

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

% Date of decision: 22nd October, 2018

+ FAO(OS) 132/2018, CM No. 35104/2018
M/S KUSHAL INFRAPROJECT INDUSTRIES (INDIA) LTD
..... Appellant
Through: Mr. Kirti Uppal, Sr. Adv. with
Mr. Vishal Mann and
Mr. Pranvir Sethi, Adv.

versus

UMED SINGH (DECEASED) THR LRS & ORS
..... Respondents
Through: Mr. Parvinder Chauhan, Adv. and
Mr. Nitin Jain, Adv.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. The present appeal has been filed by the appellant challenging the order dated August 08, 2018 whereby the learned Single Judge has closed the right of the appellant herein to file list of witnesses as well as the evidence by way of affidavits.

2. The facts are, the appellant herein has filed a suit for specific performance based on an Agreement to Sell executed with the respondents on January 23, 2013. The respondents filed written statement to the suit filed by the appellant on November 01, 2013. On March 03, 2015, the defendant No.1 expired. On March 04,

2015 the issues were framed. On March 21, 2015, counsel for the respondents informed the counsel for the plaintiff regarding the death of the defendant No.1 and also informed regarding the particulars and addresses of the legal heirs of the defendant No.1 in the suit. On April 30, 2015, an application has been filed by the appellant under Order 22 Rule 4 CPC to implead the legal heirs of the defendant No.1. It is the case of the appellant that between May 20, 2015 and July 24, 2017, the matter was listed for service upon the legal heirs of the deceased defendant No.1 and finally they were impleaded in place of deceased defendant No.1 on November 24, 2013. The learned Joint Registrar had closed the right of the appellant to lead evidence. When the matter was listed before the learned Single Judge, a prayer for extension of time to file the list of witnesses as well as evidence by way of affidavits was made before the learned Single Judge, which was declined.

3. Mr. Parvinder Chauhan, learned counsel appearing for the respondents has taken a preliminary objection on the maintainability of the appeal inasmuch as under Section 10(1) of the Delhi High Court Act, 1966 read with Section 104 and Order 43 Rule 1 CPC, the impugned order being not a judgment and is not an appealable

order, the appeal is not maintainable. He would rely upon the judgment of the five judges of this Court in the case of *University of Delhi and Anr. v. Hafiz Mohd, Said and Others* **FAO (OS) 6/1968 decided on March 02, 1972** and *Hari Singh v. Kharaiti Lal & Sons* **1995 (32) DRJ 309.**

4. Mr. Kirti Uppal, learned Senior Counsel for the appellant submit, there was no occasion for the plaintiff to file list of witnesses and the evidence by way of affidavits between May 20, 2015 and November 24, 2017, as the application under Order 22 Rule 4 CPC was under consideration of the Court. He stated that such period could not have been taken into consideration to close the right of the appellant to file list of witnesses and the evidence by way of affidavits. He also stated, the impugned order is as good as the final judgment as the appellant shall not be in a position to establish its claim in the suit before the learned Single Judge in the absence of list of witnesses and affidavits.

5. We agree with the submission made by Mr. Chauhan on the maintainability of the appeal in view of the judgments referred to by him, whose reference is made above. In this regard, we reproduce

para 44 of the judgment in the case of **University of Delhi and Anr.** (*supra*), as under:-

“44. Our conclusion, therefore, is that an appeal under Section 10(1) of the Act against the order of a single judge in the exercise of ordinary original civil jurisdiction to a Division Court lies only in those cases where an order is a judgment as defined in the Code. In other words apart from the orders which have the force of a decree, appeals will, therefore, lie only against those orders passed by the single judge which are mentioned in Section 104 read with Order 43 Rule 1 of the Code and no appeal will lie against other orders which are outside these two provisions. As the impugned order of the learned single judge is not one of those orders specified in Section 104 read with Order 43 Rule 1 of the Code the same cannot be held to be a judgment within the meaning of Section 10(1) of the Act and hence no appeal is competent under this Section.”

6. Similarly, in **Hari Singh** (*supra*), in which case also an appeal has been filed under Clause 10 of the Letters Patent by the defendant in the suit against order dated September 03, 1993 whereby further opportunity was declined to the appellant to cross examine PW 2 and further the time granted to him to lead his

evidence was restricted to three days as against ten days time requested by him. One of the issues, which fell for consideration was whether the appeal under Clause 10 of the Letters Patent or Section 10 of the Delhi High Court Act lies. The Coordinate Bench has, in paras 4 to 7, held as under:-

“4. The first question for consideration is whether on the facts stated the appeal under Clause 10 of the Letters Patent or Section 10 of the Delhi High Court Act lies. The Letters Patent by Clause 10 confers a right of appeal against a "judgment". So does the Delhi High Court Act. What kind of an order will constitute a judgment will depend on the facts and circumstances of each case and on the nature and circumstances of the order passed. The term "judgment" has not been defined in Clause 10 of the Letters Patent. As to what order would constitute a judgment within the meaning of the said clause has been a subject of controversy, till a matter from Bombay came before Supreme Court in Shah Babulal Khimji Vs. Jayaben D. Kania & Another, wherein Clause 15 of the Letters Patent (Bombay) was involved.

5. As noticed in Shah Babulal Khimji's case, a judgment can be of three kinds, viz., (1) a final judgment; (2) a preliminary judgment, and (3) intermediary or interlocutory judgment. A judgment

which decides all the questions or issues in controversy so far as the learned Single Judge is concerned and leaves nothing else to be decided is a final judgment, i.e., when the suit for action brought by the plaintiff is dismissed or decreed in part or in full. A preliminary judgment is normally based on a preliminary objection regarding the maintainability of the suit, consequent where to the suit is either dismissed or the objection over-ruled. Such an order decides an important aspect of the trial which affects a vital right of one of the parties and amounts to a judgment appealable to a larger Bench. However, every interlocutory order cannot be regarded as a judgment. Such of the interlocutory orders, which contain the quality of finality but are not covered under Order 43 Rule 1 Civil Procedure Code, are judgments within the meaning of Clause 10 of the Letters Patent and are appealable. Such an order can be a judgment, if the adverse effect on the party concerned is direct and immediate rather than indirect or remote and it works serious injustice to the party concerned.

6. *In the instant case, the impugned orders are made during the course of recording of evidence and relate to the admissibility or relevancy of evidence and the conduct of the proceedings. These are of ancillary nature and do not have the attribute of finality. In Shah Babulal Khimji's case, it was held that the order of a*

learned Single Judge relating to the "relevancy" or "admissibility" of a question or document is not a judgment for the purpose of Letters Patent. The Supreme Court held as under:

"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."

7. From the above quoted passage, it is evident that the orders on the question of relevancy or admissibility of questions, made by the Single Judge, do not amount to judgment, conferring a right of appeal in Clause 10 of the Letters Patent."

7. In view of consistent pronouncements by the five judges Bench of this Court and a Coordinate Bench of this Court, we are of the view that the order under challenge do not amount to a "judgment" conferring a right to appeal under Section 10 of the Delhi High Court Act, 1966. Further, the order impugned is not an

appealable order under Section 104 read with Order 43 Rule 1 of the CPC. The appeal is not maintainable and is dismissed.

CM No. 35104/2018 (for stay)

Dismissed as infructuous.

V. KAMESWAR RAO, J

CHIEF JUSTICE

OCTOBER 22, 2018/ak

