Union of India

Vs

Mohindra Supply Company

Civil Appeal No. 112 of 1958

(K. N. Wanchoo, K. C. Das Gupta, J. C. Shah, Raghuvar Dayal JJ)

05.09.1961

JUDGMENT

SHAH, J. –

A dispute arising under a contract relating to the supply of solidified fuel between Messrs. Mohindra Supply Company - hereinafter referred to as the respondents - and the Governor-General of India in Council was referred to arbitration of two arbitrators. On March 19, 1946, the arbitrators made and published an award directing the Governor-General to pay to the respondents Rs. 47,250/- with interest at 3% from July 17, 1944, till payment. This award was filed in the court of the Subordinate Judge, First Class, Delhi. The Governor-General applied for an order setting aside the award on certain grounds which for the purposes of this appeal are not material. The Subordinate Judge refused to set aside the award on the grounds set up and rejected the application. Against the order refusing to set aside the award, the Governor-General preferred to the Lahore High Court an appeal which after the setting up of the Dominions of India and Pakistan was transferred to the Circuit Bench of the East Punjab High Court at Delhi. Falshaw, J., who heard the appeal set aside the order, because in his view the dispute could not be referred to arbitration under the contract which gave rise to the dispute and "that was sufficient to invalidate the award". Against that order an appeal was preferred under clause 10 of the Letters Patent of the High Court of Lahore, which by the High Court (Punjab) Order, 1947 applied to the East Punjab High Court. Before the Appellate Bench, the Governor-General contended that the appeal under the letters Patent was prohibited by section 39(2) of the Indian Arbitration Act. The question whether the appeal was maintainable was referred to a Full Bench of the High Court. The Full Bench opined that an appeal from the judgment of a Single Judge exercising appellate powers did lie under clause 10 of the Letters Patent, notwithstanding the bar contained in section 39(2) of the Arbitration Act. After the opinion of the Full Bench was delivered, a Division Bench considered the appeal on its merits and set aside the order of Falshaw, J. The Union of India appeals against the decision of the High Court.

In this appeal, we are only concerned with the question whether the appeal under clause 10 of the Letters Patent of the High Court against the order of Falshaw, J., was maintainable. The proceedings relating to arbitration are, since the enactment of the Indian Arbitration Act X of 1940, governed by the provisions of that Act. The Act is a consolidating and amending statute. It repealed the Arbitration Act of 1899, Schedule 2 of the Code of Civil Procedure and also clauses (a) to (f) of section 104(1) of the Code of Civil Procedure which provided for appeals from orders in arbitration proceedings. The Act set up machinery for all contractual arbitrations and its provisions, subject to certain exceptions, apply also to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that, other enactment were an arbitration agreement, except in so far as the Arbitration Act is inconsistent with that other

enactment or with any rules made thereunder. Section 39 of the Act, which deals with appeals, provides :

> " (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order :

An order -

> (i) superceding an arbitration;
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> (ii) on an award stated in the for of a special case;
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> (iii) modifying or correcting a award;
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> (iv) filing or refusing to file a arbitration agreement;
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> (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
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> (vi) setting aside refusing to set aside an award :
>
> Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.
>
> (2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court. "

