

Precision Technofab and Engineering Pvt. Ltd. Vs. State of M.P. and ors.

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Court : Madhya Pradesh

Decided On : Dec-16-2005

Reported in : 2006(1)MPHT246; 2004(3)MPLJ541

Judge : Dipak Misra, ;U.C. Maheshwari and ;Ravi Shankar Jha, JJ.

Acts : Madhya Pradesh Uchh-Nyayalaya (Letters Patent Appeals Samapti) Adhiniyam, 1981 - Sections 1, 2 and 2(1); Government of India Act - Sections 107 and 108; Madhya Pradesh High Court Rules - Rules 10, 11 and 12; Madhya Pradesh High Court Orders; [Constitution of India](#) - Articles 226 and 227

Appeal No. : Letters Patent Appeal No. 166/2004

Appellant : Precision Technofab and Engineering Pvt. Ltd.

Respondent : State of M.P. and ors.

Advocate for Def. : S.K. Yadav, Dy. Adv. General for the Respondent Nos. 1 to 5 and ;A.K. De, Adv. for the Respondent No. 6

Advocate for Pet/Ap. : Kishore Shrivastava, Sr. Adv. and ;Prem Francis, Adv.

Disposition : Appeal dismissed

Judgement :

Dipak Misra, J.

1. What would have been a matter of interesting debate as regards expressing an opinion because of the difference between two of our esteemed peers that had emerged relating to grant of State largess and the non-justiciability of it because of contractual spectrum and the justiciability of the same because of incurable and unacceptable irregularities that had cropped up while granting a contract in favour of a private respondent, the respondent No. 6 herein (with the efflux of time and change in law it has invited a converted scenario as we proceed further to delineate in course of our decision) pales into insignificance, for a thing that being with bang always does not end with bang, but may, due to different reasons, ends with a whimper on which one has no control.

2. We need not state the facts in detail, except stating that a writ petition under Article 226 of the [Constitution of India](#) forming the subject-matter of W.P. No. 382/2004 was filed at the Gwalior Bench and the learned Single Judge dismissed the writ petition recording his conclusion in Paragraph 23 as under:-

23. Considering the facts and circumstances of the present case in the backdrop of the aforesaid legal principle, it can not be said that the decision taken by the High Powered Review Committee is vitiated by any illegality or arbitrariness. There is nothing on record except certain vague statement made by the petitioners to indicate that the decision was taken in arbitrary or illegal manner. Even though, there are certain observations made by the Chief Engineer and other authorities but in view of the fact that Progressive Review Committee consisting of senior officials of the State have applied their mind and have given cogent reasons for accepting the tender of respondent No. 6, the aforesaid argument can not be accepted.

3. After the writ petition was dismissed by order dated 2-8-2004 a Letters Patent Appeal under Clause 10 of Letters Patent came to be filed before the Division Bench. S.S. Jha, J. concurred with the judgment rendered by the learned Single Judge and came to hold in Paragraph Nos. 9 and 10 as under:-

9. In the present case, after going through the entire record and the minutes of the meeting of the Progress Review this Court does not find any infirmity in the order passed by the Single Bench. Expert body has considered the tenders of the

appellant as well as respondent No. 6 and has decided to award works contract to respondent No. 6. It has recorded reasons for awarding contract to respondent No. 6. We are of the opinion that no case is made out for interference with the reasoned order passed by the learned Single Bench.

10. In the result, this appeal has no merit and is dismissed with costs. Consequently, interim order is vacated. Counsel's fee is quantified at Rs. 1000/- (Rs. One thousand).

4. A.K. Gohil, J. expressed his inability to concur with S.S. Jha, J. and formulated the opinion in Paragraph 32 as under :-

32. Thus, in view of the foregoing discussion this appeal and the petition both are allowed and the decision of the respondent Nos. 1 to 5 including PRC and of learned Single Bench is set aside and it is directed that the respondents and PRC shall re-examine the matter afresh in the light of the foregoing discussion and observations made and after considering the objections raised by the appellant and the note of Chief Engineer dated 29-10-03, Secretary, Water Resources Department, dated 30-10-2003 and financial agenda note shall decide the question of awarding of contract judiciously in accordance with law. Parties to bear their own costs.

