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Court : Delhi

Decided On : Feb-22-2011

Judge : Vikramajit Sen; Siddharth Mridul, Jj.

Acts : [Delhi High Court Act, 1966](#) - Section 10; [Code of Civil Procedure \(CPC\), 1908](#) - Order 26 Rule 9

Appeal No. : FAO(OS) No.53-54/2011

Appellant : Prashant Projects(P) Ltd.

Respondent : Indian Oil Corpn. Ltd.

Advocate for Def. : Mr. A.S. Chandhiok And Ors.

Advocate for Pet/Ap. : Mr. Ramji Srinivasan And Ors.

Judgement :

1. Whether reporters of local papers may be allowed to see the Judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

CM No.2084/2011

1. Allowed, subject to all just exceptions. FAO(OS) No.53-54/2011

2. This Appeal has been filed under Section 10 of the [Delhi High Court Act, 1966](#) (DHC Act for short) against the Order passed by the learned Single Judge on 21.1.2011 dismissing the Plaintiffs application under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (CPC for short) praying for the appointment of a Local Commissioner for carrying out measurement of the work done by the Plaintiff.

3. We have summoned and perused the original documents, especially because a copy of IA No.17646/2010 under Order XXVI Rule 9 of the CPC appears not to have been placed on record. In the said application, there is no mention of the fact that a joint inspection of the Project had been carried out and/or that the Defendant/Respondent had not conducted this exercise properly.

4. In the impugned Order, the learned Single Judge has dismissed the application opining that "the appropriate course for the Plaintiff would be to get the measurement done at its own level from an expert independent body and for this purpose, the Local Commissioner is not required to be appointed". It had been contended before the learned Single Judge, and reiterated before us by Mr. A.S. Chandhiok, learned Additional Solicitor General that the intent behind the application is the Plaintiff/Appellants endeavour to wriggle out of joint measurement which has been carried out on 10.11.2010. In this regard, it has been emphasized that no objection in respect of the carrying out of the joint measurement has been articulated in the Plaintiffs letter/notice dated 12.11.2010.

5. At the very threshold, the learned ASG has raised an objection as to the maintainability of the present Appeal under Section 10 of the DHC Act. Nevertheless, he has again offered that the Respondent would have no objection to the Plaintiff/Appellant carrying out measurement of the work allegedly executed by it. The learned ASG has submitted that the Plaintiff only needs to indicate the date on which this exercise is to be embarked upon. Mr. Ramji Srinivasan, learned Senior Counsel for the Appellant, however, has roundly rejected the offer contending that a Local Commissioner ought to have been appointed for the purpose.

6. So far as the maintainability of the Appeal under Section 10 of the DHC Act is concerned, we must refer to *Shah Babulal Khimji vs- Jayaben D. Kania*, (1981) 4 SCC 8. The High Court of Delhi was constituted under the DHC Act. While Letters Patent applied to the Punjab High Court, which earlier held territorial sway, technically it was not the precursor of the Delhi High Court. This aspect of curial annals has been fully unraveled by a decision of a Constitution Bench of five learned Judges of this Court in *University of Delhi vs- Hafiz Mohd. Said*, AIR 1972 102 : ILR (1972) Delhi 1, which has been set aside by a brief Order of two paragraphs on the premise that it was irreconcilable with the enunciation of the law contained in *Khimji*. We may emphasise, at the risk of repetition, that *Khimji* deals with the maintainability of a Letters Patent Appeal. We, however, must assume, because of the pronouncement in *Jugal Kishore Paliwal vs- S. Sat Jit Singh*, (1984) 1 SCC 358, which has overruled *Hafiz Mohd. Said*, that Section 10 of the DHC Act is in pari materia in content and effect with Letters Patent. We can only conjecturise that the disparate nature of the Delhi High Court when compared to chartered High Courts, such as in Punjab, Bombay etc., was not brought to the notice of their Lordships by the Advocates in *Jugal Kishore Paliwal*. We are sanguine that if this aspect is revisited by the Supreme Court, a different conclusion may be pronounced with regard to the High Courts which have not emerged from Chartered High Courts. To avoid prolixity, we shall merely refer to a Division Bench decision in *Wee Aar Constructive Builders vs- Simplex Concrete Piles (India) Ltd.*, 2010 II AD (Delhi) 382 where a more detailed consideration of this conundrum was considered.