The two sub-sections of section 39 are manifestly part of single legislative pattern. By sub-section (1), the right to appeal is conferred against the specified orders and against no other orders; and from an appellate order passed under sub-section (1) no second appeal (except an appeal to this Court) lies. On the question whether the interdict, in sub-section (2) operates against an appeal under the Letters Patent, there has been divergence of opinion amongst the High Courts in India. The Bombay High Court in Madhavdas v. Vithaldas (I. L. R. (1952) Bom. 570) held that there is no further right of appeal under the Letters Patent when a Single Judge of the High Court disposes of an appeal under section 39(1) of the Arbitration Act. The same view was expressed by the Madras High Court in Radha Krishan Murthy v. Ethirajulu (I. L. R. (1945) Mad. 564). In Hanuman Chamber of Commerce Ltd., Delhi v. Jassa Ram Hira Nand (A. I. R. (1948) Lah. 64) and Banwari Lal Ram Dev v. The Board of Trustees, Hindu College (I. L. R. (1948) E. P. 159) it was held that a right to appeal under the Letters Patent against an order passed in appeal under section 39(1) is not restricted by section 39(2). In the view of the Lahore and the East Punjab High Courts appeals prohibited by sub-section (2) were second appeals, i. e., appeals under section 100 of the Civil Procedure Code and "Intra-court appeals" such as appeals under the Letters Patent from an order of a Single Judge to a Bench of the same Court were not prohibited. The Madras High Court in a recent judgment - Mulchand Kewal Chand Daga v. Kissan Das Gridhardass ((1961) 74 L. W. 408 F. B) has overruled its earlier decision in Radha Krishna Murthy's case and has held that section 39 deals only with appeals from orders passed by a court to a superior court and not with appeals "intra-court" and therefore section 39(2) does not operate to prohibit an appeal under the Letters Patent against the order of a Single Judge exercising appellate jurisdiction in an arbitration matter.

Section 39(2) expressly prohibits a second appeal from an order passed in appeal under section 39(1) except an appeal to this court. There is clear indication inherent in sub-section (2) that the expression "second appeal" does not mean an appeal under section 100 of the Code of Civil procedure. To the interdict of a "second appeal", there is an exception in favour of an appeal to this Court; but an appeal to this Court is not a second appeal. If the legislature intended by enacting section 39(2) nearly to prohibit appeals under section 100 of the Code of Civil Procedure, it was plainly unnecessary to enact an express provision saving appeals to this Court. Again an appeal under section 39(1) lies against an order superseding an award or modifying or correcting an award, or filing or refusing to file an arbitration agreement or staying or refusing to stay legal proceedings where there is an arbitration agreement or setting aside or refusing to set aside an award or on an award stated in the form of a special case. These orders are not decrees within the meaning of the Code of Civil Procedure and have not the effect of decrees under the Arbitration Act. Section 100 of the Code of Civil Procedure deals with appeals from appellate decrees and not with appeals from appellate orders. If by enacting section 39(2) appeals from appellate decrees were intended to be prohibited, the provision was plainly otiose; and unless the context or the circumstances compel the Court will not be justified in ascribing to the legislature an intention to enact a sterile clause. In that premise the conclusion is inevitable that the expression 'second appeal' used in section 39(2) of the Arbitration Act means a further appeal from an order passed in appeal under section 39(1) and not an appeal under section 100 of the Civil Procedure Code. This view was expressed by Savdekar, J., in Madhavdass v. Vithaldas (I. L. R. [1952] Bom. 570) and by Rajamannar, C. J., in Mulchand Kewal Chand Daga v. Kissan Das Gridhardass ((1961) 74 L. W. 408 F. B) and we agree with the learned Judges that the adjective "imports a further appeal, that is, numerically second appeal".

The problem to which attention must then be directed is whether the right to appeal under the Letters Patent is at all restricted by section 39, sub-sections. (1) and (2). Clause 10 of the Letters Patent of the High Court, in so far as it is material, provides :

> "And we do further ordain that an appeal shall lie to the said High Court..... from the judgment (not being a judgment passed in exercise of appellant 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 an order made in the exercise of revisional jurisdiction..... of one Judge of the High Court.... ".