5. Ordinarily we would have dwelled upon the facts depicted and updraped but we are not disposed to do the same for the simon pure reason, when initially we made a query to Mr. Kishore Shrivastava, learned Senior Counsel being assisted by Mr. Prem'Francis whether after the decision rendered by the Apex Court in the case of Jamshed N. Guzdar v. State of Maharashtra and Ors. : AIR 2005 SC862 , whether there is jurisdiction to advert to merits of the case. Mr. Kishore Shrivastava, learned Senior Counsel raised the following contentions to bolster the stance that the said decision does not create any kind of impediment for adjudication of the matter on merits. In this backdrop, we feel it obligatory to put forth the contentions raised by him in seriatim and dwell upon them.

6. Accordingly, we proceed to enumerate the contentions :-

(a) Though the LPA has been placed before the Full Bench it is not exactly or precisely a LPA but a reference to be answered in accordance with the terms contained in Clause 26 of the Letters Patent which lays a postulate that a reference is to be answered by expressing an opinion by taking recourse to different types of modes or methods so that, the lis in question is put to rest.

(b) Though Clause 10 of the Letters Patent has been repealed by virtue of the Madhya Pradesh Uchh-Nyayalaya (Letters Patent Appeals Samapti) Adhiniyam, 1981 (for brevity 'the Act') Clause 26 has not been repealed and, therefore, the present case has to be treated as a matter of reference which would required to be answered and not to be thrown overboard on the ground that letters patent appeal is not maintainable by virtue of the aforesaid repealed enactment.

(c) When the Judges constituting the Division Bench differ in their opinion the LPA was maintainable and they could have decided on that day but as the same has remained undecided it has lost the status of an LPA (because of difference of opinion).

(d) There are three kinds of references under the M.P. High Court Rules & Orders, namely, a reference under Rule 11 read with Clause 26 of the Letters Patent and Rule 12 of the Rules occurring in Chapter I and the present case should be treated as a reference in the second category.

(e) Though the Repeal Act came into force in the year 1981 and only save the appeals that had been filed by the commencement of the aforesaid statute yet by virtue of the decision rendered in the case of Balkrishna Das and Ors. v. Perfect Pottery Co. Ltd. Jabalpur and Ors. : AIR 1985 MP42 , the appellants were heard by this Court by virtue of which LPAs were saved and decided on merits till the Constitution Bench judgment of the Apex Court came into the field and there is no observation anywhere the judgment delivered during the interregnum period would be treated as a nullity and, therefore, the present LPA should be heard as on date, as if the Apex Court judgment has not come into being and quite apart from the above, there being difference of opinion it has earned the status of a reference under High Court Rules and Orders.

(f) If no opinion is expressed by the Full Bench, difference of opinion between the Judges who constituted the Division Bench would remain on record and the same has to be taken into consideration for constituting the majority view under Clause 26 of the Letters Patent.

7. Mr. S.K. Yadav, learned Deputy Advocate General appearing for the respondent Nos. 1 to 5 combatting the aforesaid submissions contended that this Full Bench is in effect hearing the LPA and as the same is not maintainable any finding recorded by it would be totally unwarrantable for the Court does not record a finding in a case which is not maintainable and second the Court does not decide academic issues, the issue at hand has become totally academic when the proceeding before it itself is not maintainable. It is his further proponentment that the decision rendered in the case of Jamshed N. Guzdar (supra) has not saved any appeal and, therefore, the contention that the appeal was maintainable when it was decided and the finality being not attached to it, can be taken up as a reference in aid and assistance of Clause 26 of the Letters Patent, is a submission which deserves to be repelled.

8. Mr. A.K. De, learned Counsel appearing for the respondent No. 6 has adopted the submissions urged by the learned Deputy Advocate General for the State.

