

**HIGH COURT OF JAMMU AND KASHMIR**  
**AT JAMMU**

LPAOW No.45/2014  
CMA No.58/2014

Date of order:20.11.2014

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Sansar Chand

v.

Som Dutt

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**Coram:**

**Hon'ble Mr. Justice M. M. Kumar, Chief Justice**  
**Hon'ble Mr. Justice Tashi Rabstan, Judge**

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**Appearing counsel:**

For the appellant (s) : Mr. O.P.Thakur, Advocate.

For the respondent (s) : Mr. Vijay Gupta, Advocate.

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| i)  | Whether to be reported<br>Press/Media       | : | Yes |
| ii) | Whether to be reported in<br>Digest/Journal | : | Yes |
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**M.M.Kumar, CJ**

1. This letters patent appeal under Clause 12 of the Letters patent is directed against the order dated 04.07.2014 rendered by a learned Single Judge of this Court upholding the order dated 11.05.2013 passed by learned 1<sup>st</sup> Additional District Judge, Jammu. The aforesaid order was challenged by invoking the provisions of Articles 226 and 227 of the Constitution of India read with Sections 103 and 104 of the Constitution of Jammu and Kashmir. It is further appropriate to notice that the learned Additional District Judge was hearing an appeal against interim order dated 31.12.2010 passed by Munsiff, Akhnoor in a suit for declaration-cum-permanent prohibitory injunction. In accordance with the interim order the

parties were asked to maintain status quo, which was set aside by the learned 1<sup>st</sup> Additional District Judge. That order has been further upheld by the learned Single Judge.

2. Mr. Vijay Gupta, learned counsel for the respondent, at the outset has raised a preliminary objection by submitting that the appeal under Clause XII of the Letters Patent is not maintainable as it emerges from an order of a Single Judge passed under supervisory jurisdiction. He further submitted that in any case intra Court appeals under Clause XII of the Letters Patent are now barred by virtue of the amendment made in the Code of Civil Procedure by adding Section 100-A.

3. In order to decide the aforesaid issue it would not be necessary to notice the facts. In any case facts in detail have been noticed by the learned Single Judge and no repetition would be necessary particularly in view of the legal issue raised before us.

4. Mr. Gupta, learned counsel for the respondents, has placed reliance on a judgment of the Full Bench of Gujarat High Court rendered in the case of *Gujarat State Road Transport Corporation v. Firoze M. Mogal and another*, AIR 2014 Gujarat 33. According to Mr. Gupta, the Full Bench has taken into consideration a large number of judgments of Hon'ble the Supreme Court and has rightly reached the conclusions, which

are summed up in para 258 of the judgment. Learned counsel has maintained that the aforesaid conclusions reached by the Full Bench of Gujarat High Court do not leave any manner of doubt that the present letters patent appeal would not be maintainable.

5. Mr. O.P.Thakur, learned counsel for the appellant has, however, submitted that when petition is filed under Article 227 of the Constitution of India in exercise of supervisory jurisdiction then an original order is passed by issuing a writ of certiorari directing the subordinate Courts to function within their bounds. In that regard learned counsel has placed reliance on a judgment of Hon'ble the Supreme Court rendered in the case of *Surya Dev Rai v. Ram Chander Rai*, AIR 2003 SC 3044. On the basis of the aforesaid analogy Mr. Thakur has argued that the basic function of exercising supervisory jurisdiction by the High Court under Article 227 is to correct errors of jurisdiction. According to the learned counsel, if the Courts below have exceeded jurisdiction or refused to exercise jurisdiction vested in it or there is grave illegality committed then the High Court may issue an appropriate writ. Applying the aforesaid principles, Mr. Thakur has argued that the refusal to exercise jurisdiction by the learned Single Judge has resulted in passing of an order on original side, which would be amenable to letter patent appeal. Mr. Thakur has also placed reliance on two other

judgments of Hon'ble the Supreme Court rendered in the cases of *M/s M.M.T.C. Limited v. Commission of Commercial Tax*, AIR 2009 SC 1349 and *M/s Lokmat Newspapers Pvt. Ltd. v. Shankarprasad*, AIR 1999 SC 2423, wherein it has been held that if a Single Judge has exercised jurisdiction under Article 226, a letters patent appeal would be maintainable. If jurisdiction is exercised under Article 227, such an appeal would not be maintainable. However, it has been submitted that if the Single Judge of High Court while considering the petition under Article 226 or 227 fails to indicate under which provision he has decided the matter then the matter may be considered in its proper prospective in an Letters Patent Appeal. Therefore, Mr. Thakur has submitted that the appeal would be maintainable if it is viewed from that aspect.

