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

Date of Decision: 16th September, 2019

+ LPA 601/2019 & CM APPLs. 41262/2019 & 41263/2019

RIHANA BEGAM Appellant

Through: Md. Azam Ansari, Adv.

versus

DELHI METRO RAIL CORPORATION LTD Respondent

Through: Mr. Tarun Johri with Mr. Ankur Gupta, Advs. for DMRC.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE C.HARI SHANKAR

D.N. PATEL, CHIEF JUSTICE (Oral)

CM APPL. 41262/2019 (exemption)

Allowed, subject to just exceptions.

LPA 601/2019 & CM APPL. 41263/2019

1. This Letters Patent Appeal has been preferred by the original petitioner whose W.P.(C) No.8615/2019 is pending before the learned Single Judge and in the said writ petition following order has been passed:

“The learned counsel for the petitioner submits that the relief is claimed only against the respondent no.3. The other respondents are, therefore, deleted from the array of parties. The petitioner shall file an amended memo of parties within one week from today.

Issue notice. Mr. Ankur Gupta, Advocate accepts notice on behalf of the Delhi Metro Rail Corporation (DMRC). He prays for and is granted two weeks time to file the reply. Rejoinder thereto, if any, be filed within one week thereafter.

List on 17th October, 2019.”

2. Learned counsel appearing for the appellant (original petitioner) submitted that the appellant was in search of a stay against dispossession of the property which was under acquisition by respondent No.3/Delhi Metro Rail Corporation.

3. As stay has not been granted by the learned Single Judge and notice has been issued, the present Letters Patent Appeal has been preferred.

4. Having heard the learned counsel for the appellant (original petitioner) and looking to the order passed by the learned Single Judge dated 26.08.2019 in W.P.(C) No.8615/2019, we see no reason to entertain this Letters Patent Appeal mainly for the reason that – firstly, notice has already been issued by the learned Single Judge and, secondly, the writ petition is already pending before the learned Single Judge. If the appellant wants to prepone the hearing of the said writ petition, request can always be made by the petitioner before the learned Single Judge for preponing the hearing. Otherwise, we see no reason to entertain this Letters Patent Appeal because no rights and liabilities of the parties have been decided by the order dated 26.08.2019. As the writ petition is already pending before the learned Single Judge, we are not analyzing the facts on record in the writ petition about the acquisition of the house by Delhi Metro Rail Corporation in lieu of the compensation.

5. An appeal, under the Letters Patent lies against a “judgment”. The interpretation of the term “judgment” for the purposes of appealability under the Letters Patent, came in for incisive analysis by the Supreme Court, in **Shah Babulal Khimji v. Jayaben D. Kania**, (1981) 4 SCC 8. Paras 108 to

117, 119 and 120 of the said decision may, be reproduced thus:

“108. The relevant portion of clause 15 of the letters patent may be extracted thus:

“We do further ordain that an appeal shall lie to the said High Court of Judicature at Madras, Bombay, Fort William in Bengal from the judgment ... of one Judge of the said High Court....”

109. Clause 15 makes no attempt to define what a judgment is. As letters patent is a special law which carves out its own sphere, it would not be possible for us to project the definition of the word “judgment” appearing in Section 2(9) of the Code of 1908, which defines “judgment” into the letters patent:

“‘Judgment’ means the statement given by the Judge of the grounds of a decree or order.”

110. In Mt. Shahzadi Begam, v. Alak Nath [AIR 1935 All 620 : 1935 ALJ 681 : 157 IC 347] , Sulaiman, C.J., very rightly pointed out that as the letters patent were drafted long before even the Code of 1882 was passed, the word “judgment” used in the letters patent cannot be relatable to or confined to the definition of “judgment” as contained in the Code of Civil Procedure which came into existence long after the letters patent were given. In this connection, the Chief Justice observed [29 Cal LJ 225] as follows:

“It has been held in numerous cases that as the letters patent were drafted long before even the earlier Code of 1882 was passed, the word ‘judgment’ used therein does not mean the judgment as defined in the existing Code of Civil Procedure. At the same time the word ‘judgment’ does not include every possible order, final, preliminary or interlocutory passed by a Judge of the High Court.”

111. We find ourselves in complete agreement with the observations made by the Allahabad High Court on this aspect of the matter.

112. The definition of the word “judgment” in sub-section (9) of Section 2 of the Code of 1908 is linked with the definition of “decree” which is defined in sub-section (2) of Section 2 thus:

“ ‘Decree’ means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.”

113. Thus, under the Code of Civil Procedure, a judgment consists of the reasons and grounds for a decree passed by a court. As a judgment constitutes the reasons for the decree it follows as a matter of course that the judgment must be a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by sub-section (2) of Section 2 cannot be

physically imported into the definition of the word “judgment” as used in clause 15 of the letters patent because the letters patent has advisedly not used the terms “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 “judgment” 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 judgment.— 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 Section 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 to be judgments within the meaning of the letters patent and, therefore, appealable. There may also be interlocutory orders which are not covered 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. For instance, where the trial Judge in a suit under Order 37 of the Code of Civil Procedure refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff's case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the letters patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate but of a minimal nature and rather too remote because the plaintiff still possesses his full right to