By this clause, a right to appeal except in the cases specified, from one Judge of the High Court to a Division Bench is expressly granted. But the Letters Patent are declared by clause 37 subject to the legislative power of the Governor-General in Council and also of the Governor-in-Council under the Government of India Act, 1915 and may in all respects be amended or altered in exercise of legislative authority. Under section 39(1), an appeal lies from the orders specified in that sub-section and from no others. The legislature has plainly expressed itself that the right of appeal against orders passed under the Arbitration Act may be exercised only in respect of certain orders. The right to appeal against other orders is expressly taken away. If by the express provision contained in section 39(1), a right to appeal from a Judgment which may otherwise be available under the Letters Patent is restricted, there is no ground for holding that clause (2) does not similarly restrict the exercise of appellate power granted by the Letters Patent. If for reasons aforementioned the expression "second appeal" includes an appeal under the Letters Patent, it would be impossible to hold that notwithstanding the express prohibition, an appeal under the Letters Patent from an order passed in appeal under sub-section (1) is competent.

The Punjab High Court in Banwari Lal Ram Dev v. The Board of Trustees, Hindu College (I. L. R.

(1948) E. P. 159) and the Lahore High Court in Hanuman Chamber of Commerce Ltd., Delhi v. Jassa Ram Hira Nand (A. I. R. (1948) Lah. 64), held that the appeals contemplated by section 39 are appeals to superior courts and not "intra-court appeals" and therefore the right to appeal under the Letters Patent was not restricted by sub-sections. (1) and (2). But a little analysis of this argument is likely to exhibit the somewhat startling consequences. If the appeal contemplated by section 39(1) is only an appeal to a superior court, orders passed by a subordinate court decisions whereof are made appealable to the same court will not be appealable at all under the Arbitration Act. For instance, under the Bombay Civil Courts Act, certain decisions of Assistant Judges are made appealable to the District Courts. An Assistant Judge is a Judge of the District Court and under the Bombay Civil Courts Act, appeals against his orders and decrees in certain cases lie to the District Court. If the argument that an appeal under clause (1) of section 39 means an appeal to a superior court, be accepted, an appeal from an order under section 39(1) by an Assistant Judge will not lie at all. There are similar provisions in the Civil Courts Acts in the other States as well. The qualifying expression "to the court authorised by law to hear appeals from original decrees of the Court passing the order" in section 39(1) does not import the concept that the appellate court must be distinct and separate from the court passing the order or the decree. The legislature has not so enacted and the context does not warrant such an interpretation. The clause merely indicates the forum of appeal. If from the decision of a court hearing a suit or proceeding an appeal will lie to a Judge or more Judges of the same court, by virtue of section 39(1) the appeal will lie from the order passed under the Arbitration Act, if the order is appealable, to such Judge or Judges of that court. The argument that the right to file an appeal to the Supreme Court from orders in arbitration proceedings would be seriously restricted has in our view no substance. If an order passed in a proceeding on the original side of the High Court is appealable under section 39(1), an appeal will lie to a Division Bench of the High Court and from the order passed by the Division Bench, an appeal, by the express provision contained in sub-section (2) will lie subject to the restrictions contained in the relevant articles of the Constitution to the Supreme Court. If the order is not one falling within section 39(1), no appeal will evidently lie. It is true that against an order passed in arbitration proceeding, by a Division Bench of a High Court in an appeal, an appeal to this Court as a matter of right may lie, if the requirements of Article 133 are fulfilled; but if the same case is heard by a Single Judge no such appeal will lie. But the right to appeal is a creature of statute; no litigant has an inherent right to appeal against a decision of a court. The anomaly relied upon by the appellant occurs in second appeals, and revision applications as well. If these proceedings are heard and disposed of by Single Judges, there is no right of appeal to this Court but against decisions of Division Benches the right to appeal may be exercised.