6. On merits, Mr. Thakur has argued that a substantial question of law for determination of this Court would arise as to whether any right could emerge from an agreement to sell in respect of immovable property. The Courts below have answered the aforesaid question one way or the other.

7. Having heard learned counsel for the parties and after perusing the record with their able assistance, we are unable to persuade ourselves to take the view that the instant appeal under Clause XII of the Letters Patent is maintainable. The order of the learned Single Judge impugned in this appeal by

no stretch of imagination can be regarded as the one passed under Article 226 of the Constitution of India read with Section 103 of the Constitution of Jammu & Kashmir. The only possibility is that such an order could be passed by exercising supervisory jurisdiction under Article 227 of the Constitution of India read with Section 104 of the Constitution of Jammu & Kashmir. It has also remained undisputed that the jurisdiction conferred by Article 227 or Section 104 is not an original jurisdiction. It is well settled proposition of law as opined by various Courts. (See *Hudi Goshon v. Sudi Goshon*, AIR 1962 Punjab 467; *Sukhendu Bikash Barua v. Hare Krishan De*, AIR 1953 Cal 636 and *In re v. Tirupuliswamy Naidu*, AIR 1955 Madras 287). At this stage it would be profitable to read Clause XII of Letters Patent, which is set out below *in extenso*:-

“And we do further ordain that an appeal shall lie to the said High Court of Judicature from the judgment (not being a judgment passed 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, and not being a sentence or order passed or made in the exercise of the power of superintendence) of one Judge of the said High Court or one Judge of any Division 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 or one Judge of any Division Court, consistently with the provisions of Civil. P.C. made 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 where the judge who passed the judgment declares that the case is a fit one for appeal but that the right of appeal from other judgments of the judges of the said High Court or of such Division Court shall be to us, Our Heirs or successors and be heard by our board of Judicial Advisers for report to us.”

8. The aforesaid Clause XII of the Letters Patent is akin to the Clause incorporated in the Letters Patent governing such proceedings in other High Courts. Once it is concluded that the learned Single Judge while passing the impugned order had exercised jurisdiction under Article 227 of the Constitution of India read with Section 104 of the Constitution of Jammu & Kashmir then it is not difficult to hold that the letters patent appeal would not be maintainable. The issue is no longer *res integra*. Hon'ble the Supreme Court in categorical terms has opined in numerous judgments that letters patent appeal would not be maintainable against an order passed by a learned Single Judge in exercise of power of superintendence under Article 227. In that regard reliance may be placed on judgments rendered in the cases of *Ramesh Chandra Shankla v. Vikram Cement* (2008) 14 SCC 58, *Kesho Ram v. Hem Raj* (2008) 17 SCC 96, *Mohd. Saud and another v. Dr. (Maj) Shaikh Mahfooz & others* (2010) 13 SCC 517 and *Shalini Shyam Shetty & another v. Rajendra Shankar Patil*, (2010) 8 SCC 329.

9. In the case of *Mohd. Saud* (supra) it has been held that against an interim order no letters patent appeal would be maintainable. The view of Hon'ble the Supreme Court is discernible from the following paras, which are extracted in *extenso*:-

“13. While at first glance this argument may appear plausible but when we go deeper into it, we will realize that

it has no merit. It would be strange to hold that while two appeals will be maintainable against the interlocutory orders of a District Judge, only one appeal will be maintainable against a final judgment of the District Judge.

14. It may be noted that there seems to be some apparent contradiction in Section 100-A as amended in 2002. While in one part of Section 100-A it is stated “where any appeal from an original or appellate decree or order is heard and decided by a Single Judge of a High Court” (emphasis supplied), in the following part it is stated “no further appeal shall lie from the judgment and decree of such Single Judge”. Thus while one part of Section 100-A refers to an order, which to our mind would include even an interlocutory order, the latter part of the section mentions judgment and decree.

