Amruthappa Vs. Abdul Rasool

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Court : Andhra Pradesh

Decided On : Apr-15-1987

Reported in : AIR1988AP215

Judge : Jagannadha Rao, J.

Acts : Code of Civil Procedure (CPC), 1908 - Sections 104 and 104(1) - Order 4, Rule 1 - Order 39, Rule 1 - Order, 43 Rule 1 - Order 47, Rule 1; Transfer of Property Act, 1882 - Sections 60 and 52

Appeal No. : Revn. Civil Misc. Petn. No. 5825 of 1987 in A.A.O. No. 1057 of 1986

Appellant : Amruthappa

Respondent : Abdul Rasool

Advocate for Def. : Azizullah Khan, Adv.

Advocate for Pet/Ap. : C. Poomaiah and ;K. Ramakrishna Reddy, Advs.

Judgement :
ORDER

1. This review petition raises two questions of law :

1. Whether a letters patent appeal lay to a Division Bench against an appellate order of single Judge in an appeal under O. 43, R.1, C.P.C. read with S. 104(1), C.P.C. and whether S. 104(2) was a bar to the maintainability of a Letters patent

appeal under cl.15 of the Letters Patent and consequently whether this review petition is not maintainable?

2. Whether in the case of a sale or a share in the hypotheca by some of the co-mortgagors to the usufructuary mortgagee, S. 60 of the T.P. Act requires the non-alienating co-mortgagor to sue for redemption of his own share and whether, if the sale in favour of the mortgagee is pending the suit filed for redemption and possession of the whole Property, S. 52 of the T.P. Act requires the mortgagee to first surrender possession of the entire property and then sue for partition and possession.?

2. I shall initially deal with the first question mentioned above and 1 shall deal with the second question later and I shall mention, under each point, such of the facts which are necessary for determination of the point separately.

3. Point No. 1 :-The Petitioner in this review petition is the plaintiff in O. S. No.,3/86 on the file of the District Court, Ranga Reddy District. He filed the suit for partition and separate possession of the suit mulgi on the basis of a purchase under a registered sale deed dt. 5-9-1985 of the half share of some of the co-mortgagors. The petitioner was also the mortgagee earlier under a usufructuary mortgage dt. 9-4-1974. The contesting respondents are the mortgagors owning the other half share and who obtained a decree for redemption earlier against the petitioner herein. The petitioner contended that even though this purchase of the half share of the co-mortgagors could not execute the decree for redemption and obtain possession from him but that they should file a fresh suit for partition and that till then they cannot obtain possession. On that basis the petitioner filed I.A. No. 604/86 for grant of temporary injunction restraining the defendant- respondent from proceedings with the execution of the redemption decree in O.S. 65/79 on the file of the District Munsifs Court, Tandur and for restraining him from dispossessing the petitioner from the suit mulgi, pending disposal of the, suit O.S. No. 3/86. The Court below by its order dt. 28- 6-1986 dismissed the said I.A. No. 604/86. against the said order the plaintiff preferred C.M.A No. 1057/86 under O. 43, R. 1(r) read with S. 104, C.P.C. After hearing the parties on both sides I passed an order on 30-9-1986 dismissing the C.,M.A.

4. Against the above order passed by me in the C.M.A. 244/86 the petitioner-plaintiff referred Letters Patent Appeal No. 244/86 and the same was admitted and when the latter came up for final hearing the petitioner's counsel withdrew the L.P.A. as e considered that the L.P.A. was not maintainable. The L.P.A. was consequently withdrawn. Thereafter the petitioner filed the present review petition accompanied by application for condonation of delay. I have condoned the delay and have now taken up the review petition for admission and hearing.

5. Now the review will be maintainable only if an appeal is permissible and no appeal has been, in fact, preferred or where no appeal at all is permissible. This is clear from cl. (a) and (b) of sub-rule (1) of O. 47, R. 1 C.P.C. In this case an L.P.A. has in fact been preferred and has been withdrawn. It is argued for the petitioner that no L.P.A. lay from an order passed in a C.M.A. by a single Judge of this court in an appeal against an order from the DistrietCourtarisingunderO..43R. 1, C.P.C. For that purpose reliance is placed on the judgment of the Supreme Court in Shahbabulal Khimji v. Jayaben, AIR 198 1 SC 1786. That is how it has become necessary to decide the question whether an appeal lay under cl. 1 5 of the Letters Patent to a Division Bench against the order passed by me in the C.M.A. which was an appeal from the District Court under the provisions of O. 43, R. 1, read with S. 104 C.P.C.

6. For the purpose of 'appreciating the point argued before me it is necessary to extract S. 104 C.P.C. and also the provisions of O. 43, R. 1, C.P.C. (in so far as necessary) and Cl. 15 of the Letters Patent (Madras).

