

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

LETTERS PATENT APPEAL NO. 41 OF 2010

Nisar s/o Dagdu Shaikh
Age : 45 yrs, occu.: business,
R/o Nisar Dhaba, Opposite
Hotel Rajasab, Osmanabad.

Appellant.

Versus

Sachin Rangrao Shinde
Age : 27 yrs, occu.: business
R/o Osmanabad.

Respondent.

Mr. K.J. Suryawanshi, Advocate for the appellant.
Mr. P.S. Dighe, Advocate for the respondent.

**CORAM : T.V. NALAWADE AND
SUNIL K.KOTWAL, JJ.**

Dated : 24 January 2019.

JUDGMENT (Per Sunil K. Kotwal).

1. The only point for consideration before us is, whether the Letters Patent Appeal is tenable against the order passed by Civil Court.

2. The appellant is original defendant and the respondent is original plaintiff in Special Civil Suit No.48/2003, decreed by Civil Judge, Senior Division, Osmanabad. This

Letters Patent Appeal is filed against the order passed by Single Judge in Writ Petition No.7972 of 2009, upholding the order passed by Civil Judge, Senior Division, Osmanabad in M.C.A. No.125/2009, rejecting the application filed by defendant to set aside the exparte decree passed against him.

3. The facts, in nutshell, are that the plaintiff filed Special Civil Suit 48/2003 before Civil Judge, Senior Division, Osmanabad for recovery of Rs. 1,50,000/- from the defendant. As per the direction of the trial Court, the process server visited the residence of defendant to effect substitute service under Order V Rule 20 of the Code of Civil Procedure, by fixing the suit summons at the conspicuous place at the house of defendant, as previously the defendant was not found available. However, on that date the defendant was personally present in his house and he personally received the suit summons and acknowledged the same.

4. Despite service of summons, defendant did not remain present before the trial Court and in the result exparte decree was passed against the defendant. Subsequently defendant appeared before the trial Court and filed Civil Misc.

Application No.125/2009 to set aside the *exparte* decree, on the ground of lack of proper service of suit summons. Miscellaneous Civil Application was rejected by the trial Court on 21.07.2009. Against that order defendant preferred M.C.A. No.64/2009, which was allowed and *exparte* decree passed against defendant was set aside. Against that order the plaintiff filed Writ Petition No.7972 of 2009 before the Single Judge of this Court. That was allowed and the order passed by District Court in M.C.A. No.64/2009 was set aside and the order passed by trial Court was restored. Against that finding the present Letters Patent Appeal arises.

5. As the preliminary objection was raised by the respondent regarding tenability of Letters Patent Appeal against the order passed by Civil Court, learned Counsel Mr. K.J. Suryawanshi was heard for the appellant and learned Counsel Mr. P.S. Dighe for respondent.

6. Learned Counsel for the appellant placed reliance on the judgment of Full Bench of this Court in the case of **“Advani Oerlikon Ltd. Vs. Machindra Govind Makasare and others”** [**2011 (2) Mh.L.J. 916**], wherein the following guidelines are issued by Full Bench, in para 20 of the judgment :-

“20. Upon this discussion, we now proceed to answer the questions formulated in the order of reference:

Re: 1 : It is not a correct proposition in law that this Court cannot correct jurisdictional errors or errors resulting in miscarriage of justice committed by authorities which are subordinate to it by invoking powers under [Article 226](#) of the Constitution.

Re: 2 : It is not a correct proposition in law that jurisdictional errors or errors resulting in miscarriage of justice committed by subordinate Courts/Tribunals can only be corrected by this Court in exercise of powers under Article 227 of the Constitution. The writ of certiorari can be issued under Article 226 of the Constitution where the subordinate Court or Tribunal commits an error of jurisdiction. Where the subordinate Court or Tribunal acts without jurisdiction or in excess of it or fails to exercise jurisdiction, that error of jurisdiction can be corrected. Moreover when the Court or tribunal has acted illegally or improperly such as in breach of the principles of natural justice the writ of certiorari is available under Article 226.

Re: 3 : Where the facts justify the invocation of either Article 226 or Article 227 of the Constitution to correct a jurisdictional error or an error resulting in a miscarriage of justice committed by authorities

subordinate to this Court, there is no reason or justification to deprive a party of the right to invoke the constitutional remedy under Article 226 of the Constitution.

Re: 4 : It is open to the Court while dealing with a petition filed under Articles 226 and/or 227 of the Constitution or a Letters Patent Appeal under Clause 15 of the Letters Patent arising from the judgment in such a petition to determine whether the facts justify the party in filing the petition under Article 226 and/or 227 of the Constitution.

Re: 5 : The cause title, the averments and prayers in the petition can be taken into account while deciding whether the petition is one under Article 226 and/or 227 of the Constitution.

