

Delhi High Court

Neelam Arya vs Din Mohd.(Deceased) & Ors. on 9 April, 2013

Author: V. K. Jain

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on : 02.04.2013
Judgment pronounced on : 09.04.2013

+ LPA 114/2013
NEELAM ARYA Appellant
Through : Mr. V.P. Singh, Sr. Adv. with Mr.
N.S. Vasisht, Mr. Vishal Singh ,
Adv.

versus

DIN MOHD. (DECEASED) & ORS. Respondents
Through : Mr. Dhanesh Relan, Adv. for R-1
to 4

And

+ LPA 181/2013
NEELAM ARYA Appellant
Through : Mr. V.P. Singh, Sr. Adv. with Mr.
N.S. Vasisht, Mr. Vishal Singh ,
Adv.

versus

THE DIVISIONAL COMMISSIONER GOVT. OF NCT OF
DELHI & ORS. Respondents
Through : Mr. Dhanesh Relan, Adv. for R-1
to 4

CORAM:

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V.K. JAIN

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V.K. JAIN, J.

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1. Late Shri Din Mohd., legal heir of late Shri Safed Khan, filed W.P(C) No.2365/1982 questioning the proceedings initiated against him by the Deputy Custodian General of Evacuee Properties and the order dated 29.6.1982 passed by him in respect of land measuring 8 bighas and 40 biswas situated in Village Chandan Hola of Delhi under the Administration of Evacuee Property Act, 1950 and the Disabled Persons (Compensation and Rehabilitation) Act, 1954. His case was that the property in question was never an evacuee property and neither was it so declared nor could it have been declared an evacuee property. The learned Single Judge vide order dated 26.2.2009, quashed the order impugned in the said writ petition and held all consequential actions of the respondent based on the order questioned in the writ petition to be illegal. Vide order dated 22.01.2010, the learned Single Judge made some corrections as regards the area of the land in question. The appellant before us namely Mrs. Neelam Arya was not a party to the aforesaid writ petition. The case

of the appellant is that the aforesaid land was purchased by her from one Mr. Gurbax Singh to whom it was granted being an evacuee property.

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2. The order dated 26.2.2009 was assailed by the appellant by way of LPA No.217/2011. The aforesaid appeal was withdrawn by the appellant on 7.3.2011 with liberty to file a review petition. In terms of the leave granted by the Division Bench, the appellant filed a Review Petition No. 198/2011, which was dismissed by the learned Single Judge vide detailed speaking order dated 17.1.2013. Being aggrieved, the appellant has filed LPA 114/2013 challenging the order dated 26.2.2009 and 22.01.2010 passed in the writ petition and the order dated 7.1.2013 passed in the review petition.

3. Pursuant to the judgment dated 26.2.2009 in W.P(C) No.2382/1982, the land in question was mutated in the name of the petitioners in W.P(C) No.6544/2011 and the mutation earlier recorded in favour of the appellant Mrs. Neelam Arya was stood cancelled. The petitioner in W.P(C) No. 6544/2011 submitted an application to the concerned SDM/ Tehsildar for grant of NOC for sale of the aforesaid land to Ishwar Builders Private Limited. This however was opposed by the appellant Mrs. Neelam Arya. As a result of which, the NOC was not issued. W.P(C) 6544/2011 was then filed for direction to the respondent to issue NOC for sale of the aforesaid land to the petitioners. Though, LPA Nos.114/2013 & 181/2013 Page 3 of 13 initially the appellant Mrs. Neelam Arya was not impleaded as a party to the writ petition, she came to be impleaded during pendency of the writ petition. Vide order dated 15.2.2013, the learned Single Judge directed the official respondent to issue NOC in respect of the land in question. However, since two cross suits between Mrs. Neelam Arya on the one hand and the petitioners in W.P(C) No.6544/2011 on the other are pending adjudication, the learned Single Judge also directed that the NOC would clearly state that it was being issued subject to the petitioners taking requisite permission for sale from the Court in which those suits are pending adjudication. Being aggrieved from the aforesaid order, LPA No.181/2013 has been filed by Mrs. Neelam Arya impugning the aforesaid order passed by the learned Single Judge.