7. S.104,C.P.C.readsasfollows: 'Orders from which appeal lies :

(1)An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders

* * * * * *

(ff) an order under S. 35A

(ffa) an order under S. 91 or S. 92 refusing leave to institute a suit of the nature referred to in S. 91 or S. 92, as the case may be;

(g) an order under S. 95.,

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest Or detention in the Civil prison df any Person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules: . Provided that no appeal shall lie against any order specified in cl. (ff) save on the ground that no order, or an order for the payment of a less amount ought to have been made.

(1) No appeal shall lie from order passed in appeal under this Section.'

The relevant provisions of O. 43 R. 1, C.P.C. read as follows:

'Or. 43. R.1. Appeals from orders:

An appeal shall lie from the following orders under the provisions of S. 104, namely,

(a) to (q) .....

(r) an order under R. 1, R. 2, (Rule 2A), R. 4 or R. 10 of 0. XXXIX.'

Clause 15. of the Letters Patent reads as follows

'Appeal 'from the Court of original jurisdiction to the High Court in its appellate 'jurisdiction :- And 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 not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court, subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in exercise of the power of superintendence under the

provisions of S. 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge Of the said High Court or one judge of any Division Court, pursuant to S. 108 of the Government of India Act, and that notwithstanding any thing hearing before provided, an appeal shall lie to the said High court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to S. 108 of the Government of India Act, made (on or after the first day of Feb. 1929) in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the judge who passed the Judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to us. Our heirs or successors in our or Their Privy Council, as hereinafter provided.'

8. From a reading of the provisions of Cl. 15 it is clear that a Letters Patent appeal would lie from the Judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate Jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in exercise of the power of superintendence under the provisions of 5. 107 of the Government of India Act or in the exercise of criminal jurisdiction) the appeal will lie from the judgment of a learned single Judge of the High Court to a Division Bench. So far as Judgment rendered by a learned single Judge in exercise of the appellate jurisdictions in respect of a decree or order made in the exercise of appellate jurisdiction is concerned appeals could lie to a Division Bench only if the learned single Judge declared the case as a fit one for appeal and in other cases there is a right of appeal from one single Judge to a Division Bench (i.e. without such leave). In other words a plain reading of the provisions would show that against judgments rendered by the single Judge in first appeals - be they appeals against decrees or orders but provided they are 'judgments' as understood under the Letters Patent - an appeal would lie to a Division Bench. However, if the learned single Judge rendered the judgments either in regular second Appeals against the decrees or in Second Appeals against orders (such as those which were permissible till 1976)

an appeal would lie to a Division Bench from such judgment rendered by the High Court in the Second Appellate Jurisdiction, only if the learned single judge certifies the case as one fit for further appeal.

9. The question therefore is : Whether there is anything in the Civil Procedure Code or in any other statute which would detract from filing of letters patent appeal from an order passed by a learned single Judge in a C.M. A. preferred from a District Court or a Sub Court under O. 43, R. 1 read with 5. 104(1) C.P.C. as in the present case.

10. A reading of Clause (2) of S. 104 C.P.C. would show that no appeal lies from an order passed in an appeal under S. 104(1), C.P.C. So far as C.M.As. carried from the Munsif's Court to the Sub Court or District Court under O. 43, R. 1, C.P.C. or similar C.M.As. filed from the Sub Court to the District Court, it is clear that there is no further appeal to High Court. In such ca' where the appellate order is passed by the Sub Court in appeals arising from the Munsif's Court or where the C.M.As. are disposed of by the District Courts in appeals arising from the Sub Court there is no further second appeal to the High Court but there is only a revision under S. 115 C.P.C. to the High Coin T here is no difficulty so far as these cases are concerned.

11. The difficulty, however, arises with regard to orders passed by the Sub Court or the District Court and against which a direct appeal lies to the High Court under O. 43, R. 1 read with S. 104(1), C.P.C. and as to whether a Letters Patent Appeal lies to a Division Bench against the order passed k the learned single Judge in such C.M.As. It can be seen from a plain reading of Cl. 15 of the Letters Patent that if such orders passed in the C.M.A's. by the learned single Judge amounted to 'judgments' within the meaning of the said words in Cl. 15 of the Letters Patent, an appeal would, normally he to a Division Bench. But the question is whether S. 104(2) would act as a bar to any such further Letters Patent appeal to a Division Bench and whether the order of the learned single Judge would become final.

12. It is argued for the respondent that S. 4(1) of the Civil Procedure Cede preserves appellate jurisdiction conferred by the Letters Patent fully and that it must be understood that such appeal lies to a Division Bench notwithstanding

anything in S 104(2), C.P.C. To appreciate his contentioi it is necessary to refer to S. 4(1), C.P.C. which reads as follows.

'Section 4(1) :In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local. law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.'