9. To appreciate the rival submissions raised at the Bar, we would like to refer to Clause 10 of Letters Patent. It reads as under :-

10. Appeal to the High Court from Judges of the Court.- And we do further ordain that an appeal shall lie to the said High Court of Judicature at Nagpur 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 the 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 the exercise of the powers of superintendence under the provisions of section one hundred and seven 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 section one hundred and eight of the Government of India Act and that notwithstanding anything hereinbefore 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 section one hundred and eight of the Government of India Act, made 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 Judge of the said High Court or of such Division Court shall be to Us, Our Heirs and Successor in Our or Their Privy Council, as hereinafter provided.

10. Clause 26 which according to Mr. Shrivastava has to be read with Chapter 1, Rule 11 of the High Court Rules and Orders reads as under :-

26. Single Judges and Division Courts.-

And we do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Nagpur in the exercise of its original or appellate jurisdiction may be performed by any Judge or by any Division Court, thereof appointed or constituted for such propose in pursuance of section one hundred and eight of the Government of India Act: and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but if the Judges be equally divided they shall state the point on which they differ and the case shall then be heard upon that point by one or more of other Judges and the point shall be decided according to the opinion of the majority of Judges who have heard the case including those who first heard it.

11. Submission of Mr. Shrivastava is that Clause 26 having not been repealed has to be given due weightage and the Court should not treat as if it has become absolutely ineffective. The learned Senior Counsel has read various p-paragraphs from the decision rendered in the case of Ladhuram Rameshwardayal (Firm) v. Krishi Upaj Mandi Samiti, Shivpuri and Ors. 1977 MPLJ 641, to buttress his contention. Whatever may be the factual score therein, we would straightway go to Para 20 where the Full Bench has recorded its conclusions. The said paragraph

reads as under :-

20. In the result, we answer the two questions referred to us as follows:-

(1) When on account of difference of opinion between two Judges constituting a Division Bench, a matter is referred to a third Judge nominated by the Chief Justice under Rule 11 of Chapter I of the High Court Rules and the third Judge, after formulating the point or points of difference of the Judges of the Division Bench, returns his opinion under Clause 26 of the Letters Patent, any other Division Bench of which one or both of the Judges were not members of the Division Bench which originally heard the case, can render the decision in accordance with the majority of the opinion of the Judges of the referring Bench and the referee Bench.

(2) When on difference of opinion between two Judges constituting a Division Bench, a matter is referred to a third Judge, the third Judge can only express his 'opinion' on the 'point' on which the Judges are divided in opinion. However, the third Judge can not 'decide' that point. (He has to leave to the Division Bench to 'decide' the point as directed under Clause 26 of the Letters Patent). Nor can he enter into any other point on which the Judges of the Division Bench were not divided in opinion. If the third Judge expresses his opinion on any other point or finally decides the case as a whole, the later part of his opinion (be it styled as 'order' or 'judgment') has to be ignored as without jurisdiction. After the third Judge has recorded his opinion, the case must be laid before the Division Bench for deciding the point or points which were referred to the third Judge according to the method provided by Clause 26 of the Letters Patent and it is at this stage that a Division Bench will finally decide the case before the same Division Bench which first heard it, after it is returned by the third Judge. When one of the Judges constituting the Division Bench which first heard the case, has retired or is not otherwise available, the Chief Justice can constitute another Division Bench to decide the case according to the method provided by Clause 26 of the Letters Patent.

12. At this juncture we may profitably refer to Rules 10, 11 and 12 occurring in Section 1(Chapter I) of the M.P. High Court Rules and Orders. They are as under

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10. If a Judge sitting alone considers that the decision of the proceedings pending before him involves reconsideration of a decision of two or more Judges [***] he may refer to the Chief Justice with a recommendation that it be placed before a Full Bench for a decision on a stated question or questions. The referring Judge shall dispose of the proceedings in accordance with the decision of the Bench on the question or questions referred to it.

11. When in any appeal or civil matter heard by a Bench of two Judges, the Judges composing the Bench differ on a point of law and state the point on which they differ the proceedings shall be placed before the Chief Justice for the purpose of nominating one or more of the other Judges to deal with the matter.