4. As far as order dated 26.2.2009 passed in W.P(C) 2365/1982 is concerned, admittedly, the said order was challenged by the appellant by way of LPA No.217/2011, which came to be withdrawn on 7.3.2011. Admittedly, the appellant, while withdrawing the aforesaid LPA did not seek any permission from the Court to file a fresh appeal against the order dated 26.2.2009 in case the review petition which she proposes to file was dismissed. Having withdrawn the appeal without obtaining liberty to file LPA Nos.114/2013 & 181/2013 Page 4 of 13 a fresh appeal in the event of not succeeding in the review petition, the appellant is precluded from filing a fresh appeal questioning the very same order. Therefore, the appeal to the extent it assails the order dated 26.2.2009 is not maintainable.

5. The next question which comes up for consideration is as to whether an appeal against an order rejecting the review petition filed by the appellant is maintainable or not. This question came to be considered by us recently in Govt. of NCT of Delhi & Ors. vs. Mool Chand Sharma [LPA 73/2007 decided on 26.2.2013] and after considering various decisions including the decision of the Division

Bench of this Court in C.S. Agarwal vs. State and Ors.[2011 VIII AD (Delhi) 265], the decision of the Supreme Court in Shah Babulal Khimji vs. Javaben [AIR 1981 SC 1786], the decision of the Division Bench of this Court in Basant Kharbanda vs. Punjab & Sind Bank [1997 1 AD(Delhi) 398] and the decisions of the Supreme Court in Green View Tea & Industries vs. Collector, Golaghat and another [2002 1 SCC 109], Suseel Finance & Leasing Co. vs. M. Lata and others [(2004) 13 SCC 675] and Shankar Motiram Nale vs. Shiolalsing Gannusing Rajput [(1994) 2 SCC 753], this Court, inter alia, held as under:

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"8. The expression 'judgment' used in the Letters Patent came to be interpreted by the Supreme Court in Shah Babulal Khimji vs. Jayaben, AIR 1981 SC 1786 as under:

"113. The concept of a judgment as defined by the Code of Civil Procedure seems to be rather narrow and the limitations engrafted by sub-sec. (2) of Section 2 cannot be physically imported into the definition of the word 'judgment' as used in Cl. 15 of the Letters Patent because the Letters Patent has advisedly not used the term 'order' or 'decree' anywhere. The intention, therefore, of the givers of the Letters Patent was that the word 'judgment' should receive a much wider and more liberal interpretation than the word 'judgement' used in the Code of Civil Procedure. At the same time, it cannot be said that any order passed by a trial Judge would amount to a judgment; otherwise there will be no end to the number of orders which would be appealable under the Letters Patent. It seems to us that the word 'judgment' has undoubtedly a concept of finality in a broader and not a narrower sense. 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 under Sec. 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 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 a 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 in the judgments within the meaning of the Letters Patent and, therefore, appealable. There may also be interlocutory orders which are not corrected by Order 43, Rule 1 but which also possess the characteristics and trappings of finality in that, the orders may LPA Nos.114/2013 & 181/2013 Page 7 of 13 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.

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120.We might, however, at the risk of repetition give illustrations of interlocutory orders which may be treated as judgments:

(10) An order granting review.

122. We have by way of sample laid down various illustrative examples of an order which may amount to judgment but it is not possible to give such an exhaustive list as may cover all possible cases. Law with its dynamism, pragmatism and vastness is such a large ocean that it is well-nigh impossible for us to envisage or provide for every possible contingency or situation so as to evolve a device or frame an exhaustive formula or strategy to confine and incarcerate the same in a straitjacket.

xxx When the Court dismisses a review petition, it merely takes a view that no new important matter or evidence as contemplated in Rule 1 of Order 47 of the Code of Civil Procedure has been discovered, there is no mistake or error apparent on the face of the record and there is no other sufficient reason for reviewing of the judgment/order in question and, therefore, declines to exercise the jurisdiction vested in it to review its judgment/ decree or order. Such an order cannot be said to be an order deciding or adversely affecting, directly and immediately, any valuable right of the LPA Nos.114/2013 & 181/2013 Page 8 of 13 parties and, therefore, would not qualify as a judgment within the meaning of clause 10 of Letters Patent, in terms of the decision of the Supreme Court in Shah Babulal Khimji (supra).

Consequently, no appeal against an order dismissing the review application is maintainable either under Code of Civil Procedure or under Clause 10 of Letters Patent."

