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S.S. Associate Vs. M.S. Associate

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Court : Guwahati

Decided On : Apr-04-2001

Judge : N.C. Jain, C.J., ;P.G. Agarwal and ;A.H. Saikia, JJ.

Acts : Code of Civil Procedure (CPC), 1908 - Section 104 and 104(2) - Order 39, Rules 1 and 2 - Order 41, Rules 1 and 2 - Order 43, Rule 1;; Trade and Merchandise Marks Act, 1958 - Section 109 and 109(5); ; Guahati High Courts Rules - Rule 3

Appeal No. : LPA Nos. 3 of 1998

Appellant : S.S. Associate

Respondent : M.S. Associate

Advocate for Def. : Mr. N.M. Lahiri, ;Mr. S. Medhi, ;Mr. D. Arya, ;Mr. S. Jain, ;Mr. P. Upadhyay and ;Mr. R. Bora, Advs.

Advocate for Pet/Ap. : Mr. A.K. Phukan, ;Mr. S. Sarma, ;Mr. A.H. Choudhury, ;Mr. R.L. Yadav and ;Mr. R. Islam, Advs.

Disposition : LPA No. 1/99 and 3/98 dismissed

Judgement :

P.G. Agarwal, J.

1. In Letters Patent Appeal No. 1/99 and 3/98, vide a common order dated 10.2.99, the matter, regarding maintainability of Letters Patent Appeal against an order of the Single Judge before the Division Bench, was referred to the Full Bench.

2. We have heard Mr. A.K. Phukan, senior Advocate and Mr. S. Sarma learned counsel for the appellants and Mr. N.M. Lahiri, Senior Advocate for the respondents.

3. Although the facts in L.P.A 1/99 and 3/98 are not much relevant for the purpose of deciding the issue before us, we can advert to them to appreciate the question raised in this Reference. The respondent plaintiff instituted Civil suit before the Deputy Commissioner, judicial, who function as the District Judge of Dimapur, Nagaland, for relief under Trade and Merchandise Marks Act, 1958. Plaintiff also sought temporary injunction and the learned Presiding Officer thereafter granted ex-parte injunction as prayed for. Feeling aggrieved the respondents preferred Misc. First Appeal before the High Court and the learned Single Judge-dismissed the appeal, whereupon the appellant preferred the Letters Patent Appeal. The respondent plaintiff raised objections regarding the maintainability of the Letters Patent Appeal in view of the provisions contained in Section 104(2) CPC and relied on a decision of the Full Bench of this Court in the case of Modern Supply Agency and Another v. Musstt Anowara Begum in L.P.A. No. 8/95 1998 (4) GLT 150. A Full Bench of this Court relying on a decision of the Apex Court in the case of Resham Singh Pyara Singh v. Abdul Sattar, 1996 (1) -SCC 49 held :

'The appeal .before the learned Single Judge was under the provisions of Order 43. Rule 10 and in view of the provisions of sub-section (2) of Section 104 no further appeal would lie from any order passed in an appeal under this section. In view of the law laid down by (he Apex Court in the case of Resham Singh Pyara Singh (Supra) we are of the opinion that the Letters Patent Appeal will not lie before the Division Bench of High Court against the order of the learned Single Judge by virtues of Section 104(2) of the Code of Civil Procedure.'

4. So far the prayer for further appeal under Section 104(2) CPC is concerned, the law is well settled in view of the Catena of decisions of the Apex Court. In the case

of New Kenilworth Hotel (P.) Ltd. v. Orissa State Finance Corporation, 1997 (3) SCC 462, the 5. Apex Court held :

'It is seen that the very object of introducing these amendments was to cut down the delay in disposal of suits and to curtail the spate of remedial step provided under the Code. As held earlier, the right of appeal is a creature of the statute and the statute having expressly prohibited the filing of second appeal under sub-section (2) of Section 104, the right of appeal provided under clause 10 clearly indicates that an appeal would lie from the judgment not being a judgment passed in exercise of appellate jurisdiction'. Thereby the judgment from an appellate jurisdiction stands excluded under the first part of clause 10 of the letters patents itself. Therefore, the Division Bench of the High Court was right in holding that the letters patent appeal would not lie against man order of the learned Single Judge.'

6. Relying on the decision of the Apex Court in the case of Shah Babulal Kimji v. Jayaben 1981 (4) SCC 8 and New Kenilworth Hotel (P) Ltd. (Supra) the Apex Court in a recent case of Hemalata Panda & Ors. v. Sukuri Dibya & Ors., 2000 9 (2) SCC 218 held that in view of the provisions contained in Section 104 CPC, the Letter Patent Appeal against the order of the Single Judge is not maintainable. Section 104 CPC clearly provides that no further appeal shall lie from an order passed in Appeal under Section 104read with Order 43 Rule 1. The words are clear and explicit and they must be given full effect. In view of the Apex Court decision, as quoted above, we are of the view that the 'decision of the Full Bench in the case of Modern Supply Agency (Supra) so far the power under Section 104 C.P.C. Is concerned, needs no reconsideration. We reiterate the above decision.