15. To resolve this conflict we have to adopt a purposive interpretation. The whole purpose of introducing Section 100-A was to reduce the number of appeals as the public in India was being harassed by the numerous appeals provided in the statute. If we look at the matter from that angle it will immediately become apparent that the LPA in question was not maintainable because if it is held to be maintainable then the result will be that against an interlocutory order of the District Judge there may be two appeals, first to the learned Single Judge and then to the Division Bench of the High Court, but against a final judgment of the District Judge there can be only one appeal. This in our opinion would be strange, and against the very purpose of the object of Section 100-A, that is, to curtail the number of appeals.

16. It is well settled that the modern method of interpretation is purposive vide *Directorate of Enforcement v. Deepak Mahajan* (1994) 3 SCC 440, *Hindustan Lever Ltd. v. Ashok Vishnu Kate* (1995) 6 SCC 326 (vide SCC pp. 347-48:JT P.631) and *Workmen v. American Express International Banking Corpn.* (1985) 4 SCC 71.

17. We are of the opinion that the apparent contradiction in Section 100-A as amended in 2002 was only due to bad drafting, and not much can be made out of it once we understand the purpose of Section 100-A.

18. For the reasons given above, we are of the opinion that the Full Bench of the High Court has taken a correct view. Thus there is no force in these appeals, which are accordingly dismissed. No costs.” (emphasis added)

10. *In the case of Ramesh Chandra Shankla* (supra) similar view has been taken, which is discernible from the following observations:-

“48. In our considered opinion, however, on the facts and in the circumstances of the present case, the petitions instituted by the Company and decided by a Single Judge of the High Court could not be said to be original proceeding under Article 226 of the Constitution. We are clearly of the view that the learned Single Judge had decided the petitions in exercise of power of superintendence under Article 227 of the Constitution.

49. We have already referred to the facts of the case. According to the Company, voluntary retirement was accepted by the employees. They thereafter challenged the action on the ground that the acceptance was not voluntary but they were compelled to opt for the scheme and were paid some amount which was not in consonance with law and the action of not allowing them to continue in the employment amounted to removal from service. They, therefore, approached Labour Court for an appropriate relief. The Labour Court entertained complaints and issued notice.

50. The Company appeared and raised preliminary objections. Issues were framed and a prayer was made by the Company to decide “issues of law” as preliminary issues which prayer was rejected by the Labour Court. The Company approached Industrial Court which also did not interfere with the order of the Labour Court. That order was again challenged by the Company by filing petitions in the High Court and the learned Single Judge dismissed the petitions. In view of the aforesaid facts, we have no doubt that the learned Single Judge was exercising power of superintendence over a Court/Tribunal subordinate to it under Article 227 of the Constitution. Obviously, a remedy of intra court appeal was not available. We, therefore, hold that the Division Bench was right in coming to the conclusion that intra court appeals filed by the Company were not maintainable. We see no infirmity in that part of the order. The contention of the appellant Company is, therefore, rejected.” (emphasis added)

In the case of Shalini Shyam Shetty (supra), their Lordships of the Supreme Court took the view that jurisdiction under Article 227 is neither original nor it is appellate. It is for both administrative and judicial superintendence. A proceeding under Article 227 could never be governed under the original side rules of the High Court. In the cases where the High Court exercises jurisdiction under Article 227, it is entirely



discretionary and it cannot be claimed as a matter of right and no appeal would be maintainable from an order passed by a Single Judge of a High Court in exercise of power under Article 227, which remedy is available in respect of an order passed by learned Writ Court under Article 226 of the Constitution. (See paras 46 to 48).

Their lordships of Hon'ble the Supreme Court has still taken a similar view in the case of Kesho Ram (supra) in which appeal was filed against an order of the High Court of Jammu & Kashmir. A Division Bench of this Court had held that no letter patent appeal against an order passed in exercise of revisional jurisdiction would be available. Accordingly appeal was dismissed which led to the filing of further appeal to Supreme Court. The view of the Supreme Court is discernible from paras 6, 7 and 8, which read thus:-

“6. Dr. Singhvi, on the other hand, has pointed out that an order rejecting an application in review was not appealable and the only remedy for having such an order set aside was to file an application for review under order 47 Rule 7(2), but when such an application had been dismissed, no further application could be entertained by virtue of Order 47 Rule 9 CPC. He has also stressed that a perusal of Clause 12 of the Letters Patent also spelt out that an order in revision was not appealable under the said clause and that in any case, it was open to the appellant to challenge the order dated 8-9-1987, in appeal.

