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SooperKanoon Citation : sooperkanoon.com/852055

Court : Kolkata

Decided On : Jan-31-2003

Reported in : AIR2003Cal132,(2003)2CALLT165(HC)

Judge : Asok Kumar Ganguly and ;Debiprasad Sengupta, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 43, Rule 1

Appeal No. : G.A. No. 832 of 2002

Appellant : Barun Kumar Goswami and anr.

Respondent : Arun Kumar Goswami and anr.

Advocate for Def. : Dipak Shome, Sr. Adv. and ;C.S. Saha, Adv.

Advocate for Pet/Ap. : H.K. Mitter, Sr. Adv., ;Supriyo Bose and ;Soumen Sen, Adv.

Disposition : Appeal dismissed

Judgement :

Asok Kumar Ganguly, J.

1. The appellant is the Defendant No. 4 in a suit filed by the plaintiff/respondent No. 1 for cancellation of the deed of partition dated 31st July 1968 and for a declaration that the premises No. 12A. Lakshmi Narayan Mukherjee Lane and

12B, Anukul Mukherjee road are 'Debattar Properties' not liable to partition. There is alternative prayer also in the said suit.

2. The appeal is directed against an order dated 21st December 2001 by which the learned Judge of the First court after hearing the parties was pleased to allow an application for recall of the previous order dated 30th November 1999. The order dated 30th November 1999 was passed by the learned Judge admittedly on mentioning when the suit was not the list. By the said order, the learned Judge, upon hearing the submission made by the plaintiff/respondent No. 1 declared that the suit stands abated as a whole and as such the suit was dismissed and all interim orders stood automatically vacated in view of the said order of recording the abatement of the suit.

3. This appeal is mainly argued before us on the preliminary objection taken by Mr. Shom, the learned Counsel appearing for Rina, Adhya who wanted to be added as a party in the suit as her application for such addition was pending. The preliminary objection is that the appeal is not maintainable inasmuch as an order recalling a previous order recording the abatement of the suit is not a judgment within the meaning of Clause 15 of the Letters Patent.

4. From the perusal of the order under appeal the following facts appear :

The learned Judge of the First court by a previous order dated 30th November 1999 dismissed an application for substitution of the deceased plaintiff on the ground of non-prosecution of the said application. On such grounds of non-prosecution of substitution petition, the suit abated as the sole plaintiff died . But thereafter, an application was taken out by Smt. Rina Adhya for recalling the said order as she previously filed an application to be added as a party to the suit. Her application for addition as a party defendant was pending on the date of passing of the order of the abatement of the suit and interim order was issued on that application for addition. It also appeared from the record that the said order of abatement of the suit was obtained behind the back of Smt. Rina Adhya and without any notice being served upon her. The suit was not listed either, so Smt. Rina Adhya did not get any notice and the order as noted above, was passed on mere mentioning. The learned Judge also referred to another order dated 11th

June 1999 in the same proceeding by which another learned Judge directed that all applications pending in the suit namely the substitution application and the application for addition filed by Smt. Rina Adhya be heard one after another. The learned Judge held that Smt. Rina Adhya should have been heard before the order of abatement of the suit was recorded.

5. The learned Judge further held when any order has been passed without any notice to the persons who might be affected by such order, such order is a nullity and can be set aside at any stage whenever a complaint has been made. So even if the order of abatement of the suit has been drawn up and filed, the Court, has jurisdiction to recall the said order when an application has been brought within the period of limitation. The learned Judge noted that initially an oral application was made for setting aside the order of recording abatement of the suit and thereafter, within the period mentioned In the oral order an application was filed. The learned Judge also held that in making the application no fraud was practised by Rina Adhya. As such the learned Judge allowed the application for recall and the order dated 30th November 1999 was recalled and it was directed that all applications be placed in the list before the appropriate bench and it was further directed that it would be open for all the parties to agitate their respective contentions. The learned Judge further made it clear that since the impugned order was recalled and the suit was restored, all the Interim orders which were subsisting at the time of dismissal of the suit, were restored.

6. Therefore, the question which precisely falls for decision of this Court is whether an order recalling an order of abatement of the suit is appealable or not.

7. Mr. shom appearing for Smt. Rina Adhya submitted that the order is not appealable and in support of such contention he relied on a decision of the Supreme Court in the case of Keshardeo Chamrla v. Radha Kissen Chamria, reported in : [1953]4SCR136 . The facts in Keshardeo were that on the adjourned date of hearing of an execution proceeding the decree holder applied for time for giving instructions to his lawyer but the application for time was refused by the court and the execution proceeding was dismissed on part satisfaction by the very same order. But this was done without formally calling for the execution case and

without intimating the decision on the adjournment application to the decree holder's lawyer in order to enable him to take necessary steps. The decree-holder then applied under Section 151 of Civil Procedure Code for restoration of the case and the Court restored the execution case under its inherent powers in order to rectify the mistake it had committed by dismissing the execution proceeding without giving any opportunity to the decree-holder to take necessary steps.

