valuable rights of either of the party, it would be treated as a judgment within the meaning of Letters Patent.

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Every interlocutory order cannot be treated 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.

17. In Midnapore Peoples' Coop. Bank Ltd. and Others vs. Chunilal Nanda, (2006) 5 SCC 399, the Supreme Court, while placing reliance on *Shah Babulal Khimji (supra)*, laid down that interim orders/interlocutory orders passed during the pendency of a case falls under one or the other of the following categories:-

- (i) *Order which finally decide a question or issue in controversy in the main case.*
- (ii) *Orders which finally decide an issue which materially and directly affects the final decision in the main case.*
- (iii) *Orders which finally decide a collateral issue or question which is not the subject-matter of the main case.*
- (iv) *Routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment.*
- (v) *Orders which may cause some inconvenience or some prejudice to party, but which do not finally determine the rights and obligations of the parties.*

18. In the said judgment, the Supreme Court held that orders falling in categories (i), (ii) and (iii) as mentioned above were judgments for the purposes of filing appeal under Letters Patent, whereas the orders falling under categories (iv) and (v) were not judgments and special appeals against them were not maintainable under Letters Patent.

19. The Division Bench of the Allahabad High Court in ***Amit Khanna*** (*supra*) has held that an order of transfer or refusal is only a discretionary order which is passed keeping in mind the convenience of the parties to facilitate the progress and decision of the case on merits. It does not in any manner affect the substantive rights of the parties concerning the subject matter or the issues involved in the case. No party has a right to insist for trial of his or her case by a particular Court of his choice or convenience. The Division Bench of the Allahabad High Court held that an order passed under Section 24 would be an order under category (iv) or (v) as categorized by the Supreme Court in ***Midnapore Peoples' Coop. Bank Ltd.*** (*supra*), from which a Letters Patent is held to be excluded. The Division Bench of the Allahabad High Court has held that in transferring or refusing to transfer a suit from one Court to the other, there is surely no decision which is taken by the Court on the merits of the matter and such an order is made only to facilitate the final decision but it in itself, is not a decision at all to be called a judgment.

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20. The judgment of the Kerala High Court in the case of ***K.V.Balan & Anr.(supra)***, is not applicable in the facts of the case inasmuch as the provisions of Section 5(1) of the Kerala High Court Act are not *pari material* to Section 10(1) of the Delhi High Court Act.

21. Section 5 of the Kerala High Court Act lays down as under:-

“5. Appeal from judgment or order of single Judge:- *An appeal shall lie to a Bench of two Judges from -*

(i) a judgment or order of a single Judge in the exercise of appellate jurisdiction in respect of decree or order made in the exercise of original jurisdiction by a Subordinate Court.”

(Underlining supplied)

22. Clearly, under Section 5 of the Kerala High Court Act, an appeal lies from both judgment and order in contrast to Section 10(1) of the Delhi High Court Act, where an appeal lies only against a judgment and not an order and for an order to qualify as a judgment, the order has to satisfy the tests laid down in ***Shah Babulal Khimji (supra)***.

23. In the present case, the learned Single Judge has, for administrative convenience, refused to transfer the proceedings from one Court to the other in exercise of discretionary powers under Section 24. By the impugned order, there is no adjudication on the merits of the case of either of the parties. A Court passes an order

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under Section 24 for the purposes of convenience of trial, however, in the facts and circumstances of the case, the Court may not exercise the discretion and may refuse to transfer the matter. The adjudication is not on the merits of the matter. The impugned order can clearly not be said to be a judgment satisfying the tests as laid down by the Supreme Court in ***Shah Babulal Khimji*** (*supra*). The impugned order does not decide any matter of moment and does not affect any vital or valuable right of the parties. It clearly does not cause serious injustice to the parties concerned.

24. In our view, the impugned order does not satisfy the tests of a judgment as laid down by ***Shah Babulal Khimji*** (*supra*) and as such cannot be regarded as a judgment in terms of Section 10(1) of the Delhi High Court Act. Clearly, no appeal under section 10 of the Act would be maintainable against the said order.

25. In view of the above, the appeals are accordingly dismissed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J.

JULY 06, 2015
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BADAR DURREZ AHMED, J.