13. It is clear from S. 4(1), C.P.C. that in

The absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed, by or under any other law for the time being in force. The question immediately arises as to what is the meaning of the clause 'in the. absence of any specific provision to the contrary'. Does it mean any specific provision in the C.P.C. itself or whether such specific provision should be in any other law

14. Of course, if there is any other special law which prohibits the maintainability of an appeal to a Division Bench under Cl. 15 of the Letters Patent that should be construed as a specific provision to the contrary as mentioned in S. 4(1), C.P.C. Examples of such provisions are contained for example in S. 39(2) of the Indian Arbitration Act 1940 and in the Assam Revenue Tribunal(Transfer of Powers) Act, 1948. So far as S. 39(2) of the Indian Arbitration Act is concerned it clearly specifies that no second appeal lies from an order passed on appeal -under S. 39(1) and that nothing in the sub-section affects or takes away any right of appeal to the Supreme Court. In Union of India v. Mohinder Supply Company, : [1962]3SCR497 the Supreme Court construed that said provision in S. 39(2) as prohibiting a Letters Patent Appeal to a Division Bench by treating the same as a Second Appeal against the order passed under S.39(1) of the Arbitration Act. Similarly S. 5 of the Assam Act provides that no appeal or revision shall lie against any order passed by the Assam High Court in the exercise of its power in appeal or revision under the said Act. A Full (Division ?) Bench of the Assam High Court held in Radha Moban Pathak v. Upendra Patowary, AIR 1962 Assam 7 1. that no Letters Patent Appeal lay to a Division Bench in view of the specific statutory

provisions in the special law.

15. Coming to S. 104(2), C.P.C. a contrary view was taken by a Full Bench of the Madras High Court in Paramasivan v. Ramasami, AIR 1933 Mad 570 (FB) and it was held that S. 104(2) was not a bar to the maintainability of a Letters Patent Appeal. In that case, the learned Subordinate Judge appointed a receiver and Pandalai, J. vacated that order in a C.M.A. the plaintiff preferred a Letters Patent Appeal. The question arose whether Cl. 1 5 of the Letters Patent applied. The Full Bench held that a Letters Patent Appeal lay. Ramesam, JJ. observed (at page 572) as follow-, :

'Secondly, Mr. Ramabhadra Ayyar contended that under Order 43, Rule 1, the order of Pandalai, J. was final and no Letters Patent Appeal lay against his order. This question was the subject of consideration by several Judges of this Court under the Old Code and though at one time a different rule prevailed, ride Vasudeva Upadhya v. Viswaraja Theertha Samy, (1897 ILR 20 Mad 407) after the Full Bench decision in Chapman v. Moidin Kutti (1 899 ILR 22 Mad 68); which was a decision of Six Judges and where all the prior cases were considered and the later case Muthuvaien v. Periyasami Iyer, (1903) 13 Mad LJ 497 the practice of this Court has been uniformly to hold that the Civil Procedure Code does not control the Section of the Letters Patent, and that principle has been applied in other decisions of this Court, for example, Dhanaraju v. Bala Kishadass Motilai, AIR 1929 Mad 641 (FB). It is true that the Allahabad High Court has been always following a different rule under the New Code and under the old code, but the practice of this Court has been different. There is nothing in the language of the, New Code to show that the Legislature intended to lay down a principle different from that in the Old Code. The preliminary objections are over-ruled.'

16. Similarly Anantakrishna Ayyar, J, Observed (at page 576) follows: -

'The question whether an appeal lies under Cl. 15, Letters Patent, against the judgment of a single Judge of the High court based on an appeal preferred to the High Court under O. 43, C.P.C. (corresponding to. S. 588 of the earlier Cqde) has been the subject of discussion in some cases in this Court. The decision of Boddam and Bhashyam Ayyangar, JJ. in Muthuvaien v. Periyasami Iyer, (1903-13

Mad LJ 497) is directly against the contention raised by the respondents before us. The learned Judges, after noticing the reasoning of the Full Bench of this Court; in the case reported in Chapman v. Moidin Kutti, (1899 ILR 22 Mad 68) and of the Privy, Council decision in Hurrish Chunder v. Kali Sundarl, (1883) ILR 9 Cal 482: 10 Ind App 4, and of the decision of a Bench of this Court in Sabapathi v. Narayana Swamy, (1902 ILR 25 Mad 555) came to the conclusion that the provisions of the Letters Patent prevail, and that an appeal lay from the judgment of one Judge of the High Court in such cases. It was remarked that the prohibition contained in the C.P.C. related only to the entertainment of a further appeal by another Court of a higher grade in such cases, and that the provision of the Letters Patent conferring a right of appeal from the judgement of one Judge of the High Court to the same Court were not in any way interfered with by the provisions of the C.P.C.