12. If a Bench of two Judges considers that the decision of the proceedings pending before them involve reconsideration of a decision of two or more Judges [***] they may refer the matters to the Chief Justice with a recommendation that it be placed before a Full Bench. The referring Judges may refer a stated question or questions or may ask that the proceeding be heard and decided by the Bench in which it is referred. If the referring Judges refer a stated question or questions they shall dispose of the proceeding in accordance with the decision of the Full Bench on the question or questions referred to it.

13. Contention urged by Mr. Shrivastava is that when the two Judges had differed it is permissible under Clause 26 to refer the matter to a third Judge or to a Larger Bench but essentially and conceptually it is a reference and unless the reference is answered judgment rendered by two Judges would remain in force which would create a very piquant situation. Before we advert to the aforesaid submission of Mr. Shrivastava, we think it seemly to refer to Section 2 of the 1981 Act. The said provision reads as under :-

2. Abolition of appeal from judgment or order of one Judge of the High Court made in exercise of original or appellate jurisdiction.- (1) No appeal, arising from a suit or proceeding which includes a writ petition under Article 226 and/or Article 227 of the [Constitution of India](#), instituted or commenced, whether prior or subsequent to

the commencement of this Act, shall lie to the High Court from a judgment, order or decree of one Judge of the High Court, made in exercise of original jurisdiction or in exercise of appellate jurisdiction, in respect of a judgment, order or decree made by a Court subject to the superintendence of the High Court, notwithstanding anything to the contrary contained in Clause 10 of the Letters Patent of His Majesty dated the 2nd day of January, 1936 constituting High Court of Judicature at Nagpur, or any other law.

(2) Notwithstanding anything contained in Sub-section (1), all appeals pending before the High Court on the date immediately preceding the date of commencement of this Act shall continue to lie and be heard and disposed of as hereto before as if this Act had not been enacted.

14. It is highlighted by Mr. Shrivastava that there limited saving of an appeal but by virtue of the judgment rendered in the case of Balkrishna Das and Ors. (supra) the appeal continued and prior to the decision rendered by the Apex Court the appeals were heard on merits and decisions were rendered.

15. To appreciate the aforesaid submission of the learned Senior Counsel we have carefully scanned the anatomy of provision of Section 2. The said provision saves the appeal in a limited manner. The Apex Court in the case of Jamshed N. Guzdar (supra), has held that the enactment is valid. Their Lordships have not observed anything with regard to saving or prospective applicability. We only say so, as nothing has been saved therein. It is clear as day, while rendering the judgment the High Court has not power to say that the judgment will be prospective. The concept of prospective overruling or applicability rests only with the Apex Court. The said view has been expressed by the Apex Court in the cases of L.C. Golak Nath and Ors. v. State of Punjab and Anr. : [1967]2SCR762 and further reiterated in the case of Ashok Kumar Gupta and Anr. v. State of U.P. and Ors. : [1997]3SCR269 .

16. In view of the aforesaid we can not say that the said decision would have any kind of prospective applicability. However, we refrain from saying anything with regard to the appeals that were heard and decided during the interregnum period.

17. The real fulcrum and gravamen of the submission of Mr. Kishore Shrivastava, learned Senior Counsel for the appellant is that, it is not a LPA but a reference. To bolster his submission he has laid emphasis on Clause 26. We have produced Clause 26 hereinabove. What is really postulated in Clause 26, in our considered opinion, is basically adjective in nature. It does not really touch or dwell upon the substantive facet of law. To clarify, it mainly deals with how the opinion has to be given and how the decision will be rendered. These are basically procedural aspects. What really emerges for consideration is whether we are hearing a reference as per the High Court Rules and Orders or in essentiality and contextuality an LPA. Be it placed on record what is fundamental to the case at hand is that the Division Bench was hearing LPA. Be it noted that the Bench has not finally delivered a judgment on that day. They also could have referred the matter for consideration by a Larger Bench. Had the matter would have been referred to a Larger Bench, as we perceive, the Bench would still have been hearing only the LPA. In praesenti, if we answer the reference keeping the factual matrix in view, it would tantamount to rendering a decision in LPA.