7. We have heard the learned counsel for the parties very carefully. We find substance in Mr. Singhvi's argument based on Order 47 Rule 7(2) but as of today, the prime issue before us is with regard to the maintainability of the letters patent appeal. A bare perusal of Clause 12 reveals that an appeal against an order in revision is not maintainable.

8. We are, therefore, of the opinion that all the observations/findings recorded by the Letters Patent Bench were non est being completely unauthorized in law. We

have therefore no hesitation in dismissing the present appeal as well. .....  
 ..... We, however, dismiss the appeal. No costs.” (**emphasis added**)

11. The aforesaid authoritative pronouncements by Honb’le the Supreme Court have binding effect under Article 141 of the Constitution of India as it is law declared by the Supreme Court. Therefore, the conclusion is evident that the appeal is not maintainable. The judgment of the Division Bench rendered in the case of *Sudershana Gupta and another v. Girdhari Lal* (2013) 3 JKJ 547 or any other judgment to the contrary on which reliance has been placed by learned counsel for the appellant are held to be *per incuriam* and cannot have a binding force.

12. Clause XII of the Letters Patent came up for consideration before another Division Bench of this Court in the case of *The J&K Co-operative Bank v. Shams-ud-din Bacha*, AIR 1970 J&K 190. The Division Bench also took the view that the Letters Patent Appeal was not maintainable against an order passed in exercise of jurisdiction under Article 227 of the Constitution of India or Section 104 of the Constitution of J&K and proceeded to observe as under:-

“The above provision of the Letters Patent clearly excludes an appeal from an order made by a Single judge of the court in exercise of his revisional jurisdiction, as also an appeal from a sentence or order passed or made by him in exercise of his power of superintendence. An order passed under S.104 of the Constitution of Jammu and Kashmir is nothing but an order made in exercise of the supervisory jurisdiction conferred on the court by the

Constitution. In these circumstances, Cl. 12 of the Letters patent excludes appeals from such orders.” (emphasis added)

13. The view of the Division Bench is consistent with the view taken by Hon’ble the Supreme Court in various judgments referred above. In *Shalini Shyam Shetty and another v. Rajendra Shankar Patil*, AIR 2010 SCW 6387, their Lordships of the Supreme Court proceeded to hold that the letters patent appeal against the order passed under revisional/supervisory jurisdiction was not maintainable. In fact the practice of entertaining petitions under Article 226 by Bombay High Court has been deprecated. After considering its earlier judgments including the one cited by Mr. O.P.Thakur, their Lordships of the Supreme Court formulated various principles to conclude that dispute relating to property seeking declaration cum permanent prohibitory injunction would involve disputed questions of fact and such dispute cannot be entertained by the High Courts under Article 226 or under Article 227 of the Constitution of India. Even if it is presumed that the learned Single Judge has passed the order under Article 227 of the Constitution then the proper remedy for the appellant would be to file Special Leave Petition instead of invoking Clause XII of the Letters Patent.

14. In the present case learned Single Judge was necessarily hearing a petition under Article 227 of the Constitution of India

and has upheld the order dated 11.05.2013 passed by the learned 1<sup>st</sup> Additional District Judge, who had set aside the order of status quo passed by the learned Munsiff, Akhnoor directing maintenance of status quo in a suit for declaration-cum- permanent prohibitory injunction. It is true that the view taken by the learned Single Judge upholding the order of learned Additional District Judge in *stricto sensu* is not an order passed on appeal, yet the learned Single Judge was necessarily hearing a petition under Article 227 of the Constitution of India read with Section 104 of the Constitution of Jammu & Kashmir. Such an order of the learned Single Judge cannot be subjected to letters patent appeal.

15. We further place reliance on some of the following conclusions recorded in para 258 by the Full Bench of Gujrat High Court in the case of Gujrat State Road Transport Corporation (supra).