That view has been accepted all along in this Court, though the Allababad High Court would seem to be of a different opinion, Muhmmed Nalmullah Khan v. Ihsan URah, (1892) ILR 14 All 226 (FB), (Sri Kishan v. Ishry, (1892) ILR 14 All 223 appears to be a mistake); and Piarilal v. Madanial, (1917) ILR 39 All 191 : (AIR 1917 All 325(2)). Having considered the provisions of S. 588 of the old Code on the one hand and S. 104 and O. 43 of the present Code on the other, 1 do not think that there is any sufficient ground for holding that the decision in Muthuvaien v. Periyasami Iyer, (1903-13 Mad LJ 497) should not govern judgment passed under the present C.P.C., by a learned Judge of this Court in an appeal preferred under O. 43, Civil P.C. I have no hesitation in . overruling the preliminary objection.'

Thus, against an appellate order in a C.M.A. arising under O. 43, R. 1 and S. 104(1), C.P.C. a Letters Patent Appeal was maintainable notwithstanding S. 104(2), C.P.C..

17. I shall now refer to the judgment of Boddam and Bhashyam, lyengar, JJ., in Muthuvaien's case. In that case also a CMA was preferred to the High Court against the order of the learned subordinate Judge anda further appeal was sought to be preferred under Cl. 15 of the Letters Patent to a Division Bench,

against the order of the learned single Judge. The Division Bench after referring to the Privy Council case in Harish Chunder v. Kali Sundari, (1883 ILR 9 Cal 482) and of the Madras High Court in Sabapathi v. Narayana Swamy, (1902 ILR 25 Mad 555) and to Ss. 588 and 585, C.P.C. observed that the word line used in the said provisions did not prohibit a Letters Patent Appeal to a Division Bench. It was observed :

'The word 'final' is used in the section simply in the sense that there shall be no second appeal to a Court of a higher grade and in this view it is not inconsistent with the provision made by S. 15 of the Letters Patent in appeals from the judgment of one Judge of the High Court to the High Court. We therefore overrule the preliminary objection.'

18. The Nagpur High Court in Ganapati v. Pilaji, AIR 1956 Nag 211, was also dealing with a Letters Patent Appeal preferred against an order of a learned single Judge who in his turn dismissed an appeal under O. 41, R. 11, C.P.C. That appeal before single Judge arose out of an order passed by the District Judge in regard to recording of a compromise. the question arose whether S.104(2), C.P.C. was a bar to a further appeal to a Division Bench. Hidayatullah, C. J. and Sen, J. referred to the Full Bench decision of the Madras High Court in Paramasivan v. Ramasami, (AIR 1933 Mad) above mentioned and to the cases referred to therein by Ramesam, J. and to the decision of the Privy Council in Harish Chunder v. Kali Sundari,. (1883 ILR 9 Cat 482) case. Apart from these decisions they gave a further reason to the effect that S. 104 applied only to appeals to the High Court from subordinate Court but now to appeals from a single Judge of the High Court to a Bench. For the purpose of this additional reason they referred to the statement of law in Mulla C.P.C. as also a decision of the Bombay High Court in Vamn Ravji v. Nagesh Vithnu, (AIR J940 Born 216) decided by -Wadia and Lokur, JJ. for the proposition that S. 104 applied to appeals to the High Court from subordinate Courts but not to appeals under cl. 15 of the Letters Patent from order of a single Judge. The Nagpur High Court also relied upon the decision of a Division Bench of the Allahabad High Court in Ramsarup v. Kaniz Ummehani, (AIR 1937 All 165). So far as the judgment of Bombay High Court in Vaman Ravji's case, AIR 1940 Bom 216, is concerned, that was a case of an appeal preferred

against the order of Norman, J. in an appeal from an order of the District Judge. The Bombay High Court observed that in view of S. 4, C.P.C. the provisions of S. 104 did not apply to the Letters Patent jurisdiction which was a special jurisdiction. They also referred to the Full Bench of the Madras High Court in Paramasivan Pillai's and to the judgment of the Privy Council'. It was observed that a Judge of the High Court sitting single was not a Court subordinate to the High Court and that, therefore, S. 104(1)(2) did not apply.

19. Coming to the judgment of the Allahabad High Court in Ramsarup's case (AIR 1937 All 165) the position is that a Letters Patent Appeal was preferred against an order of Allsop, J. who disposed of a first appeal arising out of an order under O. 39, R. 1 from a subordinate Court. Referring to the objection under S. 104(2) of the C.P.C., Sulaiman, C.J. and B0ennet, J. held that a Letters Patent Appeal lay. They referred to S. 4(1), C.P.C. and distinguished Piarilal's case (AIR 1917 All 325(2)) on the ground that it was decided under the old code and because Cl. 10 of the Utters Patent was amended in 1929. They also distinguished the Full Bench decision of the Allababad High Court in Muhmmed Naimul Khan v. Ihsan Ullah, (1892 ILR 14 All 226) on the ground that the point 'decided in the said Full Bench was different though there were certain observations to the effect that a Letters Patent Appeal would not He because of the provisions of C.P.C.