7. It has been urged on behalf of the appellant that Chapter 2 and Chapter 8 of the Guahati High Court Rules, for short 'the Rules' provide for appeal before the Division Bench against the appellate order of the Single Judge. It was also submitted that the provisions of the Gauhati High Court Rules were not considered' by the Full Bench in Modern Supply Agency (Supra) and, as such, the matter needs re-consideration. Chapter -2 of the Gauhati High Court Rules provide for constitution of Benches and power of the Benches and of the Registrar. During the course of argument the learned counsel Shri Phukan has referred to Rule 3 of

Chapter 8 of the Rules, which reads as under :

'The memorandum of appeal shall be drawn up in accordance with the provisions of Order XLI, R. 1, Civil Procedure Code, and shall be subscribed by an advocate of the Court. It need not be accompanied by a copy of the judgment appealed from. It shall be the duty of the officer to whom the memorandum is presented under R. 2 above to endorse thereon the date of presentation and send the same to the stamp reporter who shall satisfy himself that it is order and within time and that there is a declaration by the Judge who passed the judgment that the case is a fit one for appeal, except in the case of an appeal from the judgment of a Single Judge passed in a First Appeal including the First Miscellaneous appeal when no such declaration wilt be necessary.'

8. In view of the above, which provides that no declaration is necessary if the appeal is against the judgment of the Single Judge passed in First Misc. Appeal, Shri Phukan submits that it shows that an appeal lies against the order of the Single Judge before the Division Bench. The Gauhati High Court Rules are framed to regulate the proceeding arising out of/exercise of such rights, and which are otherwise conferred by statute. The Rules do not derive any extra-constitutional powers in derogation of other statutory provisions. Admittedly, the Rules framed by the High Court under the CPC, Letters Patent appeal or under the Constitution of India can not override the provisions of CPC, Letter Patent or the Constitution.

There is another aspect of the matter also. Does the Rule create a right of appeal As we know the right of appeal is a statutory right which is given under the Act. No right can be created by Rules derogatory to the provisions of the Act or in absence of the provisions of the Act. In Shah Babul Khaimji's case (Supra) the Apex Court observed :

'An order which is appealable under the Code or under any other statute becomes appealable as the statute confers a right on the litigant to prefer an appeal against such an order. Such an order may or may not be appealable as 'judgment' under Clause 15 of the Letter Patent as a 'judgment' becomes appealable as Letter Patent confers on the litigant a right of appeal against such an order as judgment;. An order appealable under the Letters Patent may or may not be appealable under

the Code. A right of appeal is a creature of statute.'

9. Learned counsel for the appellant has also referred to the provisions of Clause (5) of Section 109 of the Trade and Merchandise Marks Act, 1958, which reads as under :

'Where an appeal is heard by a Single Judge, a further appeal shall lie to a Bench of the High Court.'

10. The provisions under Section 109 providing for appeal is against the order of the Registrar who acts as a Tribunal. Thus, Section 109 of the Act is not applicable to an order of injunction passed under Order 39 Rules 1 and 2 CPC. In this connection we may refer to the observations of the Apex Court in the case of Whirlpool Corporation v. Registrar of Trade & Merchandise, Mumbai & Ors., Judgment Today 1998 (7) SC 243, wherein it has been held that where a proceeding is pending under the Trade and Merchandise Marks Act, the Registrar acts as a Tribunal and when a proceeding is pending before the High Court, it will be treated as Tribunal.

11. The provisions of Sub-clause (5) of section 109, as quoted above, however clarifies the incorporation of the provisions in Rule 3 of Chapter 8, as quoted above. Section 109(5) of Trade and Merchandise Marks Act provides statutory right of appeal against the judgment of the learned Single Judge before the Division Bench and Rule 3 provides for such exigencies.

12. Rule 3 merely describes a situation whether a particular certificate is required or not required and as such it can not be interpreted to confer a right of appeal which is not provided expressly under any statute or which is derogatory to the provisions of the Civil Procedure Code. The provisions contained in Rule 3 Chapter 8 can be invoked in appropriate cases but that cannot be the basis for providing a forum for appeal.

13. In view of our aforesaid discussion, we held that no Letters Patent Appeal lies against the judgment of the Single Judge passed in Misc. First Appeal arising in respect of an order passed by the Subordinate Court under Order 39 Rules 1 and

2 of the CPC and the decision of Full Bench in Modern Supply (Supra) needs no interference.

14. For the reasons stated above, the Letter Patent Appeal No. 1/99 and 3/98 stands dismissed as not maintainable. No costs.

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