

THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE MS JUSTICE J.UMA DEVI

WRIT APPEAL NO.1244 OF 2017

JUDGMENT: {Per the Hon'ble the Acting Chief Justice Ramesh Ranganathan}

This appeal, under Clause 15 of the Letters Patent, is preferred against the proceedings in Writ Petition No.25401 of 2017 dated 01.08.2017 ordering notice, and deferring hearing of admission of the Writ Petition by two weeks.

In *Kunala Subbarao v. P.Nagaratnayamma*¹ a Division Bench of this Court observed:

“.....We have heard Sri Suryanarayanamurthy for the appellants at full length and we are fully satisfied that this particular appeal is wholly incompetent and cannot be maintained under clause 15 of the Letters Patent. It should be emphasised that the institution of an appeal is a statutory creation and is unknown to that grand old dame, common Law. **This appeal is filed under clause 15 of the Letters Patent. The question whether an appeal, under clause 15 of the Letters Patents, is competent against a mere ordering of notice by a learned single judge should therefore be answered only on the basis of the meaning the word 'judgment' bears in clause 15 of the Letters Patent. Clause 15 of the Letters Patent provides for a right of appeal only against a 'judgment' passed by a learned single judge. If ordering notice within that meaning then appeal would be competent. The question therefore is whether in ordering notice on the appellants' application for grant of stay, Lakshminarayana Reddy, J., has passed a judgment. It must be admitted that the meaning of the word 'judgment' has sometimes been variedly interpreted in our High Court itself by some learned judges acting on the assumption that even ordering notice without finally adjudicating upon the merits of the C. M. P. would amount to passing of a judgment. But its ordinary meaning is one which Halsbury's Laws of England gives us any decision given by a court on a question at issue between the parties (se Burrows' 'Words & Phrases'). According to this meaning of the word 'judgment', where there is no adjudication on merits, there can be no judgment. It appears to us that this view is preferable to the other which assumes that there can be a judgment even where there is no adjudication on the issue between the parties. In other words, the word 'judgment' means adjudication of the issues between the parties, may be even ex parte. By ordering a mere notice the Court does not trench upon the merits and makes no adjudication on issues between the parties. It merely postpones the adjudication to a future date. Let us admit that such a postponement causes**

¹ AIR 1982 AP 443

some inconvenience or even detriment to the party. But that inconvenience or detriment is not the result of an adjudication by the Court on any issue between the parties. It is merely postponing the hearing to a future date. That is not one of the issues between the parties and that is no adjudication at all. The court does not lose its jurisdiction over the matter by ordering notice nor would it become functus officio by passing such an order. Strictly speaking the notice ordered would not in any way affect the rights of the applicant as such an order would have the effect of only postponing the hearing to a later date after service of notice on the party sought to be affected. It is really an act of refusal to adjudicate immediately and that might cause prejudice, but that is no adjudication and no passing of a judgment. The ordering of notice cannot by any reasonable standards be regarded as amounting to passing of a judgment on any issue between the parties. If such an order is not a judgment, clearly no appeal lies. The recent judgment of the Supreme Court is *Shah Babulal Khimji v. Jayaben* (reported in AIR 1981 SC 1786), approving the observations of Sri Arnold Whiel C. J. in *Tuliam Row's case* (1912 ILR 35 Mad 1) clearly goes against the argument of the appellants. Arnold White C. J. in his judgment assumed that judgment is the function of an adjudication of the rights. He even said that such an adjudication must put an end to the entire suit or proceedings so far as the Court before which the suit or proceeding is pending is concerned. Clearly ordering notice does not involve any adjudication of the rights of the parties, nor does it put an end to the entire suit or proceedings must put an end to the entire suit or proceedings so far as the Court before which the suit or proceedings is pending is concerned. **Clearly ordering notice does not involve any adjudication of the rights of the parties, nor does it put an end to the proceedings in the sense in which the learned Chief Justice has used that word. Ordering of notice can be nothing more than a step towards obtaining the final adjudication in those proceedings. Even where it might cause prejudice, it cannot be described as a judgment. It is a step in aid and such a step in aid isn't a judgment within the meaning of Letters Patent.** In view of the above, we are unable to entertain this appeal.

But Sri Suryanarayanamurthy argued that it is the substance of an order that must be looked into and not the form and that even ordering of notice can at times amount to a rejection of the petitioner's prayer for relief. It may be. But what Clause 15 of Letters Patent makes appealable is only positive adjudication but not refusal to grant immediate aid. But Sri Suryanarayana Murthy's argument is slightly guilty of exaggeration. So long as it is permissible for the Court to adjudicate upon the C. M. P. on which a notice has been ordered, it would be theoretically impossible to contend that ordering of notice in such case affects anyone's rights. There is scope for retrieving of the situation and there is scope for retrieving. That would exclude the possibility of any adverse effects being produced. **In our view, this substance theory of adverse effects has therefore no substance. In any case, in view of the fact that Clause 15 of Letters Patent permits appeals only against judgments and as ordering of notice does not trench upon merits or constitute adjudication, no Letters Patent Appeal is competent against those orders.**

The other argument of the learned counsel Sri. Suryanarayana Murthy is that just as some Courts treated refusal to grant an ex parte injunction and ordering notice as amounting to refusal to grant an ex parte stay. In fact, the provisions of C. P. C. make the granting of an ex parte stay an exception by calling for recording of special reasons for such an

order. We are, therefore, unable to accept that submission. **But in any case for the purpose of Clause 15 of the Letters Patent, it should be held that unless a matter is adjudicated upon on issues between the parties, no judgment can ensue. No order made by Court merely issuing notice and postponing the adjudication to a future date can be regarded as a judgment. The fact that retrieval and restitution are possible in all such cases, no real harm or detriment can ensue to the parties....**" (emphasis supplied)

As extracted hereinabove, an identical question, whether an appeal would lie against an order of the learned Single Judge having ordered notice, fell for consideration before the Division Bench in **Kunala Subbarao**¹, and the Division Bench held that mere ordering of a notice does not amount to a "judgment", and it is only against a judgment that an appeal lies under Clause 15 of the Letters Patent. The Division Bench took note of the judgment of the Supreme Court in **Shah Babulal Khimji v. Jayaben D.Kanta**² and observed that, in view of the fact that Clause 15 of the Letters Patent permits appeals only against judgments and as ordering of notice neither trenches upon merits nor does it constitute adjudication, no Letters Patent Appeal is competent against those orders. The Division Bench further observed that no order made by the Court merely issuing notice, and postponing adjudication to a future date, can be regarded as a judgment; and as retrieval and restitution are possible in all such cases, no real harm or detriment can ensue to the parties.

The judgment of the Coordinate Bench in **Kunala Subbarao**¹ is binding on us and, in the light of the law declared therein, we are precluded from entertaining an appeal under Clause 15 of the Letters Patent in the present case.

As the learned Single Judge has only ordered notice and has merely deferred hearing of admission of the Writ Petition by two

² AIR 1981 SC 1786(1)

weeks, no appeal is maintainable thereagainst under Clause 15 of the Letters Patent. The Writ Appeal fails and is, accordingly, dismissed. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand dismissed.

(RAMESH RANGANATHAN, ACJ)

(J.UMA DEVI, J)

31st August 2017
RRB

