

(1993) 03 GAU CK 0019**Gauhati High Court****Case No:** Letters Patent Appeal No. 2 of 1993

Azad Ali, Dispur, Guwahati

APPELLANT

Vs

Housefed and Ors.

RESPONDENT

Date of Decision: March 24, 1993**Acts Referred:**

- Civil Procedure Code, 1908 - Order 43 Rule 1, 100A, 104, 104(2), 4(1)
- Civil Procedure Code, 1908 (CPC) - Order 43 Rule 1, 100A, 104, 104(2), 4(1)

Citation: (1994) 1 GLJ 1**Hon'ble Judges:** U.L.Bhat, J and R.K.Manisana Singh, J**Bench:** Division Bench**Advocate:** M.K.Choudhary, J.N.Sharma, D.N.Choudhary, C.K.Sharma Barua, A.H.Saikia,
Advocates appearing for Parties**Judgement**

R.K. Manisana, J.

This is an appeal from an order made on 3.2.93. by a Single Judge (Phukan, J) in MA (F) No. 2 of 1991. A few facts leading to this appeal may briefly be stated. In respect of the land described in the schedule to plaint, the plaintiff/appellant instituted TS No. 14 of 1990 in the Court of Assistant District Judge (2) Guwahati for declaration of title, confirmation of possession and permanent injunction. In that suit the plaintiff made an application under Order 39, Rules 1 and 2 read with section 151 of the Code of Civil Procedure for restraining the defendants from disturbing the possession of the plaintiff. The trial Court made an order on 7.3.90 granting ex parte ad interim injunction directing the defendant/respondents to maintain the status quo of the suit property. The order was vacated by an order dated 3.1.91. Being aggrieved by that order, the plaintiff/appellant filed MA (F) No 2 of 1991 in this Court. The learned Single Judge dismissed the appeal on 3.2.93. Against that order the plaintiff now appeals.

2. Shri DN Choudhury, learned counsel for the respondents, has questioned the maintainability of the appeal under Letters Patent in view of subsection (2) of section 104 of the Code. Shri JN Sarma, learned counsel for the appellant, has submitted that the bar under subsection (2) of section 104 shall not be operative in the present case in view of section 4 of the Code.

3. The question which arises for consideration is whether the present appeal is maintainable under clause 15 of the Letters Patent. The relevant portion of clause 15 of the Letters Patent may be extracted thus :

""Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdictionAnd We do further ordain that an appeal shall lie to the said High Court 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 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) of one Judge of the said Court 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 made ..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 where, the Judge who passed the judgment declares that the case is a fit one for appeal; ...❖. (emphasis added)

Clause 15 provides for internal appeals in the High Court in respect of an appeal from the Court of the original jurisdiction to the High Court in its appellate jurisdiction and also from the judgment of one Judge on the original side of the High Court. Clause 15 contains two parts. The first part relates to a second appeal, if arises from the District Court subordinate to the High Court, or first appeal from the judgment of one Judge on the original side of the High Court. An appeal in the second part is a third appeal, where the Judge who passed the judgment declares that the case is a fit one for appeal. The third appeal which was available against the decision or judgment of a Single Judge, in certain cases, is now taken away by section 100A of the Code. Section 100 A was inserted by the Amending Act 104 of 1976. Section 100A provides that notwithstanding contained in any Letters Patent for any High Court where any appeal from an appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment, decision or order of such Single Judge in such appeal or from any decree passed in such appeal. After incorporating section 100A, what remains in clause 15 is only the first part of it.

4. The question then is, Whether section 104 and Order 43, Rule 1, shall be applicable in internal appeals in the High Court? Subsection (1) of section 104 provides:

""An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders."

The orders which are appealable are enumerated in subsection (1). We are required to consider clause (i) which reads thus : "any order made under rules from which an appeal is expressly allowed by rules". But subsection (2) of section 104 provides that "no appeal shall lie from any order passed in appeal under this section"". In Order 43, Rule 1, appealable orders under the provisions of section 104 are specified. One of them is an order under Rules 1 and 2 of Order 39.

5. In view of section 104 and Order 43, Rule 1, certain orders specified in section 104 and Order 43, Rule 1, only are appealable, and no appeal lies from any order; and section 104 (2) contemplates only one appeal and not two appeals, that is to say, there is no second appeal from the order passed in appeal against an order.

6. At this stage, it will be helpful to refer to a decision of the Supreme Court reported as *Shah Babulal Khimji vs. Jayaben*, AIR 1981 SC 1786. The facts of that case were as follows : The plaintiff appellant in that case filed a suit on the original side of the Bombay High Court for specific performance of a contract and prayed for an interim relief by appointing a receiver of the suit property and injecting the defendant from disposing of the suit property during the pendency of the suit. The Single Judge after hearing the notice of motion dismissed the application for appointment of receiver as also for interim injunction. Thereafter, the plaintiff appellant filed an appeal before the Bombay High Court which dismissed the appeal on the ground that the order refusing to grant injunction or to appoint receiver was not a judgment as contemplated by clause 15 of the Letters Patent

On the facts and in the circumstances of that case, two of the questions which arose for consideration before the Supreme Court were : (1) Whether an order refusing to grant interim injunction or to appoint receiver is judgment within the meaning of the word "judgment" used under clause 15 of the Letters Patent ? and (2) Whether provisions of section 104 as well as Order 43, Rule 1, shall apply to internal appeals in the High Court against an order passed by one Judge on the original side under clause 15 of the Letters Patent .