20. From the above discussion it is clear that the Madras High Court in Paramasivan's case (AIR 1933 Mad 570) (FB) dissented from Piarilal's case and Muhmmed Naimul Khan's case. The Allahabad High Court in Ramsarup's case distinguished Piarilal's case and Muhmmed Naimul Khan's case and took a different view. The Nagpur High Court in Ganapathi v. Pilaji, (AIR 1956 Nag 2l 1) relied upon the Madras Full Bench in Paramasivan v. Ramasami and the decision of the Allahabad High Court in Ramsarup v. Kaniz Ummehani and the decision of the Bombay High Court in Vaman Ravji v. Nagesh Vishnu, (AIR 1940 Bom 216).

21. As things stood thus, the Supreme Court in the year 1981 -in Shah Babulal Khimji's case AIR 198 1 SC 1786 has specifically. approved Muhmmed Naimul Khan's case and Piarilal's case and overruled the decision of the Allahabad high Court in Ramsarup's case and of the Bombay High Court in Vaman Ravji's case

(AIR 1940 Bom 216) (vide Paras 41, 42, 43, 61 and 62). It is the effect of- the above view taken by the Supreme Court is the next question

22. It will be seen that the Supreme Court has accepted Muhmmed Naimul's case (1892 ILR 14 All 226) (FB) and Piarilal's case (AIR 1917 All 325(2)) which were not accepted by the Madras High Court in Paramasivan's case (AIR 1933 Mad 570) (FB). The Supreme Court has also overruled the latter Allahabad riding. in Ramasarup's case (AIR 1937 All 165). It may be noted that in Ramasarup's case the learned Judges distinguished Muhmmed Naimul Khan's case and Piarlial's case and did not follow the same. Again, the Supreme Court also overruled Vaman Ravji's case which followed the Madras Full Bench in Paramasivan's case.

23. In my view, the obvious effect of the Supreme Court judgment is to overrule the Madras view in Paramasivan's case; the Allahabad view in Ramsarup's case; the Nagpur view in Ganapathi's case (AIR 1956 Nag 21 1) and the Bombay view in Vaman Ravji's case. . The Supreme Court must be taken to have accepted the view of the Allahabad High Court in Muhmmed.Naimul Khan's case and Piarilal's case (AIR 1917 All 325(2)). I may also point out further that the Supreme Court specifically proved the decision of the Lahore High Court in Ruldu Singh v. Sanwal Singh, (AIR 1922 Lah 3M2)) and of the Calcutta High Court in Lea Badin V. Upendra Mohan Roy Choudary, AIR 1935 Cal 361 and also the decision of the Full Bench of the Calcutta High Court in Sundari Dassi v. Haran Chandra Shaha, (1916) ILR 43 Cat 857 : AIR 1916 Cat 361.

24. I have already referred to the facts in Paramasivan's case (AIR 1933 Mad 570) Ramsarup's case; Ganapathi's case and Vaman Ravji's case. It is obvious that in the above cases it was held that a Letters Patent Appeal lay against a judgment in a CMA disposed of by a single Judge of the High Court in an appeal preferred under O. 43, R. 1 read with S. 104(1) C.P.C. against an order of a Court subordinate to the High Court. It is therefore clear that after the judgment of the Supreme Court in Shah Babulal Khimji's case AIR 198 1 SC 1786 no Letters Patent Appeal can lie against C.M.As. disposed of by the learned single Judges of the High Court in appeals preferred to the High Court under O. 43, R. 1 read with S. 104(1), C.P.C. against the orders passed by the Sub Court or District Court.

25. There are also clear observations in the judgment of the Supreme Court in Shah Babulal Khimji's case to this effect. In that case (in Para 39 of A.I.R .at page 1 197) it is observed :

'Secondly a perusal of Cl. 15 of the Letters Patent of the Presidency High Court and identical clauses in other High Courts, discloses that there is nothing to show that the Letters Patent ever contemplated that even after one appeal lay from a subordinate Court to the single Judge, a Second Appeal would again lay to a Division Bench of the Court.'

And again in Para 40 (at page 1797 of A.I.R.)

'A perusal of the Letters Patent would clearly reveal two essential incidents:-

1 . .....

1. that where the trial Judge decides an appeal against a judgment or decree passed by the District Courts in the muffasal, a further appeal shall lie only where the Judge concerned declares it to be a fit one for appeal to a Division Bench.'

and again in Para 41 (at page 1797 of AIR)

'A further second appeal lying to a Division Bench from an appellate order of the trial Judge passed under O. 13, R. 1 is wholly foreign to the scope and spirit of the Letters Patent.'