8. On a revision being filed to the High Court, the High Court set aside the order of restoration and remanded the case for reconsideration and disposal in accordance with the observations made in its order.

9. On appeal to the supreme Court, the Hon'ble Supreme Court held that the executing court was justified in correcting the mistake and restoring the execution proceeding. Such order was passed by the executing court under Section 151 of the Code and such order was not appealable. The learned Judges in Supreme Court held in para 14 of the judgment that the proceedings which commenced with the decree-holder's application for restoration of the execution and terminated with the order of revival of the same could in no sense be said to relate to the determination of any question concerning the execution, discharge or satisfaction of the decree. Such proceedings are in their nature collateral to the execution and are independent of it. Having said so in para 14, in para 15 it was held that an order under Section 151 simpliciter is not appealable. The learned Judges held that under the Code only certain specific order mentioned in Section 104 and Order 43, Rule 1 are appealable and no appeal lies from any other order and an order under Section 151 of the Code is not included in the category of appealable orders.

10. The learned counsel also relied on a Division Bench Judgment of this court in the case of Robin Paul v. Kumkum Mittal reported in (1996) 1 CHN 411. The learned Judges in Robin Paul relied on the Full Bench judgment of this court in the case of Nurul Hoda v. Amir Hasan, reported in : AIR1972 Cal449 . In Nurul Hoda it was specifically held that an order setting aside an abatement of the suit is not a judgment within the meaning of Clause 15 of the Letters Patent. Such order does not decide the merit of the controversy between the parties to the suit nor does it

determine any right or liability of the parties in the suit. It was also held that the order setting aside an abatement is merely a procedural matter which has the effect of carrying the suit forward for trial. Therefore, it is not a judgment. Following the same reason the learned Judges in Rabin Pal (supra) held that an order refusing to review an earlier order on a Memorandum of Review filed under Order 47 of this Code is not appealable.

11. Learned counsel also relied on the decision in the case of S. C. Sons (P) Ltd. v. Smt. Brahma Devei Sharma reported in : AIR1986 Cal437 . The learned Judges, relying on various decisions, held in that case that an order of restoration of a suit is not a judgment. The learned Judges held that since an appeal against an order setting aside the dismissal of a suit has been excluded from the purview of appealable orders under Order 43, Rule 1 of the Code, the same cannot be treated as a judgment within the meaning of clause 15 of the Letters Patent. The learned Judges held that powers given under Clause 15 of the Letters Patent cannot be so interpreted as to make it contrary to or inconsistent with the provision of the Code.

12. Mr. Hirak Mittter, the learned senior Advocate, while assailing the preliminary objection urged that the order under appeal is certainly a judgment within the meaning of Clause 15 of the Letters Patent.

13. The learned Counsel submitted that by the recalling the previous order, the order appealed against revived a suit in respect of which abatement was recorded by the previous order. With the revival of the suit, interim order was also granted and it was argued that they are in the nature of a fresh grant. These two broad features of the order, according to the learned counsel, makes it appealable.

14. The learned Counsel further submitted that the old restricted judicial view of appealability of an order has undergone a sea change after the judgment of the supreme Court in the case of Shah Babulal Khimji v. Jayben D. Kania, reported in : [1982]1SCR187 .

15. The learned Counsel submitted that the Apex Court in Khimji has accepted the broad view and in view of such acceptance the ratio of the Special Bench

judgment of Calcutta High Court in the case of Nurul Hoda must be deemed to have been impliedly overruled.

16. These are the rival contentions of the parties.

17. Now for a proper appreciation of the argument of the learned counsel of the parties, the ratio in Khimji must be properly understood. In Khimji's case, the matter went to Supreme Court from the judgment of the Division Bench of Bombay High Court which held that an order refusing the appointment of Receiver and rejecting the prayer for interim Injunction in a suit for Specific Performance of contract is not an appealable order.

18. The Supreme court reversed the said finding and gave an authoritative pronouncement of the meaning of the expression 'Judgment' in Clause 15 of the Letters Patent. In doing so, the Supreme Court considered and explained many previous judgments on this point.

19. It is not in dispute that this appeal is also under Clause 15 of the Letters Patent and the observations of Supreme Court in Khimji are relevant.

20. In paragraph 6 in Khimji, the Hon'ble Supreme Court noted the divergence in the approach of different High Courts on the meaning of judgment in clause 15 of the Letters Patent.

