HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on: 16.08.2021
Pronounced on: 24.08.2021

LPA No.58/2021
CM No.3267/2021

Doulat Ram and another ...Appellant(s)

Through:- Mr. R.K.S.Thakur, Advocate

V/s

Roop Chand and others ...Respondent(s)

Through:- Mr. R. K.Jain, Sr. Advocate with
M/s Mohit Jain, Kamal Gupta &
Rohit Kohli, Advocates for R-1 to 11
None for R-12-14

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE PUNEET GUPTA, JUDGE

JUDGMENT

Sanjeev Kumar:J

1. Instant appeal filed under clause 12 of the Letters Patent is directed against order dated 19.03.2021 passed by a learned Single Judge, whereby the petition of the appellants for re-admission (RESC No.23/2018) of Civil First Appeal (CFA No.22/2013), dismissed vide order and judgment dated 17.09.2018, has been rejected.

2. Mr. R.K.Jain, learned Senior Counsel appearing for the contesting respondents has raised a preliminary objection to the maintainability of the letters patent appeal against the impugned order. It is argued by Mr. Jain that order dated 17.09.2018 passed by the

learned Single Judge, whereby CFA No.22/2013 was disposed of is an order passed by the learned Single Judge on merits and, therefore, no application for re-admission, in terms of Order 41 Rule 19, is maintainable.

3. Before we examine the arguments of Mr. Jain, we deem it appropriate to notice few material facts to put the issues raised in this appeal in proper perspective. The appellants and the proforma respondents filed a suit for declaration to declare the sale deed executed by the contesting respondent Nos. 1 to 7 through respondent No.8 in favour of respondent Nos.9 to 11 as null and void. The suit was contested by the contesting respondents by filing their written statements. The Court of learned District Judge, Reasi ["the trial Court"] after holding trial dismissed the suit filed by the appellants vide its judgment and decree dated 30.04.2013.

Aggrieved, the appellants challenged the judgment and decree of the trial Court by way of Civil First Appeal i.e. CFA No.22/213 before the learned Single Judge of this Court. The appeal was admitted to hearing. On 15.12.2017, the appeal along with writ petition i.e. OWP No.1798/2015 filed by the appellants against the order of Additional Commissioner, Jammu dated 28.12.2015 that had arisen out of the partition proceedings before the revenue courts, came up for consideration before the learned Single Judge. The matter was heard in part by the learned Single Judge and was directed to be listed on

07.02.2018 for continuation of the arguments. On 09.02.2018, the matter could not be heard due to non-availability of learned counsel for the respondents and, therefore, adjourned to 13.02.2018 for continuation of arguments. On 28.05.2018, learned counsel for the parties were present but the matter was adjourned to 29.05.2018 for continuation. Something similar happened on 19.07.2018 and the matter was kept on Board by the learned Single Judge for 20.07.2018. On 20.07.2018, there was no representation on behalf of the appellants, the matter was heard and reserved. Order dated 20.07.2018 reads thus; ***"Heard and reserved"***.

Thereafter the judgment was pronounced by the learned Single Judge on 17.09.2018. As is evident from the judgment dated 17.09.2018, the civil first appeal preferred by the appellants was decided on merits, though, in the absence of the appellants. Since on 20.07.2018 the appellants either in person or through their counsel were not present, as such, the arguments were concluded in their absence and the matter was reserved for judgment.

4) The appellants against whom the judgment dated 17.09.2018 was delivered filed a petition for re-admission of the appeal in terms of Order 41 Rule 19 of the Code of Civil Procedure contending, *inter alia,* that the learned Single Judge could not have decided the civil first appeal on merits in absence of the appellants and the only course open to the learned Single Judge was to dismiss the appeal in default.

5) The application was considered by the learned Single Judge and the same was rejected vide judgment impugned primarily on the ground that hearing of the appeal, which commenced on 15.12.2017 in the presence of counsel for the parties, had been concluded on 19.07.2018 that, too, in the presence of learned counsel for the parties and on 20.07.2018 the appeal was simply reserved for orders notwithstanding the use of expression “heard” appearing in he order dated 20.07.2018. The learned Single Judge, thus, held that judgment dated 17.09.2018 was not a judgment passed without hearing the appellants and, therefore, no application in terms of Order 41 Rule 19 CPC was maintainable. It is this order of learned Single Judge dated 19.03.2021, which is under challenge before us in this letters patent appeal.

6) Having heard learned counsel for the parties and perused the record, we are of the view that following questions of seminal importance arise for consideration:-

i) Whether the judgment of the learned Single Judge dated 17.09.2018 passed in CFA No.22/2013, in the absence of appellants or their counsel on 20.07.2018 when the matter was heard and reserved, is an order or judgment passed under Order-41 Rule 17(1) of the Code of Civil Procedure and, therefore, application under Order 41 Rule 19 of the Code of Civil Procedure for its re-admission lies and is maintainable?

ii) If answer to the question No.(i) is in the affirmative; whether order of rejection of the application filed by the

appellants under Order 41 Rule 19 of the Code of Civil Procedure seeking readmission of the appeal is appealable under clause 12 of the Letters Patent and whether the bar created by Section 100-A CPC that no further appeal shall lie from an order of the learned Single Judge hearing and deciding an appeal from an original or appellate decree or order, would be attracted?

7) Before we proceed to consider and examine the rival contentions and the law cited at the Bar, we deem it necessary to set out relevant provisions of the Code of Civil Procedure.

8) Order 41 of the Code of Civil Procedure deals with appeals from original decrees and procedure for hearing is laid down in Rules 16 to 29. However, Rule 16, 17 and 19 are relevant for our purpose and, therefore, are set out below:-

“16. Right to begin.-

(1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

17. Dismissal of appeal for appellant's default.-

(1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for

> hearing, the Court may make an order that the appeal be dismissed.
>
> [**Explanation**.-Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.]
>
> (2) **Hearing appeal ex parte**.-(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard ex: parte
>
> ……
>
> 19. **Re-admission of appeal dismissed for default**.-Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17 or rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal ; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit."

9) As is evident from a plain reading of Rule 16, it is the appellant that is given the right to be heard first in support of the appeal on the date fixed or any other date to which the hearing may be adjourned by the appellate court. If, upon hearing the appellant, the court does not dismiss the appeal at once, it would hear the respondent against the appeal and in such case the appellant shall be entitled to reply. It is, thus, clear that when the appeal is taken up for hearing, the court hears the appellant in the first instance and if it does not dismiss the appeal at once, it would provide hearing to the respondent against the appeal and

in such case the appellant is also given right to reply or rebuttal. Insofar as Rule 17 is concerned, if on the date fixed or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that appeal be dismissed. The explanation appended to Rule 17 makes things further clear that the appellate court is not empowered to dismiss the appeal on merits where appellant is absent on the date the appeal is called on for hearing. Similarly, if the appellant appears on such date and the respondent does not, the appeal shall be heard in ex-parte. If the appeal is dismissed in default under Rule 17 of Order 41 of the code of Civil Procedure, the remedy available to the appellant is to move an application under Rule 19 for re-admission of the appeal and where the appellant proves that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

10) These three rules reproduced herein above, when read altogether, would unequivocally provide that if on the date fixed or any other date to which the hearing may be adjourned, the appellant does not appear, the only option with the appellate court is to dismiss the appeal for default and not on merits. When we examine the facts of the instant case, we find that the arguments in the instant case began on 15.12.2017 when the appellants were heard in part and the matter was adjourned for continuation of arguments. The appeal was adjourned for

hearing on several occasions. Some times it could not be heard due to non-availability of learned counsel for the appellants and some times due to non-availability of learned counsel for the respondents. On 19.07.2018, it was listed for hearing but hearing in the matter could not be concluded by the learned Single Judge and the same was kept on Board for 20.07.2018. From order dated 20.07.2018, it is evident that on the said date, when there was no representation on behalf of the appellant, the appeal was heard and reserved. The expression used in the order "heard and reserved" conveys only one meaning i.e. on 20.07.2018, though, there was no representation on behalf of the appellants, the respondents were heard and the matter was reserved. Not only on that date hearing in the matter was concluded and the matter was reserved for orders, the appellants could not conclude their arguments because of their non-availability and even if we assume that the appellants had already concluded their part of arguments and it was only the respondents, who were heard on 20.07.2018, yet as provided in Rule 16 of Order-41 CPC, the appellant had a right of rebuttal. To put it precisely, the appeal was heard and reserved on 20.07.2019 in the absence of appellants or their counsel and, therefore, in terms of Rule 17 of Order 41 CPC, learned Single Judge ought to have dismissed the appeal for default and not on merits.

11) The order and judgment dated 17.09.2018, whereby CFA was dismissed on merits is, therefore, required to be taken as appeal dismissed for default notwithstanding the fact that the learned Single

Judge discussed the merits of the case and dismissed it being not maintainable in law. This issue fell for consideration of a Division Bench of this Court in the case of **Ghulam Qadir and others v. Sikander and others, 1981 AIR (J&K) 30**. The observations of the Division Bench made in para 13 of the judgment are noteworthy and are, therefore, reproduced hereunder:-

> "13. I have, therefore, no doubt in my mind that a court has no power to dismiss an appeal on merits when the appellant is not present in the court either personally or through his counsel. The court can either adjourn it, or dismiss it for default of appellant's appearance. Where in such circumstances the court incidentally dismisses the appeal on merits, its order shall be deemed to be one passed by it under Rule 17 (1) and an application for its re-admission under Rule 19 shall be competent. (AIR 1962 Punj 82 (supra), (AIR 1973 Pat 166) (supra), and AIR 1976 Delhi 148 (supra)). Furthermore, the court cannot dismiss such an application summarily, but is bound to give reasonable opportunity to the appellant to establish the cause for his absence by producing evidence, if necessary. (Krishna Charan Mondal v. Chinibasi Mondal, AIR 1925 Calcutta 269, Gobinda Chandra Mukerjee v. Banku Behari Dass, AIR 1927 Calcutta 888 and Jatindra Nath Mukerjee v. Surandhani Debi, AIR 1928 Calcutta 102)."

12) The discussion aforesaid and law laid down by the Division Bench of this Court in the case of Ghulam Qadir (supra) is clear

answer to the question No.1. We, therefore, hold that, though, vide order and judgment dated 17.09.2018, CFA No.22/2013 was dismissed by the learned Single Judge on merits, yet it shall be deemed to be the one passed by the learned Single Judge under Rule 17(1) of Order 41 CPC.

13) That being the position, application under Order 41 Rule 19 CPC was clearly maintainable against order dated 17.09.2018 and there should be no doubt in anyone's mind that the order passed by the appellate court rejecting the application under Order 41 Rule 19 is appealable order in terms of Order 43 Rule 1(t).

14) This brings us to question No.2. It is vehemently argued by Mr. Jain, that in view of the bar created by Section 100-A CPC, which has overriding effect on Letters Patent, the instant appeal under Clause 12 of the Letters Patent is not maintainable.

15) Mr. Jain, relying upon the judgments of Supreme Court in **Mohd. Saud v. Dr.(Maj.) Shaikh Mahfooz, 2010 (13) SCC 517; Kamla Devi v. Khushal Kanwar and another, (2006) 13 SCC 295** and a Division Bench judgment of this Court in the case of **Vijay Kumari v. Ashwani Kumar, 2021 (3) JKJ[HC] 0** would submit that the order impugned is passed by the learned Single Judge in the exercise of appellate jurisdiction and, therefore, in view of the bar created by Section 100-A CPC, the appeal is not maintainable under

Clause 12 of the Letters Patent or any other law for the time being in force in the State.

16) *Per contra*, Mr. R.K.S.Thakur, learned counsel representing the appellants, would contend that the order impugned has not been passed by the learned Single Judge while hearing and deciding any appeal from an original or appellate decree or order and, therefore, the bar created by Section 100-A CPC will not be attracted. He would further contend that since the order impugned is an appealable order under Order 43 Rule 1(t) of the Code of Civil Procedure, therefore, "judgment" within the meaning of Clause 12 of the Letters Patent. Section 100-A CPC does not create any bar for filing appeal against such order, which is neither an order passed by the Single Judge deciding an appeal from any original or appellate decree or order.

17) With a view to appreciate the rival contentions, the provisions of Section 4, Section 100- A of the Code of Civil Procedure and Clause 12 of the Letters Patent are required to be set out herein below.

Section 4 CPC reads as under:-

> "**4. Savings**.—(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

> (2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

Section 100-A of the Code of Civil Procedure reads thus:-

> "**100-A. No further appeal in certain cases**.--- Notwithstanding anything contained in any Letters Patent of the High Court or in any instrument having the force of law or in any other law for the time being in force in the State, where any appeal from an original or appellate decree or order is heard and decided by a Single Judge of a High Court, no further appeal shall lie from the judgment and decree of such Single Judge."

Clause 12 of the Letters Patent is reproduced hereunder:-

> "12. 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 not withstanding anything herein before 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, a consistently with the provisions of the civil procedure code, 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."

18) Section 4 of the Code of Civil Procedure, as is evident from its plain reading, does not mean that the CPC does not apply to the proceedings under special or local laws but only indicates that where there is an inconsistency, the Rules of Code of Civil Procedure do not prevail. The provisions of the Code of Civil Procedure will apply to all matters on which the special or local law is silent. It would, therefore, mean that the letters patent, as applicable to the High Court of Jammu & Kashmir and Ladakh, is a special law in force, which confers special jurisdiction or power for intra-court appeal from Single Bench to the Division Bench of the High Court under certain set of circumstances and in the exercise of specified jurisdiction. However, there is specific provision to the contrary made in Section 100-A of the Code of Civil Procedure.

19) Section 100-A begins with non-obstante clause i.e. “notwithstanding anything contained in any Letters Patent of the High Court or in any instrument having the force of law or in any other law for the time being in force in the State”, which means that Section 100-A is a specific provision to the contrary in terms of Section 4 and, therefore, has overriding effect on Clause 12 of the Letters Patent of this Court where it is an appeal heard and decided by a Single Judge of the High Court from original or appellate decree or order. To put it simply, the appeal under Clause 12 of the Letters Patent shall not be maintainable against a judgment and decree of the Single Bench passed in an appeal from original or appellate decree or order. This is so, because Section 100-A CPC has overriding effect and contains a provision contrary to clause 12 of the Letters Patent which provides that an appeal to the Division bench from “Judgment” of the Single Bench passed on its original side or in appeal from the original decree from the court subject to its power of superintendence. From a plain reading of Clause 12 of the Letters Patent reproduced herein above will fortify the conclusion we have drawn.

20) Under Clause 12 of the Letters Patent, as is evident from its plain reading, an appeal from a judgment of Single Bench shall lie to the Division Bench where it is rendered on the original side or while hearing an appeal against the original decree of the court subject to superintendence of the High Court. It would mean that if a judgment is passed by the Single Bench either in a suit or original proceedings like

writ jurisdiction or in an appeal against original decree from a court subordinate to it, it would be appealable under Clause 12 of the Letters Patent. However, the judgment passed in exercise of appellate jurisdiction in respect of a decree or order made in exercise of appellate jurisdiction by a court subordinate to the High Court and an order made in the exercise of revisional jurisdiction and a judgment or order of sentence passed in the exercise of power of superintendence shall not be appealable before the larger Bench (DB) of the High Court. This is the plain meaning of the expression put in the bracket i.e. (not being a judgment passed 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, and not being and 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).

21) Clause 12 of the Letters Patent further provides that in case the Judge, who passed the judgment in an appeal against the appellate decree or order of the court subordinate to the High Court declares that the case is fit one for appeal, the appeal under Clause 12 against such order, too, can be entertained by the larger Bench. It is in this manner the provisions of Clause 12 of the Letters Patent are required to be understood and appreciated. The jurisdiction of the Division Bench of the High Court to entertain an appeal against an order of Single Bench is undoubtedly circumscribed by Section 100-A CPC and where

judgment of the Single Bench appealed before the Division Bench is the one passed by the Single Bench hearing and deciding an appeal from an original or appellate decree or order, the bar of Section 100-A will be attracted and notwithstanding anything contained in Letters Patent of the High Court, the appeal before the Division Bench shall not be maintainable.

22) When we examine the instant case in light of the provisions of Section 100-A CPC, we do not find that the order impugned before us is the one passed by the Single Bench of this Court hearing and deciding any appeal from an original or appellate decree or order. The impugned order is an order passed by the Single Bench under Order-41 Rule 19, whereby the petition filed by the appellants for re-admission of the appeal dismissed vide judgment dated 17.09.2018, has been rejected. This order cannot be said to have decided an appeal either from original or appellate decree or order.

23) That being the clear position, the bar under Section 100-A CPC cannot be said to be attracted. We, therefore, have no doubt in our mind that appeal under Clause 12 of the Letters Patent against such order is maintainable. Though, it is argued by Mr. Jain that the order impugned does not amount to “judgment” the term used in Clause 12 of the Letters Patent, yet we find this question, too, no longer *res integra*. Appealable order in terms of Section 104 of the Code of Civil Procedure read with Order 43 Rule 1 CPC do decide vital rights of the

parties and, therefore, judgment in terms of Clause 12 of the Letters Patent. This issue was set at rest by Hon'ble the Supreme Court in the case of **Shah Babulal Khimji c. Jayaben D. Kania and another, (1981) 4 SCC 8.** The Supreme Court clearly held that whenever a judge trying a suit decides a controversy which affects valuable rights of one of the parties it must be treated to be a 'judgment' within the meaning of Letters Patent. The judgment could be a final judgment, preliminary judgment or intermediary or interlocutory judgment. Though all the interlocutory orders in the course of a suit or appeal cannot be treated as judgment yet orders, which decide matters of moment or affect valuable rights of parties or work serious injustice to the party concerned, would be 'judgment", therefore, appealable under relevant clause of the Letters Patent.

24) In view of the aforesaid discussion, we are convinced and are of the considered view that the instant appeal under Clause 12 of the Letters Patent is maintainable. We now discuss the judgments cited by Mr. Jain to assail the maintainability of this appeal.

25) The Supreme Court in the case of Mohd. Saud (supra) deals with altogether a different situation. In the aforesaid case, Hon'ble Supreme Court was hearing an appeal against a Full Bench judgment of Orissa High Court, which had held that LPA was not maintainable against the judgment of Single Bench passed in an appeal that had arisen out of an interim order passed by the Additional District Judge, Bhubneshwar.

Hon'ble Supreme Court after discussing the provisions of Section 100-A and its impact on the appeal provided under Letters Patent concluded and held that the appeal before the Division Bench under Letters Patent was not maintainable against an order passed by the Single Bench hearing and deciding an appeal against an appealable order passed by a Court subordinate to the High Court. Noticing some inconsistency in the language used by the legislature in Section 100-A, the Supreme Court adopted the principle of purposive interpretation and held that LPA, as held by a Full Bench of Orissa High Court, was not maintainable against a judgment and decree or order passed by the Single Bench deciding an appeal against the original or appellate decree or order. Though, in the second part of Section 100-A, the legislature has not used the term "order" conveying that Letters Patent Appeal under Section 100-A would be barred only against judgment and decree of the Single Bench. This apparent contradiction appearing in Section 100-A, as amended in the year 2002, was, thus, resolved by the Supreme Court.

26) The judgment, aforesaid, therefore, does not decide the point that has arisen in the instant case. The *ratio decidendi* of the aforesaid judgment is that the letters patent appeal will not be maintainable even against an order passed by the Single Bench whereby he decides an appeal against an order (appealable order) passed by the court subordinate to the High Court (trial court) and that the word "order",

though not finding place in the later part of Section 100-A CPC shall be read into along with expression “judgment and decree”.

27) The second judgment relied upon by Mr. Jain in the case of Kamla Devi (supra) also deals with a different fact situation. The question before the Supreme Court in the aforesaid case was whether amendment to Section 100-A by Section 4 of the Act No.22 of 2002, which came into force w.e.f 01.07.2002 was prospective in operation or it would apply to the pending cases. Hon’ble Supreme Court after discussing the issue threadbare and referring to the case law on the point in paragraph No.20 concluded that the letters patent appeal filed prior to coming into force of the 2002 Act would be maintainable. The question was decided by the Supreme Court by holding that right to appeal is a substantive right and, therefore, can only be taken away by a subsequent enactment either expressly or by necessary intendment. Section 100-A CPC, as amended by Amending Act 22 of 2002 neither expressly nor by necessary intendment has taken away the vested right of appeal and, therefore, could not held to be retrospective in operation applying even to the appeals filed prior to the amendment. We are at loss to understand as to how this judgment of the Supreme Court would help the respondents.

28) The last judgment relied upon by Mr. Jain is a Division Bench Judgment of this Court in the case of Vijay Kumari (supra) where the issue before the Division Bench was whether letters patent appeal was

maintainable against an order passed by the learned Single Judge in exercise of its appellate power. The Division Bench referring to the provisions of Clause 12 concluded that letters patent appeal from judgment of one judge of the High Court to the Division Bench would not be maintainable where the judgment has been passed in the exercise of appellate jurisdiction. It is for this reason, learned Division Bench held that the appeal in the aforesaid case, which was against an order rejecting an application for enhancement of maintenance, was not maintainable under the clause 12 of the Letters Patent. However, there is not much discussion insofar as provisions of Section 100-A CPC are concerned, except in paragraph No.25 it is observed that where an appeal is decided by a Single Judge of the High Court, further appeal against it is barred in law.

29) With respect, the Division Bench judgment (supra) is *per incuriam* and does not lay down good law, for, the the Full Bench judgment of this Court deciding the issue differently in the case of **Kamla Devi v. Balbir Singh, AIR 1981 J&K 70** was not brought to the notice of the Division Bench. In the aforesaid Full Bench judgment, the Bench had framed two questions for determination.

(1) Whether an appeal under clause 12 of the Letters Patent against a judgment of a Single Judge, passed by him in first appeal against a decree or order of subordinate court will be competent without the

case being declared to be a fit one for appeal by the Single Judge?

(2) Whether the view taken by this Court in Satya Jyoti v. Maj. R.D.Jyoti Letters Patent Appeal No.:3 of 1978 decided on 14-3-1979 is correct?

30) The case was decided by the Full Bench by 2:1 verdict. Justice I.K.Kotwal and Justice A.S.Anand answered the first question in the affirmative and second question in the negative. The Acing Chief Justice Mufti Baha-ud-Din Farooqi, however, gave his dissenting opinion.

31) In view of the Full Bench judgment, it is now trite that an appeal under Clause 12 of the Letters Patent against a judgment of Single Judge passed by him in the exercise of appellate jurisdiction against the decree or order of subordinate court is competent and the contrary view, as has been taken by the Division Bench in Vijay Kumari (supra), similar to the one taken by earlier Division Bench in the case of Satya Jyoti v. Maj. R.D.Jyoti decided on 14.03.1979 is not correct. Had the Full Bench judgment (supra) been brought to the notice of the Division Bench in Vijay Kumari's case (supra), the result would have been different.

32) Following the Full Bench judgment of this Court in the case of Kamla Devi (supra), we hold that the instant appeal is maintainable under Clause 12 of the Letters Patent and the bar created by Section

100-A CPC is not attracted, for, the order impugned is not passed by the learned Single Judge hearing and deciding any appeal against an original or appellate decree or order of the court subordinate to High Court.

33) On facts, as discussed elaborately herein above, we find that the judgment passed by the learned Single Judge in CFA No.22/2013 dated 17.09.2018 is an order passed under Order 41 Rule 17 CPC. We also find that the the appellants have shown sufficient cause for their absence on 20.07.2018 when the appeal was finally heard and reserved. We disagree with the view of learned Single Judge that notwithstanding the use of expression "heard", the CFA shall be deemed to have been heard a day before i.e. 19.07.2018 and the reasons in support of our conclusion have already been given herein above.

34) For the foregoing reasons, we allow this appeal, set aside the order impugned dated 19.03.2021, readmit the Civil First Appeal No.22/2013 and remand the case back to the learned Single Judge for hearing and deciding the Civil First Appeal afresh.

(Puneet Gupta)
Judge

(**Sanjeev Kumar)**
Judge

JAMMU
24.08.2021
Vinod,PS

Whether the order is speaking : Yes
Whether the order is reportable: Yes