(2015) 214 DLT 423 : (2014) 176 PLR 29

Delhi High Court

Case No: FAO (OS) 209/2014

SCB China Ltd. — APPELLANT

Vs

State Bank of Patiala — RESPONDENT

Date of Decision: Aug. 6, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 37 Rule 37, Order 37 Rule 37, Order 43 Rule 1, Order 43 Rule 43, 104
- Constitution of India, 1950 - Article 136
- Delhi High Court Act, 1966 - Section 10, 10(1)

Citation: (2015) 214 DLT 423 : (2014) 176 PLR 29

Hon'ble Judges: Najmi Waziri, J; Kailash Gambhir, J

Bench: Division Bench

Advocate: Sumit Bansal, Ajay Monga, Ateev K. Mathur and Devmani Bansal, Advocate for the Appellant; R.K. Sanghi, Advocate for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Kailash Gambhir, J.
The present appeal has been preferred by the appellant to assail the order dated 21.1.2014 passed by the learned Single Judge whereby the learned Single Judge had granted leave to the respondent to contest the recovery suit filed by the appellant/plaintiff under Order XXXVII, CPC.

2. The preliminary objection raised by the counsel for the respondent is with regard to the very maintainability of the present appeal. The stand of the counsel for the respondent is that the impugned order is not in the nature of a judgment through which there has been a final determination of the rights of the parties and therefore, the same is not appealable either under CPC or under the Letters Patent. In support of his arguments, counsel for the

respondent placed reliance on the decision of the Constitutional Bench in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, .

3. Mr. Sumit Bansal, counsel for the appellant, on the other hand submits that the impugned order passed by the learned Single Judge does affect the rights of the appellant as the learned Single Judge has granted unconditional leave to the defendants/respondents even in the absence of any triable issue raised by them in their application. Counsel for the appellant also submits that the learned Single Judge failed to appreciate that respondent No. 1 had issued a standby Letter of Credit and not a Letter of Credit as it was sought to be projected, therefore, this misrepresentation on the part of respondent No. 1 itself disentitles respondent No. 1 from seeking any leave to defend to contest the suit. Counsel for the appellant also argued that the learned Single Judge fell in grave error by taking a view that the respondents have made out a case of fraud of egregious nature due to non-supply of goods. The counsel further contended that the learned Single Judge failed to consider the provisions of the UCP-500 and the settled legal position that the banks deal in documents and not in goods. In support of his arguments, counsel for the appellant, placed reliance on the judgment in the case of UBS AG Vs. State Bank of Patiala, .

4. We have heard learned counsel for the parties.

5. In the present appeal, the appellant who is a plaintiff in the suit is aggrieved by order dated 21.01.2014 passed by the learned Single Judge whereby leave to defend application filed by the defendants/ respondents under Order XXXVII of the CPC has been allowed.

6. Counsel for the respondents raised the issue of the maintainability of the present appeal based on the legal position settled by the Apex Court in the case of Shah Babulal Khimji (supra).

7. We find ourselves in complete agreement with the contention raised by the counsel for the respondents. The Apex Court in the said judgment has taken a clear view that where the Trial Judge in a suit under Order XXXVII CPC refuses the defendant, leave to defend the suit, such an order directly affects the defendant because he loses a valuable right to defend the suit and such an order vitally affects a valuable right of the defendant and thus, it will undoubtedly be treated as a judgment within the meaning of the Letters Patent so as to be appealable. The Apex Court further held that the same would not be true if the Trial Court allowed the defendant to defend the suit in which case even though the plaintiff would be adversely affected, the damage or prejudice caused to the plaintiff will not be direct or immediate and the plaintiff would still possesses his full right to show that the defence is false and then ultimately succeed in the suit and therefore, such an order allowing leave to defend would not amount to a judgment within the meaning of Clause 15 of the Letters Patent but will be purely, an interlocutory order. We may usefully refer to relevant paras of the said judgment as under:-

In other words, a judgment can be of three kinds:

(1) A Final Judgment-a judgment which decides all the questions or issues in controversy so far as the Trial Judge is concerned and leaves nothing else to be decided. This would mean that by virtue of the judgment, the suit or action brought by the plaintiff is dismissed or decreed in part or in full. Such an order passed by the Trial Judge indisputably and unquestionably is a judgment within the meaning of the Letters Patent and even amounts to a decree so that an appeal would lie from such a judgment to a Division Bench

(2) A preliminary judgment-This kind of a judgment may take two forms-(a) where the Trial Judge by an order dismisses the suit without going into the merits of the suit but only on a preliminary objection raised by the defendant or the party opposing on the ground that the suit is not maintainable. Here also, as the suit is finally decided one way or the other, the order passed by the Trial Judge would be a judgment finally deciding the cause so far as the Trial Judge is concerned and therefore appealable to the larger Bench. (b) Another shape which a preliminary judgment may take is that where the Trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, res Judicata, a manifest defect in the suit, absence of notice u/s 80 and the like, and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the Trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an R order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to larger Bench.