7. Mr. Ramji Srinivasan has confined his arguments, so far as maintainability of the Appeal is concerned, within the four corners of *Khimji*. Their Lordships had, inter alia, concluded that the Judgment "must be a formal adjudication which conclusively determines the rights of parties with regard to all or any of the matters in controversy. The intention, therefore, of the givers of the Letters Patent was that the word judgment should receive a much wider and more liberal interpretation than the word judgment used in the Code of Civil Procedure". The Supreme Court also noted that "the interlocutory orders which contain the quality of finality are clearly specified in clauses (a) to (w) of Order 43 Rule 1 and have already been held by us to be judgments within the meaning of the Letters Patent and,

therefore, appealable". Thereafter, it has been stated in paragraph 115 that "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." In paragraph 119, their Lordships have amplified this aspect of the law in these words:-

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

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

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

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

8. In paragraph 120 of Khimji, rejection of an application for appointment of a Local Commissioner does not find place in the itemization of order amenable to an appeal.

9. Letters Patent was issued at a time when India was a colony of the British Empire and redressal against an order passed by a Single Judge/Trial Judge was available only before the Judicial Committee or the Privy Council. This entailed not only huge financial expense, but also required considerable discomfort of involving months of travel. If Parliament perceives it to be prudent to provide for an intra court appeal in independent India, so far as Delhi High Court is concerned, the needful can be achieved by an amendment in the DHC Act. Citizens should not be required to seek succor from archaic laws.

10. We shall now consider the contention of the Respondent that the real purpose behind the subject application is to nullify the joint inspection carried out by the parties. The sequence of events which we find relevant is that by letter dated 8.10.2010, stated by Mr. Ramji Srinivasan to actually have been issued the following month, it had informed the Defendants that they had "in terms of the termination order deputed our engineers to carry out the measurements. We request that the measurements for work carried out be taken physically. We also request you while taking the measurement, kindly jointly record the contractor supplied materials as well as the works done on this same". That this joint measurement had been carried out on 8.11.2010 has been admitted by the Appellant in paragraph 42 of the Plaint even though thereafter it has been pleaded that it was only in respect of a small part of the work done by the Plaintiff. The learned ASG, however, has emphasized that it was the first time that any grievance or umbrage had been recorded, so far as the exercise of joint measurement is concerned, was in the aforementioned pleadings. Our attention has also been drawn to the fact that the entire documentation has not been filed.

11. It seems to us that there is a force in the argument raised on behalf of the Respondent that the strategy behind the application is not the carrying out of measurement but rather diluting or defeating the veracity of the joint measurement. So far as we are concerned, the Plaintiffs refusal to carry out inspection/measurement by its own engineers is indicative that the purpose behind the application for appointment of a Local Commissioner is oblique and malafide. It is also relevant to reflect that the carrying out of measurement may not be the only method by which the Plaintiff could prove the extent of the work carried out by it.

Surely, it must also possess sufficient documentation of its own, showing deployment of manpower and utilization of material and resources at the relevant site. All this will, no doubt, be dealt with in detail in the arbitration proceedings. Therefore, assuming that the present Appeal is maintainable, we find that it is devoid of merit.

12. In this view of the matter, no useful purpose will be served by a detailed consideration of the decisions of the learned Single Benches in Chintapatla Arvind Babu vs- Smt. K. Balakristamma, AIR 1992 AP 300 and T.V. Balan vs- University of Calicut, AIR 1996 Kerala 278, to which our attention has been drawn by Mr. Ramji Srinivasan. These are also our view with regard to the Division Bench Judgment of this Court in Prima Developers vs- Lords Cooperative Group Housing Society Ltd., 159(2009) DLT 586(DB). The Court indubitably possesses powers for appointment of a Local Commissioner, but whether those powers are to be exercised depends on the peculiarity of the factual matrix obtaining in the particular instance. It can scarcely be claimed that a Local Commissioner should be appointed to nullify joint measurement carried out by the parties, even in the face of the offer by the Defendant that the Plaintiff may carry out inspection on its own.

13. Since the matter has been argued at great length, the Appeal is dismissed with costs of ` 20,000/-.

14. Since the Appeal has been dismissed, CM Nos.2082- 83/2011 are also dismissed.

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