

## **MPS Greenery Developers Limited and Another Vs The State of West Bengal and Others**

**Court:** Calcutta High Court

**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.