26. The above statement of law is clearly finding on me and I cannot therefore hold hat a further Letters Patent lay against my order in the CMA passed in an appeal under 43, R. 1, C.P.C. 27. It is, however, argued by the learned counsel for the respondent that the Supreme Court was dealing only with a question of an internal appeal lying to a Division Bench 1rom an order passed by a learned single Judge of the High Court exercising original side jurisdiction of the High Court. It is also pointed out that the Supreme Court in various paras. clearly observed that S. 104 did not override the Letters Patent nor did the Letters Patent overrule S. 104. It was also pointed out that the other learned Judge A. P. Sen, J. who rendered a concurring judgment has referred to the provisions of S. 100-A of the C.P.C. alone

as overriding the provisions of the Letters Patent in view of specific non obstante clause in S. 100-A viz. 'notwithstanding anything contained in any Letters Patent' and that in view of S. 4(1) of the C.P.C. the provisions of S. 104(2) are not attracted and do not override the express provisions in Cl. 15 of the Letters Patent giving a right of appeal against first appellate orders passed by single Judges of the High Court under O. 43, R. 1, C.P.C. It was also argued by reference to the recent decision of Madon, 3. of the Supreme Court in Uniaji v. Radhikabai, : [1986]1SCR731 that except cases falling under S. 100-A, C.P.C., the other provisions in Cl. 15 of the Letters Patent relating to appeals against orders were left intact in view of S. 4, C.P.C. On this basis, it is argued that the first part of Cl. 1 5 providing appeals against C.M.As. filed under O. 43, R. 1, still holds good and that after 1976, it is only the second part of Cl. 15,of the Letters Patent dealing with Letters Patent Appeals against second appellate orders that is abrogated in view of S. 100-A, C.P.C.

27. It is true that in Shah Babulal'.s case AIR 198 1 SC 1786 stated, after referring to, S. 4(1), C.P.C. (at page 1825), A. P. Sen, J. observed :

'It may be pertinent to point out in this connection that by incorporating S. 100-A in the Code (by the Amending Act 104 of 1976, S. 38), the Legislature has thought it fit to interfere with the right of appeal in certain cases, even if such right had been conferred by Letters Patent or any other law.'

It is also true that in the recent case in Umaji v. Radhikabai rendered by Chinnappa Reddi and Madon, JJ.'observed (at page 1314) . -

'The position which emerges from the above discussion is that under Cl. 15'tf the Letters Patent of the Chartered High Courts, from the judgment (within the meaning of that therein as used in that clause) of a single Judge of the High Court, an appeal lies to a Division Bench of that High Court and the 're is no qualification exercised by a single Judge while passing his judgment, provided an appeal is not barred by any statute (for example S. 100-A of the Code of Civil Procedure, 1908) and provided the conditions laid down by Cl. 15 are fulfilled.'

and the above observations of A. P. Sen, J. and Madon, J. do lend colour to the contention that except as to what is abrogated by S. 100-A of the C.P.C. the rest of Cl., 1 5 is left intact, and that S. 104(2) which does not contain a 'non obstante clause' like S. 100-A does not have the effect of precluding Letters Patent Appeals against first appellate orders passed by a learned single Judge against orders .of the Courts subordinate to the High Court. But, in my view, thee express overruling of the decision of the Allahabad High Court in RamSarup's case (AIR 1937 All 165) and the approval of Muhmmed Naimul Khan's case (1892 ILR 14 All 226) (F3) and Piarlial's case (AIR 1917 All 325(2)), clearly leads to the irresistible conclusion that the Full Bench of the Madras High Court in Paramasivan's case (AIR 1933 Mad 570) is also impliedly overruled, inasmuch as the Madras High Court dissented from Muhmmed Naimul Khan's case and Piarlial's case. Hence the above contentions of the respondent cannot be accepted and it has to be held that S. 104(2), C.P.C. preclude a Letters Patent Appeal against orders in appeals under No. 43,C.P.C.

28. It is also true that the Supreme Court, in Shah Babulal's case AIR 198 1 SC 1786 was primarily concerned with the Letters Patents Appeals against orders of single Judges of the High Court on the original side and not first appellate orders under O. 43, R. 1, C.P.C. of single Judges. But, the Supreme Court has incidentally dealt with the maintainability of Letters Patent Appeals against first appellate orders of single Judges under O. 43, R. 1, C.P. C. and clearly overrules later judgments of the Allahabad High Court which hold that Letters Patent Appeals lay to Division Benches. The Supreme Court approved earlier Allahabad rulings which held that no such appeals lay. The Supreme Court specifically placed reliance on S. 104(2), C.P.C. as being the cause for prohibiting Letters Patent Appeals against first appellate orders of single Judges under O. 43, R. 1, C.P.C.

29. Further, it is no doubt true that the majority of the Supreme Court in Shah Babulal's case AIR 198 1 SC 1786 too, in several places, observed that S. 104 does not override and that it is not inconsistent with Cl. 15 of the Letters Patent and vice versa, but these observations cannot help the respondents to contend that in view of S. 4, C.P.C. the entire jurisdiction under Cl. 15 is left intact except to

the extent abrogated in S. 100-A, C.P.C. It must be held that the Supreme Court construed S.104(2), C.P.C. as precluding a Letters Patent Appeal even against first appellate orders of single Judges of the High Court passed in appeals arising under 0. 43, R. 1, read with S. 104(1), C. P.C. I may also stated that Lp. Anno. 25, 26/86, D/'- 27-2-1987 Raghuvir and Sriramulu, JJ. also held so but for different reasons. So did the Full (Division ?) Bench of the Gujarat High Court in Madhusudhan Vegetable Products Ltd. v. Rupa Chemicals, : AIR1986 Guj156 and a Full Bench of the Kerala High Court in Fr. Abraham Mathews v. Illam Pillai, : AIR1981 Ker129 (FB).