show that the defence is false and succeed in the suit. Thus, such an order passed by the trial Judge would not amount to a judgment within the meaning of clause 15 of the letters patent but will be purely an interlocutory order. Similarly, suppose the trial Judge passes an order setting aside an ex parte decree against the defendant, which is not appealable under any of the clauses of Order 43 Rule 1 though an order rejecting an application to set aside the decree passed ex parte falls within Order 43 Rule 1 clause (d) and is appealable, the serious question that arises is whether or not the order first mentioned is a judgment within the meaning of letters patent. The fact, however, remains that the order setting aside the ex parte decree puts the defendant to a great advantage and works serious injustice to the plaintiff because as a consequence of the order, the plaintiff has now to contest the suit and is deprived of the fruits of the decree passed in his favour. In these circumstances, therefore, the order passed by the trial Judge setting aside the ex parte decree vitally affects the valuable rights of the plaintiff and hence amounts to an interlocutory judgment and is therefore, appealable to a larger Bench.”

114. In the course of the trial, the trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents, after the first date of hearing an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the trial Judge.

115. 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.

116. We might give another instance of an interlocutory order which amounts to an exercise of discretion and which may yet amount to a judgment within the meaning of the letters patent. Suppose the trial Judge allows the plaintiff to amend his plaint or include a cause of action or a relief as a result of which a vested right of limitation accrued to the defendant is taken away and rendered nugatory. It is manifest that in such cases, although the order passed by the trial Judge is purely discretionary and interlocutory, it causes gross injustice to the defendant who is deprived of a valuable right of defence to the suit. Such an order, therefore, though interlocutory in nature contains the attributes and characteristics of finality and must be treated as a judgment within the meaning of the letters patent. This is what was held by this Court in Shanti Kumar case [(1974) 2 SCC 387 : AIR 1974 SC 1719 : (1975) 1 SCR 550] , as discussed above.

117. Let us take another instance of a similar order which may not amount to a judgment. Suppose, the trial Judge allows the plaintiff to amend the plaint by adding a particular relief or taking an additional ground which may be inconsistent with the pleas taken by him but is not barred by limitation and does not work serious injustice to the defendant who would have ample opportunity to disprove the amended plea taken by plaintiff at the trial. In such cases, the order of the trial Judge would only be a simple interlocutory order without containing any quality of finality and would therefore not be a judgment within the meaning of clause 15 of the letters patent.

119. Apart from the tests laid down by Sir White, C.J., the following considerations must prevail with the court:

“(1) That the trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice to one party or the other cannot be treated as a judgment otherwise the appellate court (Division Bench) will be flooded with appeals from all kinds of orders passed by the trial Judge. The courts must give sufficient allowance to the trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice.

(2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

(3) The tests laid down by Sir White, C.J. as also by Sir Couch, C.J. as modified by later decisions of the Calcutta High Court itself which have been dealt with by us elaborately should be borne in mind.”

120. Thus, these are some of the principles which might guide a Division Bench in deciding whether an order passed by the trial Judge amounts to a judgment within the meaning of the letters patent. We might, however, at the risk of repetition give

illustrations of interlocutory orders which may be treated as judgments:

(1) An order granting leave to amend the plaint by introducing a new cause of action which completely alters the nature of the suit and takes away a vested right of limitation or any other valuable right accrued to the defendant.

(2) An order rejecting the plaint.

(3) An order refusing leave to defend the suit in an action under Order 37, of the Code of Civil Procedure.

(4) An order rescinding leave of the trial Judge granted by him under clause 12 of the letters patent.

(5) An order deciding a preliminary objection to the maintainability of the suit on the ground of limitation, absence of notice under Section 80, bar against competency of the suit against the defendant even though the suit is kept alive.

(6) An order rejecting an application for a judgment on admission under Order 12 Rule 6.

(7) An order refusing to add necessary parties in a suit under Section 92 of the Code of Civil Procedure.

(8) An order varying or amending a decree.

(9) An order refusing leave to sue in forma pauperis.

(10) An order granting review.

(11) An order allowing withdrawal of the suit with liberty to file a fresh one.

(12) An order holding that the defendants are not agriculturists within the meaning of the special law.

(13) An order staying or refusing to stay a suit under Section 10 of the Code of Civil Procedure.

(14) An order granting or refusing to stay execution of the decree.

(15) An order deciding payment of court fees against the plaintiff.”

6. The decision in ***Shah Babulal Khimji*** (supra) was followed by a Division Bench of the High Court of Andhra Pradesh in ***Kunala Subbarao and Ors. v. P. Nagaratnayamma***, AIR 1982 AP 443, which specifically addressed the issue of whether an LPA would lie against an order which merely issued notice, as in the present case. Para 2 of the said decision, which applies, on all fours, to the present case, may be reproduced as under:

“2. 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 Patent, 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 itself amounts to passing of a judgment 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 (see 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 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 in Shah Babulal Khimji v. Jayaben (reported in AIR 1981 SC 1786) approving the observations of Sri Arnold White C.J. in Tuljaram Row's case (1912 ILR 35 Mad I) 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 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 is not a judgment within the meaning of Letters Patent. In view of the above, we are unable to entertain this appeal.”

7. The present Letters Patent Appeal, directed against an order which merely issues notice, is, therefore, not maintainable.

8. For the aforesaid reasons, the Letters Patent Appeal is hereby dismissed. The pending application also stands disposed of accordingly.

CHIEF JUSTICE

C.HARI SHANKAR, J

SEPTEMBER 16, 2019
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