(3) Intermediary or Interlocutory judgment-Most of 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. There may also be interlocutory orders which are not covered by Order 43 Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding. Before such an order can be a judgment the adverse effect on the party concerned must be direct and immediate rather than indirect or remote. For instance, where the Trial Judge in a suit under Order 37 of the CPC refuses the defendant leave to defend the suit, the order directly affects the defendant because he loses a valuable right to defend the suit and his remedy is confined only to contest the plaintiff''s case on his own evidence without being given a chance to rebut that evidence. As such an order vitally affects a valuable right of the defendant it will undoubtedly be treated as a judgment within the meaning of the Letters Patent so as to be appealable to a larger Bench. Take the converse case in a similar suit where the trial Judge allows the defendant to defend the suit in which case although the plaintiff is adversely affected but the damage or prejudice caused to him is not direct or immediate

but of a minimal nature and rather too remote because the plaintiff still possesses his full right to show that the defence is false and succeed in the suit. Thus, such an Order passed by the Trial Judge would not amount to a judgment within the meaning of Clause 15 of the Letters Patent but will be purely an interlocutory order."

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8. A Full Bench of this Court in Jaswinder Singh Vs. Mrigendra Pritam Vikramsingh Steiner and Others, while answering a reference extensively dealt with the said issue and view taken was that an order passed by the learned Single Judge in exercise of ordinary civil original jurisdiction is not an appealable order u/s 104 read with Order XLIII Rule 1 of the CPC and in such a case, the remedy would be available u/s 10(1) of the Delhi High Court Act, 1966 and not under Clause 15 of the Letters Patent. Relevant paras of the said judgment are reproduced as under:-

" We are of the view that principles enunciated in Shah Babulal Khimji case (supra) as to what would constitute an appealable judgment/order must equally apply to Section 10 of the said Act so that if an order, which is not an appealable order under the said Code, but otherwise satisfies the tests as laid down in Shah Babulal Khimji case (supra), in other words effects vital and valuable rights or, is an order which, decides matters of moment; the remedy of appeal to the Division Bench would equally be available.

We, thus, conclude by laying down the following principle of law:

In case of an order passed by the learned Single Judge in exercise of ordinary original civil jurisdiction in case of a non-appealable order u/s 104 read with Order 43 of the said Code which meets the test of a "judgment" that decides matters of moment or affects vital and valuable rights of parties and which works serious injustice to the parties concerned as per the parameters laid down in Shah Babulal Khimji case (supra) by the Supreme Court, an appeal to the Division Bench would exclusively lie u/s 10 of the said Act and not under Clause 10 of the Letters Patent."

9. In the judgment of UBS AG v. State Bank of Patiala (supra) cited by counsel for the appellant, an objection was raised that the appeal would not be maintainable against an order granting leave to defend, as such an order did not amount to a judgment, against which an appeal would lie. The Supreme Court while reiterating the principles enunciated in Shah Babulal Khimji (supra) took a view that the said principles which applies to the Letters Patent will not apply to an appeal for which special leave is granted under Article 136 of the Constitution of India.

10. The legal position thus, is no more res integra and the legal principles which were settled in Shah Babulal Khimji (supra) continue to hold the field and our attention has not been drawn by the counsel for the appellant to any contrary view taken in any later judgment of the Apex Court. The impugned order dated 21.01.2014 allowing the application of the defendants for leave to contest the appellant/plaintiff"s suit filed by the under Order XXXVII CPC, does not qualify the test of an order against which an appeal would be maintainable u/s 10(1) of the Delhi High Court Act, 1966.

11. In view of the above discussion, we are of the firm view that the present appeal filed by the appellant is not maintainable in the eyes of law and the same is accordingly dismissed on this ground alone.

12. All the pending applications are also dismissed.