30. It is equally true that the Supreme Court in Shah Babulal's case approved an earlier ruling of 1971 of the Supreme Court in Radhey Shyam v. Shyam Behari Singh, : : [1971]1SCR783 (vide Paras 56 and 105). In that ease, two learned Judges of the Supreme Court had held following the later Allahabad view in Ram Sarup's case (AIR 1937 All 165) that against an order of a single fudge of the High Court made in appeal under :). 43, R. 1, C P.C. from a subordinate Court i.e. in a case relating to O. 2 1, R. 90, C. P.C. Letters Patent Appeal was maintainable. It is no doubt somewhat possible to argue that while Ram Sarup's case is expressly overruled (in Paras 38 to 41) in Shah Babulal's case, the Supreme Court had specifically approved Radhay Shyam's case : [1971]1SCR783 which approved Ram Sarup's case. But, in my view, the reference to Radhey Shyam's case in Shah Babulal's case is more in the context of what is a 'judgment' for purposes of Cl. 15. Therefore, it cannot be contended that Ram Sarup's case is good law.

31. It is then argued for the respondent that even if the appellate order of the single Judge is not appealable as an 'order', it is still appealable as a 'judgment' under Cl. 15 of the Letters Patent and that S. 104(2) does not then apply. It is also pointed out that there is a saying clause not only in S. 4, C.P.C. but also S. 104(1), C.P.C. I am of the view that, in the face of the express overruling of Ram Sarup's case these arguments, cannot avail.

32. For the aforesaid reasons, I hold that a Letters Patent Appeal did not lie against my orders dt. 30-9-86 disposing of the CMA filed by the petitioner under O. 43, R. 1, 'C.P.C., against the order of the District Court refusing to grant temporary

injunction under 0. 39, R. 1, C.P.C. Consequently, I hold that O. 47, R. 1(1)(a) and (b) do not come in the way of the petitioner filing this review petition. The review petition is accordingly maintainable. Point No. 1 is therefore held in favour of the petitioner and against the respondent.

33. Point No. 2 : This point has to be decided by the combined application of S. 6 of the Transfer of Property Act read with S. 52 thereof.

34. I am deciding this question afresh even though I decided the same question against the petitioner when I decided the CMA on 30-9-1986. As I have held that the review petition is maintainable, I am dealing with the fresh submissions of the appellant counsel, Sri. C. Poornaiah, I have set out this facts in my main judgment dt. 30-9-1986 but shall recapitulate them briefly, for the purpos4 of deciding this point. One Yaseen Bi is the sister of the defendant-respondent Abdu Rasool. These two persons were co-owner of the suit mulgi, having jointly acquired under a settlement dt. 18-7-1973. The have-equal shares. Both of them executed a usufructuary mortgage in favour of the appellant (plaintiff) on 9-4-1974. Thus the appellant came into possession of the mulgi AS A USUFRUCTUARY MORTGAGEE. Later, Yaseen Bi the co-mortgagor died and left behind her, certain heirs who did not co- operate with the defendant Abdul Rasool for redeeming the mortgage. Therefore, the defendant filed OS. No. 65/1979 for redemption of the entire hypotheca and POSSESSION of the ENTIRE MULGI against the appellant (who was the mortgagee) and irnpleaded the legal representatives of Yaseen Bi also as defendants. The appellant set up an alleged agreement of sate in his favour by all the mortgagors but that plea was rejected by the learned District Munsif and the suit for redemption was decreed on 31-8-1981. An appeal A.S. No. 57/82 to the District Court faded and a second appeal SA. No. 908/82 was dismissed on 22-6-1984.

35. The defendant then filed E.P. No. 24/1982 for redemption and possession of the ENTIRE MULGI. In fact, a decree for possession of the entire mulgi (and not merely the plaintiff's half share) was granted, exclusively for the defendant as against the appellant-rnortgagee.

36. At that stage, one Abdul Gafoor filed E.A. No. 32184 claiming to be a tenant but his plea was rejected on 22-1-1985 and his C.R.P. No. 239/85 was dismissed on 15-7-85. Then the heirs of Yaseen Bi filed O.S. No. 1 of 1985 on the file of the District Munsif's' Court, Tandur against the defendant and also against the mortgagee-appellant for partition and possession of a half share. Pending suit, they filed E.A. No. 2/85 for injunction for restraining the respondent from executing the redemption decree in O.S. No. 65/79. The I.A.. wa's dismissed and C.R.P. No. 1418/85 was also dismissed on 24-12-1985. By that date, the heirs of Yaseen Bi had alienated their share to the appellant- mortgagee on 5-9-1985. The heirs of Yaseen Bi preferred A.S. No. 11 of 1986 to the Sub Court, Vikarabad and the same is pending.