21. On a 'combined' reading of the various provisions of the Code the learned Judges held in Khimji that Section 104 read with Order 43, rule 1 of the Code applies to proceedings before a trial Judge of the High Court (para 26). Their Lordships further recorded that there is a 'general consensus of judicial opinion on the question on the question of applicability of Order 43, rule 1 to Letters Patent appeals (para 54)'.

22. It was also held in Khimji that even though judgment has not been defined in Letters Patent but in order to be a judgment the order passed by the trial Judge appealed against 'must have the traits and trappings of finality' and that 'appealable orders indicated in various clauses of Order 43, Rule 1 are matters of moment deciding valuable rights of the parties and in the nature of final orders as

to fall within the definition of Judgment.' (para 55)

23. Therefore, the Supreme Court held that the orders mentioned in Order 43, Rule 1 of the Code have the ingredients of being a judgment within the meaning of Clause 15 of the Letters Patent.

24. After a careful analysis of various judgments of the Privy Council, and different High Courts in India, the Hon'ble Supreme Court deduced the following principles in para 79 in Khimji:

'(1) There is no inconsistency between Section 104 read with order 43, Rule 1 and the appeals under the Letters Patent and there is nothing to show that the Letters Patent in any way excludes or overrides the application of Section 104 read with Order 43, Rule 1 or to show that these provisions would not apply to internal appeals within the High Court.

(2) Even if it be assumed that Order 43, Rule 1 does not apply to Letters Patent appeals, the principles governing these provisions would apply by process of analogy.

(3) Having regard to the nature of the orders contemplated in the various clauses of Order 43, Rule 1, there can be no doubt that these orders purport to decide valuable rights of the parties in ancillary proceedings even though the suit is kept alive and that these orders do possess the attributes or character of finality so as to be judgments within the meaning of clause 15 of the Letters Patent and hence, appealable to a larger Bench.

(4) The concept of the Letters Patent governing only the internal appeals in the High courts and the Code of Civil Procedure having no application to such appeals is based on a serious misconception of the legal position.'

25. After laying down the aforesaid principles the Hon'ble Supreme Court addressed itself to another aspect of the question which fell for its decision. Various orders not mentioned in Clauses (a) to (w) of Order 43, rule 1 are passed by the trial judge and the Supreme Court held that they may be appealable to the Division Bench. In that context, the word judgment in clause 15 assumes 'a real

significance and a new complexion'. According to Supreme Court 'the term judgment appearing in Letters Patent does not exclude orders not falling under the various clauses of Order 43, rule 1' (para 80). In other words, orders not mentioned in Order 43, rule 1 can also be judgments within the meaning of Clause 15.

26. In para 98 in Khimji Supreme Court observed that it would indicate a list of orders, apart from those mentioned in Clauses (a) to (w) of Order 43, rule 1 of the Code, which are appealable as judgments under Clause 15 and in para 120 in Khimji, the list of interlocutory orders which may be treated as judgments have been indicated.

27. In deciding the true meaning of the word 'judgment' in Clause 15, Supreme Court found that a Very narrow view was taken by the Division Bench of Calcutta High Court in the case of Justice of the peace for Calcutta reported in 1872-8, Bengal Law Reports 433.

28. The Supreme Court noted that subsequently Justice Asutosh Mookherjee in his leading judgment in Chandi Charan Saha v. Jnanendra Nath Bhattacharjee, reported in 1919 (29) Calcutta Law Journal 225 : (AIR 1919 Cal 667) widened the scope of the observations of Chief Justice Sir Couch in Justice of Peace and adopted the observations of Chief Justice White in Tulja Ram Row's case reported in 1912 (35) ILR Madras 1.

29. The learned Judges held that the expression judgment in Letters Patent must receive a broader interpretation than the word Judgment in Section 2(2) of the Code (para 113). But strictly speaking we are not concerned with that controversy here.

30. While noting the ratio in the aforesaid two decisions of Calcutta and Madras High Courts, the Supreme Court found that the Calcutta view is too narrow and the Madras view is too wide and the correct test lies somewhere between the two (para 93). After saying the so, the Supreme Court noted some of its own judgments, and then in para 115 at page 1816 in Khimji, the court laid down the following tests:

'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.'

(Underlined of emphasis)

31. At para 119, page 1817 of the report in Khimji, the Supreme Court further made the following observations :

'(1) 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 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) 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.'

