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Madhya Pradesh High Court (Gwalior Bench)

Case No: L.P.A. No. 111 of 1999

M.P. Financial Corporation and Another		APPELLANT
	Vs	
R.R. Flour Mills Pvt. Ltd. and Another		RESPONDENT

Date of Decision: Aug. 16, 1999

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1, 104, 104(2)

Citation: (1999) 2 MPJR 293 : (1999) 2 MPLJ 646

Hon'ble Judges: S.P. Srivastava, J; N.G. Karambelkar, J

Bench: Division Bench

Advocate: Arvind Dudawat, for the Appellant; P.L. Jain, for the Respondent

Final Decision: Dismissed

Judgement

S.P. Srivastava, J.

Feeling aggrieved by an order passed by the learned Single Judge of this Court disposing of a Miscellaneous Appeal contemplated under Order XLIII, Rule l(r) of the Code of Civil Procedure, 1908, with certain directions while affirming the findings in regard to the prima facie case and balance of convenience returned in favour of the plaintiff, the defendants/appellants have now come up in Letters Patent Appeal praying for the setting aside of the order passed by the learned single Judge as well as the order passed by the trial Court dated 17-11-1998 which had been challenged by them before the learned single Judge in the aforesaid appeal.

We have heard the learned counsel for the parties and have carefully perused the record.

The facts in brief shorn of details and necessary for the disposal of this appeal lie in a narrow compass : The respondent No. 1, M/s R.R. Flour Mills Private Limited had filed a suit being suit No. 3-A 1998, wherein the present appellants had been impleaded as the defendants Nos. 1 and 2 claiming a declaratory decree as well as a decree for permanent prohibitory injunction.

During the pendency of the aforesaid suit, the plaintiff/respondent No. 1 had filed an application under Order XXXIX, Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code) which was disposed of by the trial Court vide its judgment/order dated 17-11-1998, granting a temporary injunction with certain directions.

The aforesaid order passed by the trial Court was challenged by the defendants/appellants by filing a Miscellaneous Appeal under Order XLIII, Rule l(r) of the Code. This appeal was disposed of by the learned single Judge vide the judgment/order impugned in this appeal.

The learned counsel representing the contesting respondent has raised a preliminary objection in regard to the maintainability of this appeal. The contention is that by force of Section 104 of the Code, the appeals as indicated in various clauses of Order XLIII, Rule 1 of the Code would lie to the Appellate Court. But as the Section 105 of the Code provides that no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction except according to the procedure laid down by the Code and the provision contained in sub-section (2) of Section 104 of the Code expressly prohibits. Further appeal from an order passed in an appeal under Order XLIII, Rule 1 of the Code, like the present appeal is not maintainable or entertainable as under the Letters Patent, an appeal lies against an order passed by a single Judge to a larger bench of the same High Court if it is not a judgment in the exercise of the appellate jurisdiction in respect of a decree made by the trial Court unless the Judge who passed the judgment declares that the case is a fit one for appeal.

In the present case, the learned counsel for the contesting respondent has urged that none of the requisite conditions contemplated under Clause X of the Letters Patent constituted by the High Court of Judicature at Nagpur which are applicable to the High Court of Madhya Pradesh being satisfied, this appeal deserves to be dismissed as not maintainable.

The learned counsel for the contesting respondent has heavily relied upon in support of his submissions on a decision in the case of Firm Chhunilal Laxman Prasad Vs. Agarwal and Co. and Others, , wherein it had been held that if an order had been passed by a single Judge of the High Court either appointing a receiver or granting or refusing injunction under Order XXXIX, Rules 1 and 2 in some original proceedings, Letters Patent Appeal would lie against that order treating it to be a judgment. But, if the order passed by the High Court was not an original order, but

had been passed in exercise of its appellate jurisdiction u/s 104 read with Order XLIII, Rule 1 of the Civil Procedure Code, then a Letters Patent Appeal would not lie in view of sub-section (2) of Section 104 which is applicable to Letters Patent Appeal.

The Division Bench in its aforesaid decision had clarified that where an appeal was admittedly against an order of a single Judge passed in appeal u/s 104 of the Civil Procedure Code, read with Order XLIII, Rule 1 of the aforesaid Code, the Letters Patent Appeal was not maintainable.

The Division Bench in support of its aforesaid view relied upon the observations made by the Apex Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, .

Since there was divergence of views in two Division Bench decisions of this Court on the point in question, the matter was referred to for consideration before a Full Bench.

The Full Bench in its decision in the case of Mahesh Chandra Choubey v. M. M. Dubey and Ors., reported in 1994 MPLJ 657 (F.B.) : 1995 MPLJ 141, after a detailed consideration of various aspects of the matter and the implications arising under various provisions of the CPC and clause X of the Letters Patent and further the implications arising under the decision of the Apex Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, as well as in the case of Madan Naik (Dead) by Legal Representatives and Others Vs. Hansubala Devi and Others, , upholding the view expressed by a Division Bench of this Court in the case of Firm Chhunilal Laxman Prasad (supra) held that the appeal filed under Clause X of the Letters Patent is not maintainable against the order passed by a learned single Judge exercising the powers u/s 104 read with Order XLIII, Rule 1 of the aforesaid Code.

It may be noticed that the Division Bench decision of this Court in the case of Firm Chhunilal Laxman Prasad (supra) was approved by the Hon''ble Apex Court in its decision in the case of M/s. New Kenilworth Hotel (P) Ltd. Vs. Orissa State Finance Corporation and others, , wherein in paragraph 10 of the judgment it was observed that the said decision was correct in law.

In the aforesaid view of the matter, we are of the considered opinion that the preliminary objection raised against the maintainability of this appeal is liable to be sustained.

In the result, this appeal deserved to be and is hereby dismissed as not maintainable.