But it was urged that the interpretation of section 39 should not be divorced from the setting of legislative history, and if regard be had to the legislative history and the dictum of the Privy Council in Hurrish Chunder Chowdry v. Kali Sundari Debia ((1882) L. R. 10 I. A. 4, 17) which has been universally followed, in considering the extent of the right of appeal under the Letters Patent, the Court would not be justified in restricting the right of appeal which was exercisable till 1940 by litigants against decisions of single Judges of High Courts in arbitration matters from orders passed in appeals. In considering the argument whether the right of appeal which was previously exercisable by litigants against decisions of single Judges of the High Courts in appeals from orders passed in arbitration proceedings was intended to be taken away by section 39(2) of the Indian Arbitration Act, the Court must proceed to interpret the words of the statute without any predisposition towards the state of the law before the Arbitration Act was enacted. The Arbitration Act of 1940 is a consolidating and amending statute and is for all purposes a code relating to arbitration. In dealing with the interpretation of the Indian Succession Act, 1865, the Privy Council

in Narendra Nath Sircar v. Kamlabasini Dasi ((1896) L. R. 23 I. A. 18) observed that a code must be construed according to the natural meaning of the language used and not on the presumption that it was intended to leave the existing law unaltered. The Judicial Committee approved of the observations of Lord Herschell in Bank of England v. Vagliano Brothers ([1891] A. C. 107, 144 - 145) to the following effect :-

> "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute citical examination of the prior decisions..... ".

The court in interpreting a statute must therefore proceed without seeking to add words which are not to be found in the statute, nor is it permissible in interpreting a statute which codifies a branch of the law to start with the assumption that it was not intended to alter the pre-existing law; nor to add words which are not to be found in the statute, or "for which authority is not found in the statute". But we do not propose to dispose of the argument merely on these general considerations. In our view, even the legislative history viewed in the light of the dictum of the Privy Council in Hurrish Chunder's case, does not afford any adequate justification for departing from the plain and apparent intendment of the statute.

Under the code of Civil Procedure of 1877, a right of appeal was conferred upon litigants against certain orders by section 588 and from no other such orders. Clauses (s) and (t) dealt with a right to appeal against an order under section 514 superseding an arbitration, and an order under section 518, modifying an award. It was enacted in the last paragraph that the orders passed in appeals under the section shall be final. By paragraph 2 of section 589, it was provided :

> "When an appeal from any order is allowed by this chapter, it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made.....".

By section 591 it was provided :

> "Except as provided in this Chapter, no appeal shall lie from an order passed by any Court in the exercise of its original or appellate jurisdiction. "

The Code of 1877 was replaced by the Code of 1882 but the provisions relating to appeals from orders were re-enacted in identical terms. Before the decision in Hurrish Chunder's case, the view was held, especially by the Bombay and the Madras High Courts that under clause (15) of the Letters Patent of the High Courts, of Bombay, Madras and Calcutta an appeal from an order passed by a single Judge of a High Court lay only under section 588 of the Code and not otherwise. In

Sonba'i v. Ahmed bha'i Habibha'i ((1872) 9 Bom. H. C. Reports 398) a Full Bench of the Bombay High Court in construing the provisions of the Letters Patent of the High Court in the light of the provisions of section 363 of the Civil Procedure Code held that under clause 15 of the Letters Patent and under the rules of the High Court, an appeal to the High Court from an interlocutory order made by one of the Judges lies only in those cases in which an appeal is allowed under the Code of Civil Procedure and its amending Acts. A similar view was expressed by the Madras High Court in Achaya v. Ratrandu, (I. L. R. 9 Mad. 447). But the Privy Council in Hurrish Chunder Chowdry v. Kali Sundari Debia ((1882) L. R. 10 I. A. 4, 17) in a very terse observation expressed a different view, in that case one Kassiswari executed a will devising a taluk in equal shares to her daughter Chundermoni and her daughter-in-law Kali Soondari. After the death of Kassiswari, the two devisees under the will sued one Hurrish Chunder for a decree for possession of the taluk. The Subordinate Judge decreed the suit and that decree was ultimately affirmed by the Privy Council in an appeal filed by the daughters of Chundermoni, and the order of the Queen-in-Council was transmitted to the High Court for execution. In the meanwhile, Chundermoni's moiety in the taluk was purchased by Hurrish Chunder. Thereafter, Kali Sundari applied in the original jurisdiction of the High Court at Calcutta for execution of the order of the Queen-in-Council. Pontifex, J., declined to execute the order, because in his view it could not be executed by one only out of the two original plaintiffs. Against that order, an appeal was preferred under clause 15 of the Letters Patent of the High Court. A Full Bench of the High Court was unanimously of the view that the "discretion" exercised by Pontifex, J., was erroneous but in the view of Garth C. J., the order passed by Pontifex, J., was merely a ministerial order which he had no jurisdiction to pass and the appeal was incompetent. White and Romeshchunder Mitter, JJ., held that the order amounted to a "judgment" and was appealable under clause 15 of the Letters Patent. Against the order of the High Court, an appeal was taken to the Judicial Committee of the Privy Council by the defendant Hurrish Chunder. The Judicial Committee approved of the majority view of the High Court. In negativing the argument of Garth, C. J., the Committee pointed out that Pontifex, J., was not shown to have usurped jurisdiction which did not belong to him, but even if he had, that was a valid ground of appeal, and that if a Judge of the High Court made an order under a misapprehension of the extent of his jurisdiction the High Court had the power to entertain an appeal to set right such a miscarriage of justice. The Committee the observed :

> "It only remains to observe that their Lordships do not think that section 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this where the appeal is from one of the Judges of the Court to the full Court. "

This judgment (in Hurrish Chunder Chowdry's case) gave rise to a serious conflict of opinion in the High Courts in India. The High Courts of Calcutta, Bombay and Madras held, following the dictum of the Privy Council, that an order not appealable under section 588 of the Civil Procedure Code may still be appealable provided it amounted to a "judgment" within the meaning of clause 15 of the Letters Patent of the respective High Courts. - Chappan v. Moidin Kutti (I. L. R. (1899) 22 Mad. 68), Sabhapathi Chetti v. Narayanaswami Chetti (I. L. R. (1902) 25 Mad. 555), Toolsee Money Dassee v. Sudevi Dassee (I. L. R. (1899) 26 Cal. 363), and Secretary of State v. Jehangir ([1902] 4 Bom. 342). But the Allahabad High Court in Banno Bibi v. Mehdi Husain (I. L. R. (1889) 11 All. 375) expressed a contrary opinion. It was observed by Sir John Edge, C. J., that if the order was not appealable under section 588 and section 591 of the Code of Civil Procedure it could not be appealed against under the Letters Patent of the High Court. This view was affirmed by a Full Bench of the same court in Muhammad Naim-Ul-Lah Khan v. Ihsan-Ul-Lah Khan (I. L. R. (1892) 14 All. 226).

The legislature in this state of affairs intervened, and in the Code of 1908 incorporated section 4 which by the first sub-section provided :

> "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";

and enacted in section 104(1) that an appeal shall lie from the orders set out therein and save as otherwise expressly provided, in the body of the Code or by any law for the time being in force, from no other order. The legislature also expressly provided that "no appeal shall lie from any order passed in appeal under this section. "

Section 105 was substantially in the same terms as section 591 of the earlier Code.

The intention of the legislature in enacting sub-section (1) of section 104 is clear : the right to appeal conferred by any other law for the time being in force is expressly preserved. This intention is emphasised by section 4 which provides that in the absence of any specific provision to the contrary, nothing in the Code is intended to limit or otherwise affect any special jurisdiction or power conferred by or under any other law for the time being in force. The right to appeal against judgments (which did not amount to decrees) under the Letters Patent, was therefore not affected by section 104(1) of the Code of Civil Procedure, 1908.

Under the Code, as amended, the view has consistently been taken that interlocutory judgments (i. e., decisions though not amounting to decrees which affect the merits of the questions between the parties by determining some right or liability) passed by single Judges of Chartered High Courts were appealable under the Letters Patent : Ruldu Singh v. Sanwal Singh (1922) 3 Lah. 188), Paramasivan v. Ramasami (I. L. R. (1933) 56 mad. 915), Vaman Ravji Kulkarni v. Nagesh Vishnu Joshi's (I. L. R. (1940) Bom. 426), and Ram Sarup v. Kaniz Ummebani (I. L. R. (1937) All. 386).