(Underlined for emphasis)

32. Mr. Mitter very much relied on some observations in para 116 of Khimji in order to contend that the order appealed against is appealable. In para 116, the Supreme Court by way of illustration observed that an order setting aside an ex parte decree against the defendant is not an appealable order under Order 43, Rule 1. But an order setting aside an ex parte decree puts the plaintiff to serious injustice as the plaintiff will have to contest the suit and is deprived of the fruits of the decree passed in his favour. Therefore, the order setting aside the ex parte decree amounts to an interlocutory judgment and is appealable under Clause 15. The learned Counsel urged that following the same reasoning the order under appeal which revives the suit is causing great prejudice to his client and should be held appealable and the objection to the contrary be overruled.

33. We cannot accept this argument.

A somewhat similar argument has been repelled by a Full Bench decision of this court and we will revert, to that a little later.

34. The order under appeal is not one of setting aside of an ex parte decree. When a decree is passed in favour of a party that involves some adjudication and crystallization of some rights. If the same is set at naught the prejudice is obvious. By the order under appeal the abatement of the suit which was recorded previously has been recalled. Recording abatement of a suit does not involve any adjudication nor does it decide any right. It is a mechanical recording of a fact and does not amount to a decree. But when the trial Court found, as in this case, that it followed a wrong procedure in recording the fact of abatement and it corrected the same by recalling the order of abatement of the suit and without deciding anything sets down the application for hearing along with other application in terms of the previous order of the Court, there is no adjudication of any right of any party.

35. Such an order is not appealable under Order 43, rule 1 of the Code. Nor such an order is coming within the list of illustrative orders mentioned in para 120 in Khimji's case. But an order refusing to set aside abatement is appealable under clause (k) of Order 43, rule 1 of the Code.

36. So following the ratio in Khimji we are of the view that the order under appeal does not decide any rights of the parties in the suit either directly or indirectly or even in any ancillary proceeding connected with the suit. The order merely corrects the previous error made by the Court by recording the abatement of the suit. This the Court has inherent power to do. Therefore, the ratio in the case of Keshardeo Chamria (supra) supports the contentions of the learned Counsel for the respondents that no appeal lay against the order appealed against.

37. Apart from that there is direct authority of the Full Bench of this High Court in the decision rendered in the case of Nurul Huda (supra) that an order setting aside abatement is not a judgment within the meaning of Clause 15 of the Letters Patent.

38. While delivering the unanimous opinion of the Court, Justice Sabyasachi Mukherji (as His Lordship then was) overruled two previous Division Bench Judgments of this court in Sarat Chandra Sarkar v. Maihar Stone and Lime Co. Ltd. reported in AIR 1922 Calcutta 335, and also the judgment in Tara Nevatia v. Sripati Charan Dhur, reported in 67 CWN 18.

39. In Sarat Chandra, a Division Bench of this Court held that an order setting aside an abatement was a judgment under Clause 15. Following the said ratio in Sarat Chandra, another Division in Tara Nevatia also came to the said conclusion.

40. In coming to the aforesaid conclusion, the Division Bench of Calcutta High Court noted the argument advanced in Sarat Chandra that an order of setting aside abatement deprived a party, in whose favour the abatement operated, of a valuable right and also that by the order of setting aside abatement, that ancillary proceeding comes to an end. The same arguments are advanced here by Mr. Mitter. Even then it was held by the Full Bench that such an order does not amount to a judgment as it does not affect the merits of the controversy (para 8). The learned Judges held that such an order merely re-opens the controversy and is not a judgment under Clause 15 (para 9).

41. The Full Bench in para 7 laid down the following tests in order to ascertain whether a particular order is a judgment or not. Those tests are as follows :

'...the following tests should be applied in considering, whether a particular order amounts to a 'judgment' or not, namely, (i) whether the order in question puts an end to the proceeding so far as the court dealing with it is concerned, in which the order was sought and made, (11) the order must involve determination of some right or liability affecting the merits, (iii) an adjudication or a decision, which is not anything more than a step towards obtaining the final adjudication on the merits of the dispute in the proceeding is not Judgment within the meaning of Letters Patent, (iv) where the decision involves adjudication on the question of limitation or jurisdiction of the court, in certain cases, such decisions would amount to Judgment.'

42. Those tests in Nurul Huda are not in direct conflict with the (sic) laid down tests in Khimji explaining what can be called a judgment within the meaning of Clause 15.

43. Therefore, it is difficult for this Court to hold that the decision in Nurul Huda has been impliedly overruled by the decision of the Apex Court in Khimji.

44. Apart from that, this court finds that in Madan Naik v. Mst. Hansubala Devi, reported in : AIR 1983 SC676 , the Apex Court held that abatement of appeal for want of substitution does not involve any adjudication on merits and there is no contest and such an order cannot be called a decree (paras 7 and 8).

45. In view of such settled position and the reasons discussed above, this court is of the view that no appeal lay from the order appealed from. The preliminary objection succeeds. The appeal is dismissed with costs assessed at 500 Gold Mohurs.