Re: 6 : If the petitioner elects to invoke Article 226 and/or 227 of the Constitution and the facts justify such invocation, a Letters Patent Appeal against the order of the Learned Single Judge would be maintainable even though the Single Judge has purported to exercise jurisdiction only under Article 227 of the Constitution. The fact that the Learned Single Judge has adverted only to the provisions of Article 227 of the Constitution would not bar the maintainability of such an appeal. The true test is whether the facts justify the invocation of Articles 226

and 227 and this has to be determined on the facts of each case having due regard to (i) the nature of the jurisdiction invoked; (ii) the averments contained in the petition; (iii) the reliefs sought; and (iv) the true nature of the principal order passed by the Single Judge. The true nature of the order passed by the Single Judge has to be determined on the basis of the principal character of the relief granted. The fact that an ancillary direction has been issued under Article 227 of the Constitution would not dilute the character of an order as one with reference to Article 226. What has to be ascertained is the true nature of the order passed by the Single Judge and not what provision is mentioned while exercising this power.

Re: 7 : Where a petition is filed under Articles 226 and 227 of the Constitution and the facts justify the filing of such a petition, it is not lawful for the Court to hold that jurisdictional errors or errors resulting in a miscarriage of justice committed by the subordinate Courts or Tribunals can be corrected only by exercising powers under Article 227 (and that the meaning of Article 226 is redundant), thus depriving the party of a right of appeal under Clause 15 of the Letters Patent.

Re: 8 : When a petition is filed under Articles 226 and 227 of the Constitution and the facts justify the filing of such a petition, it is not open to the Court to hold that

Article 226 need not have been invoked, on the ground that Article 227 is clothed with the power to grant the same relief thus depriving the party of a right to elect or choose a remedy.

Re: 9 : In a situation where a petition is filed under Article 227 of the Constitution and judgment is rendered in favour of the Petitioner, recourse to an appeal under Clause 15 of the Letters Patent is not barred to the Respondent before the Single Judge merely on the ground that the petition was under Article 227. In [State of Madhya Pradesh vs. Visan Kumar Shiv Charanlal](#) (supra), the appeal before the Division Bench was filed by the Respondent to the proceedings before the Single Judge in a petition which had been instituted under Article 227. Accepting the submission that a nomenclature is of no consequence and it is the nature of the reliefs sought and the controversy involved which determine which Article is applicable, the Supreme Court held that the appeal before the Division Bench was maintainable. A similar position arose in the decision of the Supreme Court in [M.M.T.C. vs. Commissioner of Commercial Tax](#) (supra). The Division Bench of the High Court had held that since the petition before the Single Judge was under Article 227 of the Constitution, an appeal at the behest of the Respondent to the petition was not maintainable.

The Supreme Court held that the High Court was not justified in holding that the Letters Patent Appeal was not maintainable since the High Court did not consider the nature of the controversy and the prayers involved in the Writ Petition”.

7. Relying on this Authority, learned Counsel for the appellant submits that as the order passed by Civil Judge, Senior Division, Osmanabad is perverse and against the principles of natural justice, the Letters Patent Appeal is tenable against that order.

8. In reply, learned Counsel for the respondent submits that Letters Patent Appeal is not tenable against the order passed by the Civil Court, as the learned Single Judge was exercising supervisory jurisdiction under Article 227 of the Constitution of India, while examining the correctness of the order passed by Civil Judge, Senior Division, Osmanabad. Therefore, against the judgment passed by the learned Single Judge under Article 227 of the Constitution of India, Letters Patent Appeal is not tenable. He placed reliance on the judgments in the cases of **“Radhey Shyam and another Vs. Chhabi Nath and others”** [(2015) 5 SCC 423] and

“Jogendrasinhji Vijaysinghji Vs. State of Gujrat and others” [(2015) 9 SCC 1].

9. In the background of above-referred factual aspect, we have to examine whether the order passed by the learned trial Court was perverse or exceeding its jurisdiction. However, at bare glance at the order passed by Civil Judge, Senior Division, Osmanabad and, it emerges that he has considered the provision of Order V of the Code of Civil Procedure regarding service of suit summons, and therefore, it cannot be said that he has acted beyond his jurisdiction. Even the evidence of Process Server is considered while deciding the miscellaneous civil application as well as writ petition. Therefore, by no stretch of imagination it can be said that the impugned order is perverse or passed by the Court exceeding its jurisdiction or in breach of principles of natural justice. In the circumstances, as ruled by Full Bench of this Court, the writ jurisdiction under Article 226 of the Constitution of India cannot be invoked.

10. Otherwise also, in the case of **“Radhey Sham Vs. Chhabi Nath”** as well as **“Jogendrasinhji Vs. State of Gujrat”** (supra), the Apex Court has consistently held that

judicial orders of Civil Court are not amenable to writ jurisdiction under Article 226 and Letters Patent Appeal is not maintainable against the judicial orders of Civil Court.

11. Thus, as the Single Judge decided the Writ Petition by exercising its supervisory jurisdiction under Article 227 of the Constitution of India against the order passed by the Civil Court, the present Letters Patent Appeal is not tenable.

12. In the result, Letters Patent Appeal No.41 of 2010 is dismissed. Parties to bear their respective costs.

13. The request was made by appellant to continue the interim relief. The request is refused.

14. The amount, if any, deposited as decretal amount, is to be paid to Decree Holder alongwith accrued interest till today.

15. Letters Patent Appeal is disposed of in above-said terms.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE