DEDH NATHU RAJA (DEAD) BY L. RS. A

v.

L. ANGHA NATHU JAMAL (DEAD) BY L. RS & ORS.

September 16, 1969

[J. C. SHAH, V. RAMASWAMI AND A. N. GROVER, JJ.] B

Practice and Procedure—States Reorganisation Act (37 *of* 1956), *ss.* 52, 57 *and* 59—*High Court in Part B State of Saurashtra—Appeal from Judgment to single judge to Division Bench permissible only with certificate—Part B State merged with State of Bombay and High Court in Part B State abolished—Proceedings transferred to Bombay High Court—Letters Patent, Cl.* 15—*Judgment of single Judge in first appeal appealable without certificate—First appeal to High Court in Part B State—Disposed of by single Judge of Bombay High Court after merger—Whether appeal to Division Bench lies without certificate.* C

Under s. 22A(2) of the Saurashtra Ordinance No. 2 of 1948, an appeal lay to a Division Bench of the Saurashtra High Court from a judgment of a single Judge of that High Court in the exercise of its appellate jurisdiction, *if the Judge certified* that the case was a fit one for appeal. The D States Reorganisation Act, 1956, merged the Part 'B' State of Saurashtra into the State of Bombay, abolished the High Court of Saurashtra as from November 1, 1956, and transferred the proceedings pending before the High Court of Saurashtra to the High Court of Bombay. Section 52 of the Act conferred upon the High Court of Bombay, after November 1, 1956, the original, appellate and other jurisdiction which was exercised by the High Court of Saurashtra immediately prior to that date in respect of the territories in the State of Saurashtra. The Saurashtra Ordinance No. 2 E of of 1948 was repealed with effect from November 1, 1956, by the Saurashtra (Adaptation of Laws on Union Subjects Order, 1957, and the Rules and orders relating to practice and procedure framed by the High Court of Saurashtra were abrogated as from November 1, 1956 by rules of the High Court of Bombay made under s. 54 of the State Reorganisation Act, 1956. The effect of s. 57 of the States Reorganisation Act is that the powers of a Division Bench of the High Court for the new State of Bombay F shall be the same as the powers of the Division Bench under the law in force immediately before November 1, 1956, in the State of Bombay. Clause 15 of the Letters Patent of the High Court of Bombay, which was law in force immediately before November 1, 1956, in the State of Bombay, provides that an appeal from the judgment of a single Judge of the Bombay High Court, in a first appeal from a judgment of the Subordinate Court, could be filed *without a certificate* of the Judge hearing the first appeal. Clause 15 of the Letters Patent of the Bombay High Court G applied also to the Gujarat High Court which was established as a result of the Bombay Reorganisation Act, 1960.

A first appeal against a decree of a subordinate court in Saurashtra, pending in the Saurashtra High Court on November 1, 1956, was transferred to the High Court of Bombay, and disposed of by a single Judge of the Bombay High Court. An appeal to the Division Bench under Cl. 15 of the Letters Patent of the High Court of Bombay, was transferred to H the Gujarat High Court after its establishment, but the Gujarat High Court held that the appeal was incompetent under s. 22A of the Saurashtra Ordinance No. 2 of 1948 without a certificate from the single Judge.

A In appeal to this Court,

HELD : (1) It was only in the absence of any provision to the contrary, that a right attached to the action when it was commenced in the subordinate court in Saurashtra that an appeal against the decision of the single Judge of the High Court of Saurashtra in appeal, shall lie only if the single judge certified that it was a fit case for appeal to a Division Bench.

B *Garikapatti Veerayya* v. *N. Subbiah Choudhury*, [1957] S.C.R. 488, referred to. [443 A-B].

(2) But, from November 1, 1956, the Saurashtra High Court was abolished, the Saurashtra Ordinance No. 2 of 1948 was repealed, and the jurisdiction of the High Court of Saurashtra was conferred upon the Bombay High Court. Therefore, the single Judge of the High Court who heard the first appeal, heard it not as a Judge of the Saurashtra High Court, but as a Judge of the Bombay Court. [443 B-C]

C

(3) Section 52 of the States Reorganisation Act, 1956 does not mean that the jurisdiction conferred upon the Bombay High Court in respect of the territories within the State of Saurashtra *was to be regulated with reference to* the law which was in force on November 1, 1956 in Saurashtra. Therefore, it does not incorporate either expressly or by implication the limitations prescribed by s. 22A(2) of the Saurashtra Ordinance into the Letters Patent of the High Court. [443 G-H; 444 C-D]

D

(4) Since the restriction placed by s. 22A of the Ordinance applied only to a judgment of a single Judge of the High Court of Saurashtra and could not apply to a judgment of a single-Judge of the Bombay High Court, and could not operate to restrict a right of appeal exercisable under Cl. 15 of the Letters Patent, the judgment of the single Judge of the Bombay High Court was, under s. 57 of the States Reorganisation Act, subject to appeal to a Division Bench without a certificate of the single Judge. [443 D-F]

E

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1456 of 1966.

Appeal from the judgment and order dated April 6, 1964 of the Gujarat High Court in Letters Patent Appeal No. 8 of 1960.

F *D. U. Shah, P. C. Bhartari* and *J. B. Dadachanji*, for the appellants.

S. K. Dholakis and *Vineet Kumar*, for respondents Nos. 1(a) to 1(e) and (g).

The Judgment of the Court was delivered by

G **Shah, J.**—The facts which give rise to thise appeal are few and simple. The appellant commenced on May 3, 1951 an action in the Court of the Assistant Judge, Morvi, in the former Part 'B' State of Saurashtra for a decree for Rs. 9,387/5/- against one L. Angha Nathu Jamal and respondents 2 & 3 in this appeal. The Trial Court decreed the suit on October 17, 1955. An appeal

H was filed against the decree in the High Court of Saurashtra at Rajkot. On November 1, 1956, the High Court of Saurashtra was abolished and the proceedings pending in that Court stood transferred to the High Court of Bombay. On February 21,

1958, Vyas, J., of the High Court of Bombay allowed the appeal. Against that order an appeal under Cl. 15 of the Letters Patent of the High Court of Bombay was filed by the plaintiff but without an order of Vyas, J., certifying that the case was fit for appeal to a Division Bench of the High Court. On May 1, 1960 under the Bombay Reorganisation Act 1960, the appeal stood transferred to the High Court of Gujarat. The High Court of Gujarat held that the appeal was incompetent in the absence of an order under S. 22A of the Saurashtra Ordinance 2 of 1948 certifying that the case was fit for appeal to a Division Bench. With certificate granted by the High Court of Gujarat this appeal has been preferred.

The Rulers of Indian States in Kathiawar agreed "to unite and integrate" their territories in one State to be styled the United State of Saurashtra with a common executive, legislature and judiciary. By Ordinance 1 of 1948 the administration of the covenanting States was taken over by the *Rajpramukh*. The *Rajpramukh* issued, in exercise of power reserved to him by Art. 9 cl. (3) of the Covenant, Ordinance 2 of 1948 setting up with effect from February 29, 1948, a High Court of Judicature for the State of Saurashtra. The expression "High Court" was defined in s. 3(c) as meaning "the High Court established and constituted by this Ordinance and functioning as the High Court of the Saurashtra State. By s. 21 the High Court was to be the highest Court of appeal and revision in the State and to have jurisdiction to maintain and dispose of such appeals, revision and other cases, civil or criminal, as it may be empowered to do under the Ordinance or any enactment in force in the State. By s. 22 the High Court was also to be a Court of reference with power to hear, revise and determine all cases referred to it. By Ordinance 5 of 1950 s. 22A was added : it was provided thereby :

> "(1) Except as otherwise provided by any enactment for the time being in force, an appeal from any original decree, or from any order against which an appeal is permitted by any law for the time being in force, or from any order under Article 226 of the Constitution of India, made by a single Judge of the High Court, shall lie to a Bench consisting of two other Judges of the High Court.
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> (2) An appeal shall lie from a judgment of one Judge of the High Court in respect of a decree or order made in exercise of Appellate Jurisdiction to a Bench consisting of two other Judges of the High Court if the Judge who made the decree or order certifies that the case is a fit one for appeal."

A Under the Constitution of India, the territory of the United State of Saurashtra was formed into a Part 'B' State of Saurashtra. By the States Reorganisation Act 1956 the territory of the State of Saurashtra merged into the State of Bombay.

By s. 49 of the States Reorganization Act, 1956, it was enacted that the High Court exercising immediately before the appointed B day, jurisdiction in relation to the existing State of Bombay shall, as from the appointed day, be deemed to be the High Court for the new State of Bombay. By s. 50(1) as from the appointed day, the High Courts of all the existing Part B States (with certain exceptions not material) were to cease to function and were abolished. By section 52 was provided :

C "The High Court for a new State shall have, in respect of any part of the territories included in that new State, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of that part of the said territories by any High Court or Judicial Com- D missioner's Court for an existing State".

By s. 54 it was provided :

"Subject to the provisions of this Part, the law in force immediately before the appointed day with respect to practice and procedure in the High Court for the corresponding State shall, with the necessary modifica- E tions, apply in relation to the High Court for a new State, and accordingly, the High Court for the new State shall have all such powers to make rules and orders with respect to practice and procedure as are, immediately, before the appointed day, exercisable by the High Court, for the corresponding State :

F

Provided that any rules or orders which are in force immediately before the appointed day with respect to practice and procedure in the High Court for the corresponding State shall, until varied or revoked by rules or orders made by the High Court for a new State, apply with the necessary modifications in relation to practice G and procedure in the High Court for the new State as if made by that Court".

Section 59(3) provided that all proceedings pending in the High Court of Saurashtra or in the Court of the Judicial Commissioner for Kutch immediately before the appointed day shall stand transferred to the High Court of Bombay. By s. 119 it was H provided :

"The provisions of Part II shall not be deemed to have effected any change in the territories to which any

law in force immediately before the appointed day extends or applies, and territorial references in any such law to an existing State shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day." A

Section 127 provided : B

"The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law."

In exercise of the power conferred upon the Central Government by s. 120 of the States Reorganisation Act, 1956, the Saurashtra (Adaptation of Laws on Union Subjects) Order, 1957, was promulgated by the Central Govt. By cl. 3 of the order it was provided that Saurashtra Ordinance 2 of 1948 shall stand repealed with effect from November 1, 1956. The High Court of Bombay for the new State added rr. 252-A and 252-B to the Rules of the High Court of Judicature at Bombay, Appellate Side, 1950. By r. 252-A it was provided : C D

"Rules and orders relating to practice and procedure in the High Court in force immediately prior to the appointed day in the High Court of Bombay shall, subject to modifications made from time to time thereto, apply to the practice and procedure in the High Court." E

Rule 252-B provided :

"Rules and orders relating to practice and procedure in the High Court framed by the High Courts of Nagpur, Hyderabad and Saurashtra and Judicial Commissioner's Court, Kutch, shall stand abrogated as from the 1st November 1956 in the areas of the new State of Bombay which before the 1st November 1956 were parts of the States of Madhya Pradesh, Hyderabad, Saurashtra and Kutch." F

The High Court of Gujarat held that the appeal filed by the respondents in the High Court of Saurashtra against the judgment of the Assistant Judge, was and continued to remain subject to the provisions of s. 22A of Saurashtra Ordinance 2 of 1948 and an appeal could lie against the decision of Vyas J., only if he certified that the case was fit for appeal to a Division Bench. Clause 15 of the Letters Patent of the Bombay High Court provided : G

"And we do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a H

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 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 under the provisions of s. 107 B of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment C of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act made on or after the first day of February 1929) 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 D passed the judgment declares that the same is a fit one for appeal; but . . . . . right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors. . . . . ."

E By cl. 15 of the Letters Patent a judgment in an appeal from a civil suit by a single Judge of the High Court of Bombay is subject to appeal to a Division Bench except when the order is made in exercise of the revisional jurisdiction of the Court or in second appeal, or in exercise of criminal jurisdiction, or in exercise of power of superintendence under s. 107 of the Govern- F ment of India Act, 1935 (Art. 227 of the Constitution). Vyas, J., decided the appeal sitting as a Judge of the High Court of Bombay. *Prima facie,* his judgment delivered in a first appeal from a judgment of the subordinate court was subject to appeal to a Division Bench of the High Court of Bombay.

G There was clearly an inconsistency between s. 22A of the Saurashtra Ordinance 2 of 1948, and cl. 15 of the Letters Patent of the High Court of Bombay. By virtue of s. 22A(2) an appeal lay to a Division Bench of the Saurashtra High Court from a judgment of one Judge "in respect of a decree or order made in exercise of Appellate Jurisdiction when the Judge who made the decree or order certified that the case is a fit one for appeal". The H Legislature made no distinction between a first appeal, a second appeal, an appeal from order and an application in exercise of revisional jurisdiction But an appeal under cl. 15 of the

Letters Patent of the High Court of Bombay in an appeal from the judgment of the Court of First Instance could be filed without a certificate of the Judge hearing the appeal. A

The right to appeal from a decree or order is a substantive right. As a corollary thereto, the right to maintain a decree of a Court without interference by a superior Court and subject only to the limitation therein is also a vested right and may be taken away by express enactment or clear implication of the amending statute. In *Colonial Sugar Refining Company* v. *Irving*(1) the Judicial Committee held that a provision which deprives a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right does not regulate procedure. The Australian Commonwealth Judiciary Act, 1903, came into force on August 25, 1903. Against the judgment of the Supreme Court of Queensland in an action commenced on Oct. 25, 1902, an application was made for leave to appeal to the Judicial Committee and leave was granted on September 4, 1903. At the hearing of the appeal by the Judicial Committee the respondents applied that the appeal from the judgment of the Supreme Court of Queensland be dismissed on the ground that the power of the Court below to give leave to appeal stood abrogated by s. 39 of the Australian Commonwealth Judiciary Act, 1903. The application was rejected by the Judicial Committee. Lord Macnaghten observed : B C D E

> "As regards the general principles applicable to the case there was no controversy. On the one hand it was not disputed that if the matter in question be a matter of procedure only, the petition (to dismiss) is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Judiciary Act, it was conceded that in accordance with a long line of authorities from the time of Lord Coke to the present day the appellants (the Sugar Co.) would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore, the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure". F G H

(1) [1905] A.C. 369.

A In *Garikapatti Veeraya* v. *N. Subbiah Choudhury*(1), this Court accepted the principle in *Colonial Sugar Refining Company's* case(2). In the absence of any provision to the contrary, therefore, a right attached to the action when it was commenced in 1951, that an appeal against the decision of a single Judge of the High Court of Saurashtra shall lie only if the Judge deciding the B case certified the case to be a fit one for appeal. But the Saurashtra High Court was abolished from November 1, 1956 and the jurisdiction of the Saurashtra High Court was conferred upon the Bombay High Court. The case was tried by Vyas, J., not as a Judge of the Saurashtra High Court but as a Judge of the High Court of Bombay. In terms the restriction placed by s. 22A applies to a C *judgment of one of the Judges of the High Court of Saurashtra* : it does not apply to a judgment of a Judge of the High Court of Bombay. Once the Saurashtra Ordinance 2 of 1948 was repealed and the jurisdiction to try the appeal was conferred upon the High Court of Bombay, the right of appeal exercisable by the parties to the litigation decided by the High Court of Bombay was governed by the Letters Patent of that court nad not by s. 22A of the Sau- D rashtra Ordinance 2 of 1948. Granting that the incident prescribed by s. 22A continued to attach to the action, in terms s. 22A of the Saurashtra Ordinance could not operate to restrict a right of appeal exercisable by cl. 15 of the Letters Patent governing the judgments of the Judges of the High Court of Bombay. The expression "Judge of the High Court" in s. 22A of the ordinance for the E purpose of giving effect to the rule in *Colonial Sugar Refining Company's* case(2) cannot be read as meaning a Judge of the High Court of Bombay. By the clearest implication of the repeal by the Saurashtra (Adaptation of Laws on Union subjects) Order, 1957, promulgated by the Central Government and by the application of cl. 15 of the Letters Patent of the Bombay High Court, the judgment of Vyas, J., was subject to appeal to a Divi- F sion Bench without an order of the Learned Judge certifying the case to be fit for appeal.

In support of his submission counsel for the respondents relied upon the terms of s. 52 of the States Reorganisation Act, 1956. But that section only confers upon the High Court of Bombay G after November 1, 1956 the original, appellate and other jurisdiction, which was exercisable by the High Court of Saurashtra immediately prior to November 1, 1956, in respect of the territories within the State of Saurashtra. The section does not incorporate either expressly or by implication the limitations prescribed by s. 22A(2) of Saurashtra Ordinance 2 of 1948 into the Letters Patent of the High Court of Bombay. The jurisdiction—original, H appellate and other—which the High Court of Saurashtra could exercise prior to November 1, 1956, survived to the High Court

(1) [1957] S.C.R. 488. (2) [1905] A.C. 369.

of Bombay in respect of the territories of the State of Saurashtra, and the appeal filed by the respondent before the High Court of Saurashtra was triable in the exercise of the appellate jurisdiction of the High Court of Bombay, after the case stood transferred to that Court by virtue of sub-s. (3) of s. 59 of the States Reorganization Act, 1956. Vyas, J., functioned as a Judge of the High Court of Bombay and his judgments in first appeals were, in the absence of an express provision to the contrary, subject to appeal under cl. 15 of the Letters Patent to a Division Bench without a certificate.

The High Court of Gujarat was right in holding that in respect of the areas of the former Saurashtra State, the High Court of Bombay acquired the same jurisdiction which the High Court of Saurashtra possessed. That however, does not mean that the jurisdiction was to be regulated "with reference to the law which was in force on the appointed day *i.e.* November 1, 1956". Section 52 of the States Reorganisation Act preserved the original, appellate and other jurisdiction as under the law in force immediately before the appointed day exercisable in respect of the territories within the State of Saurashtra. Unless in the exercise of that jurisdiction any restriction under the law then in force was by express provision or by clear implication preserved, the provisions of cl. 15 of the Letters Patent must apply.

It is necessary to recall the provisions of s. 57 of the States Reorganisation Act, 1956, which provide that the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and division courts of the High Court for the corresponding State and with respect to matters ancillary to the exercise of the powers shall, with the necessary modification, apply in relation to the High Court for a new State. Immediately before November 1, 1956, against the judgment of a single Judge of the High Court of Bombay exercising power in a first appeal, an appeal lay to a Division Bench without a certificate. The power of a Division Bench to entertain an appeal continued to remain exercisable by the Judges of the Bombay High Court when dealing with cases transferred under s. 59(3) to the Bombay High Court from the Saurashtra High Court. In terms s. 57 provides that powers of the Division Bench of the High Court for the corresponding State *i.e.* the new State of Bombay shall be the same as the powers of the Division Bench under the law in force *immediately before* the appointed day in the State of Bombay. A Division Bench of the High Court of Bombay was competent to entertain an appeal against the judgment of a single Judge deciding a first appeal from the decision of a subordinate court without a certificate of the Judge deciding the appeal.

A The High Court of Gujarat have made a distinction between "power" and "jurisdiction", and they have held that when s. 52 of the States Reorganisation Act, 1956, enacts that the appellate jurisdiction of the High Court of Bombay for the new State of Bombay shall in relation to the Saurashtra area be the same as the jurisdiction which the Saurashtra High Court possessed, it is meant B that the High Court of Bombay has the same jurisdiction which the High Court of Saurashtra originally had, and in exercise of that jurisdiction is subject to the same limitations which the High Court of Saurashtra was subject. We are unable to agree with that view. Section 52 of the States Reorganization Act, 1956, does not say so, and s. 57 of that Act provides to the contrary.

C

The High Court of Gujarat was also of the view that s. 52 of the States Reorganisation Act, 1956 "crystalizes the law" only with respect to the territorial jurisdiction of each of the areas comprised in the High Court of Bombay, and if the Legislature extended the jurisdiction of the High Court of Bombay and also D retained the jurisdiction which the abolished High Court possessed, the result would be "odd and conflicting"—there being conflict of jurisdiction. But that, in our judgment, is a ground for holding that the jurisdiction of the Bombay High Court superseded in case of conflict, the restrictions on the exercise of jurisdiction by the original High Court *qua* the Saurashtra territory, and not that the jurisdiction of the High Court of Bombay was because of some E unexpressed limitation restricted.

The High Court of Gujarat recognised that the conclusion to which they had reached revealed a defect in the administration of justice. They observed :

F "The Legislature may have had a good reason for preserving in tact the old jurisdiction of the Saurashtra High Court in regard to pending cases. However, our conclusion affects cases instituted after the Reorganisation Act came into force. In our judgment, there is no reason why the litigants from the Saurashtra and Kutch areas should now be treated on a different footing from G the litigants in the old Bombay area. In our judgment, the rights of appeal of litigants in all the areas should now be placed on the same footing. We would recommend to the authorities concerned to examine this question and, if so advised, to undertake the necessary legislation so as to confer the same rights of appeal to the litigants from the Saurashtra & Kutch areas as are H given to the litigants from the rest of the State of Gujarat."

In our view the conclusion that the restriction on the "old jurisdiction of the Saurashtra High Court" in regard to pending cases was preserved by s. 52 is erroneous. The States Reorganisation Act, 1956 does not purport to preserve the restrictions upon the exercise of jurisdiction, and no implication arises from the use of the expression "original, appellate and other jurisdiction as under the law in force immediately before the appointed day", that the limitations upon the exercise of the jurisdiction which were existing prior to November 1, 1956, notwithstanding the provisions of s. 57 of the States Reorganisation Act were preserved.

The order passed by the High Court of Gujarat is set aside. and the case is remanded to the High Court to be re-entered under the original number and to be heard and disposed of according to law. Costs will be costs in the High Court.

V.P.S. *Appeal allowed and case remanded.*