37. The appellant then filed O. S. No.6of, 1986 in the Sub Court, Vikarabad for partition and I.A. No. 137186 for injunction to restrain execution by the respondent of the redemption decree but the same were transferred to the District court ,Ranga Reddi- District and renumbered as O.S. No. 3/86 and IA. 604/86. The I.A. was dismissed on 28-8-86 and against that Order the present C.M.A. has been filed under O. 43, R. 1 C.P.C.

38. The point raised is that after the purchase of a half share in the hypotheca by the usufructuary mortgagee (appellant- petitioner on 5-9-85 from the co-mortgagors (heirs of Yaseen Bi), the defendant-co-mortgagor cannot redeem and get possession .of the ENTIRE MULGI but that he has to redeem ONLY HIS HALF SHARE of the mulgi under the LAST CLAUSE of S. 60 of the Transfer of Property Act inasmuch as the inasmuch as the integrity of the mortgage was broken consequent mortgagee acquiring a half share of the hypotheca on 5-9-85 from the heirs of Yaseen Bi. This contention appears to he plausible but cannot stand scrutiny.

39. In my earlier judgment dismissing this C.M.A. on 30-9-M, I relied upon a judgment -of a Division Bench of the Allahabad High Court in Dildar v. Shukr-ullah (AIR 1924 All 444(2)) that the mortgagee-purchasers in possession could not retain possession before first handing back possession to the redeeming Co-mortgagor, in respect of the entire hypotheca and that he should later sue for

possession of his half share. I held that the mortgages possession originally being QUA mortgage he should first surrender back possession and then sue for partition and possession of his half share.

40. It is however argued for the appellant by Sri C. Poornaiah that the above judgment is not good law in view of a later judgment of the Allababad High Court in Ahmad Hussain v. Md. Quasim Khan, AIR 1926 A1146. In the latter cm it was held that once the mortgagee purchased a share of the hypothea from co-mortgagers, it was not possible for the other co-mortgagms to try to redeem and obtain possession of the cadre hypotheca but that they have to sue for partition and possession of their share of the hypotheca.

41. In my view, the latter derision in Ahamad Hussain v. Md. Quasim Khan, AIR 1926 All 46 is distinguishable. The point is that, there the alienation in favour of the mortgagee, of a share of the hypotheca was BEFFORE THE SUIT FOR REDEMPTION, whereas in the me before me, it is pending suit - in fact, after the decree for redemption - and hence under S.52, T.P. Act the principle of lis pendens applies first and the mortgagee has to give up possession, QUA MORTGAGE, to the redeeming CO. mortgagor and he has then to sue for partition and possession. He cannot drive the Co- mortgagor who has already filed the, suit for redemption to a fresh suit for partition and possession. In Dildar's case the learned Judges held in favour of the redeeming co-mortgagor's right to recover the entire hypotheca, stating that it was not clear whether the alienation in favour of the' mortgagee in that case was before or redemption. Further. there is a direct case of a Division Bench of the Bombay High Court in Naro Hari Bhave v. Vithalbhai md CCL, (IM6) ILR 10 Born 6M, where the alienation by some of the Co-mortgagors m favour of the Mortgagee was AFTER THE SUIT for, redemption was filed and the latter part of S. 60 of the Transfer of property Act was not applied but S. 52 was applied and the possession of the entire hypotheca was given to the redeeming co-mortgagor and the mortgagee was driven to a suit for partition and possession. It was observed:

'..... as the plaintiffs were clearly entitled, at the time when the suit was instituted, to redeem the WHOLE, that right ought not to be affected by the

conduct of the defendant POST LITEM MOTAM ..... they cannot force the plaintiff to 'a proper suit for partition.'

The above decision was quoted with approval by the Madras High Court in Thlial Chetti v. Ramanatha Ayyar, (1897) ILR 20 Mad 295.

42. Therefore, while it is true that under the last para of S. 60. Of T.P. Act, the co-mortgagor cannot redeem the entire hypotheca, and has to redeem only the mortgagor's share, that, principle does no apply it, the purchase of a share by the mortgagee is AFTER THE FILING OF THE SUIT for redemption by the co-mortgagor. In that case, the Co-mortgagor can sue for redemption and possession of the ENTIRE HYPOTHECA and the mortgagee cannot cling on to the possession of the property by purchasing after suit a share of the hypotheca however small, from the now redeeming co. mortgagors. In the event. he is subject to S. 52, T.P. Act and has to first surrender possession of the entire, hypotheca QUA- MORTGAGE and then sue for partition and possession. I, therefore, hold point No. 2 against the appellant-petitioner.

43. The Review Petition is allowed but the appeal again fins on merits and is dismissed with costs.

44. Petition allowed.