

(2013) 09 CAL CK 0004

Calcutta High Court

Case No: M.A.T. No. 1445 of 2013 and C.A.N. No. 9655 of 2013

MPS Greenery Developers
Limited and Another

APPELLANT

Vs

The State of West Bengal and
Others

RESPONDENT

Date of Decision: Sept. 17, 2013

Citation: (2013) 4 CALLT 340 : (2013) 5 CHN 466 : (2014) 1 WBLR 1019

Hon'ble Judges: Subhro Kamal Mukherjee, J; Murari Prasad Shrivastava, J

Bench: Division Bench

Advocate: Sakti Nath Mukherjee, Mr. Kishore Dutta and Mr. Debjit Mukherjee, for the Appellant; Subrata Talukdar and Mr. Saikat Chatterjee, for the Respondent

Judgement

Subhro Kamal Mukherjee, J.

In view of the urgency pleaded by Mr. Sakti Nath Mukherjee, learned senior advocate appearing for the appellants, we take up this matter out of turn. This is an appeal against an order dated September 2013 passed by Dipankar Datta, J. in W.P. 21858 (W) of 2013.

2. In the order impugned, the Hon'ble Single Judge held that His Lordship had no determination in the matter as the said writ petition should have been moved before the Court taking up Group IX cases. Thus, His Lordship released the matter from His Lordship's list and directed listing of the matter before the appropriate bench having determination.

3. Mr. Mukherjee, learned senior Advocate appearing in support of the appeal, invites us to hold that this is an order directing return of the petition and, therefore, this is appealable under Clause 15 of the Letters Patent read with Order 43, rule 1(a) of the Code of Civil Procedure. In support of his contention, Mr. Mukherjee cites the decision in [Shah Babulal Khimji Vs. Jayaben D. Kania and Another](#),

4. Chief Justice Sir Richard Couch, speaking for the Bench, in *The Justice of the Peace for the Town of Calcutta v. The Oriental Gas Company Limited* reported in XVII Weekly Reporter 384, inter alia, held that the expression "judgment" in Clause 15 of the Letters Patent contemplated a decision affecting the merits of the question between the parties by determining some right or liability, it might be either final or preliminary or interlocutory. The decision was followed by the another Division Bench in the case of [Gourlal Mitra Vs. Sm. Hara Sundari Paul](#),

5. Moreover, in [Shri Radhey Shyam Vs. Shyam Behari Singh](#), the Supreme Court of India quoted those observations of Sir Richard Couch (supra) with approval. In *Radhy Shyam* (supra) the Supreme Court of India held that the expression "judgment" must mean a decision, which affect the merits of the question between the parties by determining some right or liability and such a decision might either be final or preliminary or interlocutory.

6. In *Shah Babulal Khimji* (supra) the Supreme Court of India held that although the Letters Patent has been a special law, certain provisions of the CPC in the matter of procedure did apply to appeals against the decision of a trial judge to a larger bench, that is, "internal appeals".

7. It was, further, held that a combined reading of the provisions of sections 4, 5, 104 and Order 49, Rule 3 of CPC lead to the irresistible conclusion that section 104 read with Order 43, rule 1 of the CPC have been clearly applicable to the proceedings before the trial judge of the High Court. There is no inconsistency between the Letters Patent jurisdiction and section 104 read with Order 43, Rule 1 of the Code of Civil Procedure. Section 104 read with Order 43, Rule 1 expressly authorised and created a forum for appeal against orders falling under various clauses of Order 43, Rule 1 to a Larger Bench of the High Court without at all disturbing, interfering with or overriding the Letters Patent jurisdiction. In view of the clear and explicit provisions of section 117 and Order 49, Rule 3, which while exempting other provisions from the jurisdiction of the High Court, did not exempt the various clauses of Order 43, Rule 1 of the Code of Civil Procedure.

8. Mr. Mukherjee, thus, submits, by the order impugned, as the petition has been returned, this is an appealable order under Order 43, Rule 1(a) of the Code of Civil Procedure.

9. We are unable to accept the contentions of Mr. Mukherjee that, by the order impugned, the Hon"ble Single Judge returned the petition for presentation before the appropriate Court. His Lordship, by the Order Impugned, only directed that the writ petition should be listed before the Bench taking up Group IX matters, as His Lordship felt that His Lordship had no determination.

10. This is not a case of return of the petition. The petition was filed in the High Court and has been retained in the High Court at Calcutta. Only the petition is now to be listed before another Hon"ble Judge than the Hon"ble Judge, who has passed

the order impugned because His Lordship opined that he had no determination.

11. By the order impugned, no question concerning the merits of the writ petition was dealt with. No case has been decided. There was no determination of right or liability of the parties.

12. Thus, we hold that the order impugned, is not a judgment within the meaning of Clause 15 of the Letters Patent.

13. The appeal is not maintainable and, therefore, the appeal is dismissed as not maintainable.

14. However, we record, by way of abundant caution, that we have not gone into the merits of the claims and the counter-claims of the parties involved in the writ petition and all points for consideration are left open. In view of the dismissal of the appeal, the connected application becomes infructuous and is, also, dismissed.

We make no order as to costs.

Murari Prasad Shrivastava, J.

I agree.