In view of our aforesaid analysis, we proceed to record our conclusion in seriatim.

i) A power to issue the writ is original and the jurisdiction exercised is original jurisdiction.

ii) Proceedings under Article 226 of the Constitution of India are in exercise of original jurisdiction of the High Court whereas the proceedings initiated under Article 227 of the Constitution are supervisory in nature.

iii) .....

iv) .....

v) .....

vi) .....

- vii) .....
- viii) .....
- ix) .....
- x) .....

xi) If the learned Single Judge, in exercise of a purported power under Article 227 of the Constitution sets aside the order of Tribunal or Court below and at the same time, the essential conditions for issue of writ of certiorari are absent, no appeal will be maintainable against such order in view of the specific bar created under Clause 15 of the Letters Patent itself and such an order can be challenged only by way of a Special Leave Petition before the Supreme Court.

To put it very explicitly, take a case where a petition is only under Article 227 of the Constitution of India, invoking superintending powers of the High Court and not under Article 226 of the Constitution of India. After examining the matter, if the court finds substance in the petition and sets aside the order of an authority, court or a tribunal, then against such an order, an LPA would not lie on the argument that since the court has set aside the order it has decided the matter on merits having found substance in the same.

.....

xii) If a learned Single Judge, in exercise of a purported power under Article 227 of the Constitution modifies the order of Tribunal/Authority or Court below and thereby partly allows a petition to a certain extent, then in such circumstances, it could not be said that the Court exercised its certiorari jurisdiction and no appeal will be maintainable against such order in view of the specific bar created under Clause 15 of the Letters Patent itself. However, if a learned Single Judge, in purported exercise of power under Article 226 of the Constitution of India, issues a writ of certiorari, although the same is not maintainable, an appeal under Clause 15 of the Letters Patent would nevertheless be maintainable against such order.

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- xiii) .....
- xiv) .....

xv) When a remedy for filing the Revision under Section 115 of the Civil Procedure Code has been expressly barred, then in such a case, a petition under Article 227 of

the Constitution of India would lie and not a writ petition under Article 226 of the Constitution of India. When the Parliament has thought fit to restrict the powers under Section 115 of the Code with a definite object, then, under such circumstances an order which is not revisable under Section 115 of the Code of Civil Procedure cannot be challenged by way of filing a Writ Petition under Article 226 of the Constitution invoking extraordinary jurisdiction of the High Court and that too an interlocutory order passed by the Civil Court in a Regular Suit proceedings. (emphasis added)

16. A close scrutiny of the aforesaid principles culled out by the Full Bench of Gujrat High Court would lead us to conclude that the letters patent appeal would not be maintainable as it is primarily directed against the order of 1<sup>st</sup> Additional District Judge who was hearing an appeal against the order of Munsiff, Akhnoor. In cases where a revision petition is barred, a petition under Article 227 would lie in appropriate cases. Once no petition under Article 226 of the Constitution would be entertainable particularly when the Parliament has thought fit to restrict the powers under Section 115 of the Code of Civil Procedure with a definite object, then an order which is not revisable under Section 115 of the Code of Civil Procedure would equally not be a challengeable by filing a writ petition under Article 226 of the Constitution of India read with Section 103 of the Constitution of Jammu & Kashmir; and particularly when an interlocutory order passed by the Civil Court in a regular suit proceedings is subject matter of challenge. There is, thus, no scope to conclude that the appeal is maintainable and complete

answer has been provided by various judgments of Hon'ble the Supreme Court as well as a Division Bench of this Court. The Full Bench of the Gujrat High Court in the case of Gujrat State Road Transport Corporation (supra) has also placed reliance on various judgments of Hon'ble the Supreme Court and has thus concluded that letters patent appeal against an order passed under Article 227 of the Constitution of India would not be maintainable as Article 227 confers supervisory jurisdiction, which cannot be regarded as original jurisdiction.

17. We would have examined various judgments cited by Mr. O.P.Thakur, learned counsel for the appellant but refrain from doing so as we are satisfied that most of those judgments stand considered by Hon'ble the Supreme Court in the above referred cases.

18. For the reasons aforementioned, we hold that the appeal is not maintainable and the same is dismissed as such.

**(Tashi Rabstan)**  
**Judge**

**(M.M.Kumar)**  
**Chief Justice**

**Jammu**  
20.11.2014  
Vinod.