Prior to 1940 the law relating to contractual arbitration (except in so far as it was dealt with by the Arbitration Act of 1899) was contained in the Code of Civil Procedure and certain orders passed by courts in the course of arbitration proceedings were made appealable under the Code of 1877 by section 588 and in the Code of 1908 by section 104. In 1940, the legislature enacted Act X of 1940, repealing schedule 2 and section 104(1) clauses (a) to (f) of the Code of Civil Procedure 1908 and the Arbitration Act of 1899. By section 39 of the Act, a right of appeal was conferred upon litigants in arbitration proceedings only from certain orders and from no others and the right to file appeals from appellate orders was expressly taken away by sub-section 2 and the clause in section 104 of the Code of 1908 which preserved the special jurisdiction under any other law was incorporated in section 39. The section was enacted in a form which was absolute and not subject to any exceptions. It is true that under the Code of 1908, an appeal did lie under the Letters Patent from an order passed by a single Judge of a Chartered High Court in arbitration proceedings even if the order was passed in exercise of appellate jurisdiction, but the was so, because, the power of the Court to hear appeals under a special law for the time being in operation was expressly preserved.

There is in the Arbitration Act no provision similar to section 4 of the Code of Civil Procedure which preserves powers reserved to courts under special statutes. There is also nothing in the expression "authorised by law to hear appeals from original decrees of the Court" contained in section 39(1) of the Arbitration Act which by implication reserves the jurisdiction under the Letters

Patent to entertain an appeal against the order passed in arbitration proceedings. Therefore, in so far as Letters Patent deal with appeals against orders passed in arbitration proceedings, they must be read subject to the provisions of section 39(1) and (2) of the Arbitration Act.

Under the Code of 1908, the right to appeal under the Letters patent was saved both by section 4 and the clause contained in section 104(1), but by the Arbitration Act of 1940, the jurisdiction of the Court under any other law for the time being in force is not saved; the right of appeal can therefore be exercised against orders in arbitration proceedings only under section 39, and no appeal (except an appeal to this Court) will lie from an appellate order.

There is no warrant for assuming that the reservation clause in section 104 of the Code of 1908 was as contended by counsel for the respondents, "superfluous" or that its "deletion from section 39(1) has not made any substantial difference" : the clause was enacted with a view to do away with the unsettled state of the law and the cleavage of opinion between the Allahabad High Court on the one hand and Calcutta, Bombay and Madras High Courts on the other on the true effect of section 588 of the Code of Civil Procedure upon the power conferred by the Letters Patent. If the legislature being cognizant of this difference of opinion prior to the Code of 1908 and the unanimity of opinion which resulted after the amendment, chose not to include the reservation clause in the provisions relating to appeals in the Arbitration Act of 1940, the conclusion is inevitable that it was so done with a view to restrict the right of appeal within the strict limits defined by section 39 and to take away the right conferred by other statutes. The Arbitration Act which is a consolidating and amending Act, being substantially in the form of a code relating to arbitration must be construed without any assumption that it was not intended to alter the law relating to appeals. The words of the statute are plain and explicit and they must be given their full effect and must be interpreted in their natural meaning, uninfluenced by any assumptions derived from the previous state of the law and without any assumption that the legislature must have intended to leave the existing law unaltered. In our view the legislature has made a deliberate departure from the law prevailing before the enactment of Act X of 1940 by codifying the law relating to appeals in section 39.

In that view of the case, the appeal must be allowed. No order as to costs in this court. The order of the Division Bench of the High Court is set aside and the order passed by the learned Single Judge is restored. We may add that on the view taken by us as to the competency of the appeal under clause 10 of the Letters Patent, we have not heard counsel on the merits of the appeal.

Appeal allowed.

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