18. It is trite law that when the appeal itself is not maintainable it is not obligatory on the part of the Bench to express an opinion. When the decision in the case of Jamshed N. Guzdar (supra) has come into the field clearly holding that the LPA is not maintainable, our rendering an opinion would be a Sisyphean endeavour for the simple reason, actually there is no jurisdiction on the part of this Court to decide the LPA. If it is not maintainable, any observation made therein would have no fruitful effect and in fact, in a way, would be totally unwarranted.

19. The further submission of Mr. Shrivastava is that if we would not answer the reference the difference of opinion between the Judges will stand. Such a submission has its own innovativeness and in a way, an intellectual exposition at a first flush but on a deeper probe and keener scrutiny, it has to melt into insignificance, for in the ultimate eventuate our opinion in answering reference would tantamount to rendering a decision in the LPA which we presently can not do in view of the Constitution Bench decision of the Apex Court. What is impermissible to be done, need not be dwelled upon for the sake of it. Be it placed on record the present Full Bench decidedly is called upon to decide the LPA, as

our agreement or disagreement would have really the effect and impact on the decision of the LPA which in praesenti, is not maintainable and not to be decided on merits. To say that differing opinions would still hold the field, in our considered opinion, is not correct and if we are permitted to say so, common sense does not give consent to it. What will stay in the field is the order of the learned Single Judge because deciding the appeal on merits which is well nigh impermissible because of the decision of Jamshed N. Guzdar (supra) would be an anathema to concept of maintainability.

20. The last plank of submission, of Mr. Shrivastava, learned Senior Counsel is that Section 2 of the Repeal Act though had a limited application, would get attracted to the present case. We really fail to fathom. We have no hesitation in holding that we are deciding the controversy in the present scenario in the obtaining factual matrix. We can not touch on merits the LPA. Any steps taken, any opinion expressed, any action done, any view put forth, any adjudication made and any conception concertised would be within the spectrum, prism, sphere and arena of the Letters Patent.

21. The further submission of Mr. Shrivastava that Clause 10 has been abolished and not Clause 26 of the Letters Patent, is without any kind of substratum. While repealing Clause 10 the Legislature has intended not to provide a further appeal and the Supreme Court has held that the Legislature has the competence. Clause 26 of the Letters Patent deals with how a reference has to be dealt with. To give an example, the matter relating to ultra vires of a provision is listed before a Division Bench. There can be difference of opinion and in that case, the mode, the method and the manner would come into play. Similarly in respect of matters which are to be adjudicated by the Division Bench in the first instance. But when the learned Single Judge has rendered the decision and the appeal is carried out and the appeal has not been given finality by virtue of difference of opinion and in the meantime, there is a judgment by the Apex Court that LPA is not maintainable, we have no hesitation in saying that the whole case sits in a time machine in all perspective, warranting a decision in an LPA, which is not maintainable.

22. Resultantly, we answer the reference on recording the following conclusions:-

(i) Submission of the learned Senior Counsel for the petitioner that it is a reference under Clause 26 and not an adjudication under Clause 10 of the Letters Patent, is sans substance.

(ii) Clause 26 though has not been repealed by the Legislature, covers a different spectrum altogether and it should not be read in juxtaposition with the Clause 10 of the Letters Patent which is no more in the statute book.

(iii) The judgment rendered in the case of Ladhuram Rameshwar Dayal (supra) was in different context and the same would not Come into play at this juncture, in view of the law laid down by the Apex Court in the case of Jamshed N. Guzdar (supra).

(iv) The submission that an opinion has to be expressed, failing which the difference of opinion between the two Judges would remain in existence, is totally bereft of substance.

(v) Even if no opinion is expressed by the Full Bench keeping in view the obtaining factual matrix and the change in law, no anomalous situation is created inasmuch as the LPA would deem to be non-existent in law from the very beginning/ab initio inasmuch as it was not really maintainable.

(vi) The submission that in the absence of opinion by the Full Bench difference of the opinion between the two Judges would remain in the field, is bereft of any merit on the basic foundation that when infrastructure collapses superstructure is bound to collapse inasmuch as when the appeal was not maintainable, opinion expressed by the two Judges would deem to be non-existent.

23. The reference is answered, accordingly. The LPA stands dismissed. Needless to emphasise, all interim orders passed in the LPA stand vacated.