6. The learned counsel for the appellant, however, submitted that the aforesaid decision would not apply to the present case because the appellant was not a party to the writ petition and, therefore, the order passed by the learned Single Judge on 7.1.2013 meets all the requirements of a judgment as laid down by the Supreme Court in Khemji (supra). In support of his contentions, the learned counsel for the appellant has relied upon the decision of the Three Judges Bench decision of Andhra Pradesh High Court in H. Kondal Reddy vs. Central Bank of India, Hyderabad [2002(1) ALD 280] and a Full Bench decision of the same High Court in B.F. Pushpaleela Devi vs. State of A.P. and others [AIR 2002 Andhra Pradesh 420]. He has also referred to the order dated 19.10.2012 passed by the Supreme Court in Khoday Distilleries Ltd. & Ors. vs. Mahadeshwara S.S.K. Ltd. [Special Leave Petition (Civil) No.490 of 2012] whereby the issue of maintainability of a review petition LPA Nos.114/2013 & 181/2013 Page 9 of 13 in the High Court after disposal of the Special Leave Petition without granting leave but with or without assigning reasons, has been referred to a larger Bench for authoritative pronouncement on the subject.

7. The question as to whether an appeal against an order rejecting a review petition is maintainable or not came to be considered by a Five Judges Bench of Andhra Pradesh High Court in B.F. Pushpaleela Devi's case (supra) and after considering the various decisions including the decision of the Supreme Court in Khemji's case (supra) , the following view was taken:

"54.....In other words, no appeal lies under the Code from an order rejecting an application for review unless it is qualified to be a "Judgment" as per the tests laid down in Khimji's case."

56. What kind of an order will constitute a judgment within the meaning of clause 15 of the Letters Patent and will become appealable as such must necessarily depend on the facts and circumstances of each case and on the nature and character of the order passed. In our opinion the judgment within the meaning of Clause 15 of the Letters Patent would have satisfy two tests. First, the judgment must be the final pronouncement which puts an end to the proceedings as far as the Court dealing with it is concerned. Secondly, the judgment must involve the determination of some right or liability though it may not be necessary LPA Nos.114/2013 & 181/2013 Page 10 of 13 that there must be a decision on merits. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability. Since there is no definition of the word judgment in the Letters Patent itself, the expression has necessarily to be construed and interpreted in each. It is, however, safe to say that if any order has the effect of finally determining any controversy forming the subject matter of the suit itself or any part thereof or the same affects the question of Court's jurisdiction or the question of limitation, such an order will normally constitute `judgment` within the meaning of Clause 15 of the Letters Patent. We must not, however, be understood to say that any other kind of

order may not become judgment within the meaning of Clause 15 of the Letters Patent to be appealable under the provisions thereof.

8. Prima facie, it appears to us, that if an application for review of a judgment, filed by a person who was not a party to the said judgment, is dismissed by way of an order which adjudicates upon the claim made in the Review Petition and adversely affects the valuable rights of the petitioner, such an order cannot be treated at par with the order rejecting the Review Petition filed by a person, who was a party to the judgment sought to be got reviewed. We have to keep in mind that a person who was party to the writ petition decided by the judgment/ order sought to be got reviewed, had an opportunity to place his case before the Court, before the said judgment/ order was passed, whereas no such opportunity LPA Nos.114/2013 & 181/2013 Page 11 of 13 was available to a person who was not a party to the writ petition. Such a person gets an opportunity to plead his case before the Court, only by way of the Review Petition. Therefore, if his plea is not accepted by the Court, he cannot be denied the remedy of challenging the judgment/ order, rejecting his Review Petition, by way of an appeal. Hence, prima facie, we are of the view that a reasoned order, rejecting the Review Petition filed by a person, who was not party to the writ petition, will amount to a Judgment within the meaning of Clause 10 of Letters Patent and consequently an LPA would be maintainable against such an order. A perusal of the order dated 7.1.2013 would show that the learned Single Judge examined at length the case set up by the appellant in the Review Petition and rejected them on merit. It would be difficult to say that such an order, taking a final view on the claim made and the case set out in the review petition does not qualify as a judgment within the meaning of Clause 10 of the Letters Patent. In case review petition is filed by a party to the writ petition, ordinarily either he should show an error apparent on the face of the record or in case he wants to rely upon a new material, he has to show that such material could not have been produced by him earlier, even on exercise of due diligence though review can also be made LPA Nos.114/2013 & 181/2013 Page 12 of 13 for any other sufficient reason, not limited to occurrence of an error apparent on the face of the record or discovery of new important material. Such limitations, however, may not apply, when review is sought by a person who was not a party to the writ petition.

In view of the above, list both the appeals for hearing on merit on 2.7.2013.

- V.K.JAIN, J

CHIEF JUSTICE

APRIL 09, 2013
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