The Court has held that an order refusing to grant injunction or to appoint receiver must be treated to be a judgment within the meaning of the Letters Patent, as it decides a controversy which affects the valuable rights of the one of the parties though the suit is kept alive (see paras 79 and 106); and that section 104 as well as Order 43 Rule 1, shall apply to internal appeals in the High Court against the order of one Judge on the original side under clause 15 of the Letters Patent (see paras 28, 79 and 148). But the Court has, in para 40, stated thus :

"There is, therefore, no warrant for accepting the argument of the respondent that if Order 43, Rule 1 applies, then a further appeal would also lie against the appellate

order of the trial Judge to a Division Bench. As this is neither contemplated nor borne out by the provisions of the Letters Patent extracted above, the contention of the respondent on this score must be overruled.

" The Court further has, in para 41, observed ;

""A further second appeal lying to a Division Bench from an appellate order of the trial Judge passed under Order 43, Rule 1 is wholly foreign to the scope am spirit of the Letters Patent."

The above observations indicate that no appeal shall lie from any order made by a Single Judge in the exercise of his appellate jurisdiction under section 104 read with Order 43, Rule 1. Undoubtedly, in the present case, the learned Single Judge exercise his appellate jurisdiction under section 104 read with Order 43 Rule 1. Therefore, applying the above principle laid down by the Supreme Court, the present appeal is not maintainable.

7. Proceeding further, under clause 44 of the Letters Patent, all the provisions of Letters Patent are subject to the legislative power of the competent authority. Section 4 (1), CPC, provides :

"In the absence of any specific provisions to the contrary, nothing in this Code be deemed t > limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force." (emphasis added).

There are three components under section 4 (1). First, the Code generally governs matters covered by it. Secondly, if a special or local law exists covering the same area or field, the special or local law will be saved and will prevail. Thirdly, if there is and special provision to the contrary in the Code itself then that will override the special or local law. It. may be stated here that a five Judge Bench of the Supreme Court in *Maru Ram vs. Union of India*, AIR 1980 SC 2147, has, while dealing with sections 5 and 433A of the Code of Criminal Procedure, held that section 433A applies in preference to any special or local law because section 5 expressly declares that specific provisions if any, to the contrary will prevail over any special or local law. Section 5 of the Criminal Procedure Code is similar to section 4 (I), CPC.

8. The question then is Whether the provisions under section 104 (2) is "a specific provision to the contrary" ? The expression "a specific provision to the contrary" means that there must be a particular provision in the Code clearly indicating in itself, not merely by implication, in order to affect the special law or local law. Section 104 (2) clearly provides that no further appeal shall lie from any order passed in appeal under section 104 read with Order 43, Rule 1. The words are plain and explicit and they must be given full effect. Therefore, it is "a specific provision to the contrary" in the Code itself clearly indicating to affect clause 15 of the Letters Patent. Therefore, no appeal shall Me under clause 15 of the Letters Patent from an

appellate order of the learned Single Judge dismissing or allowing the appeal exercising appellate jurisdiction under section 104 read with Order 43, Rule 1, hence the present appeal is not maintainable. The view taken by us also finds support from a decision of the Bombay High Court reported as Krishna Yeshwant Shirodkar vs. Subhas Krishna Patil, AIR 1989 Bombay 68 (DB), in which it has been held that, where the appellate jurisdiction which is exercised is one under section 104 the bar contained in section 104 (2) will necessarily operate, as has been pointed out by the Supreme Court in Shah Babulal's case (AISt 1981 SC 1786))

9. With regard to the decision in Ganpati Wadgo vs. Pilaji, AIR 1956 Nagpur 211, which was relied on by Mr. JN Sanaa, learned counsel for the plaintiff-appellant, it has been held :

"Section 104 applies to appeals to High Court from Courts subordinate to it. It does not deal with appeals from a Single of the High Court to a Bench under the Letters Patent. There is no provision under the Code for any right of appeal from the decision of a Single Judge to a Bench. Such appeals are provided by clause 10, Letters Patent of this Court which is analogous to clause 10 of Allahabad and clause 15 of the Calcutta, Madras and Bombay High Courts. They cannot be said to be barred by section 104 in the absence of an express provision. On the other hand, such appeals are recognised by section 4 of the Code."

In view of our conclusion above, we respectfully are unable to agree with the decision of the Nagpur High Court.

10. On the view of the case which we have found, it is not necessary to consider the merits of the case, as any finding would be of no consequences. In the result, the appeal is dismissed as not maintainable.