P. Mohammed Meera Lebbai

Vs

Thirumalaya Gounder Ramaswamy Gounder and Others

Civil Appeal No. 383 of 1963

(K. Subba Rao, R. S. Bachawat, J. R. Mudholkar JJ)

23.08.1965

JUDGMENT

MUDHOLKAR. J. –

This is an appeal from a judgment of single judge of the Kerala High Court dismissing the appellant's suit for recovery of possession of certain property and for mesne profits. It is not disputed that the only question of law which arises in this appeal is whether the appeal could be heard and disposed of by a single Judge of the High Court. The other questions raised are purely question of fact. Article 133, cl. [3] of the Constitution clearly provides that notwithstanding anything in the article no appeal shall lie to the Supreme Court unless Parliament by law otherwise provides. Parliament has passed no law rendering the judgment of a single Judge appealable to the Supreme Court. Though this provision dose not detract from the power of this court under Art. 136 to entertain an appeal from a decision of a single Judge, it is the settled practice of this court not to interfere with a finding of fact arrived at by the High Court unless it is satisfied that in arriving at the finding of fact t

As regards the question of law it is desirable to set out how, according to the appellant, it arises. The suit was instituted on February 10, 1950 in the district court of Kottayam which was later transferred by it to the court of the subordinate Judge. Meenachil sometime in the year 1956 and was substantially decreed in the appellant's favour on July 30, 1958. Three appeals wee preferred against it. One was by Tirumalay Gounder, the first defendant, and another in January, 1959, by H. B. Mohammad Rowther, 8th defendant. The appellant had also preferred an appeal against that part of the decree which was adverse to him. All these appeals were heard together and disposed of by a common judgment on August 10, 1960 and the appeals preferred by defendants I and 8 were allowed by the High Court while the appeal preferred by the appellant was dismissed. At the time the suit was instituted the Travancore Cochin High Court Act 5 of 1125. M. E. [Corresponding to 1949 A. D.] was in force Under s. 20 of that Act read w

> "[1] That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.
>
> [2] The right of appeal is not a mere matter of procedure but is a substantive right.
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> [3] The institution of the suit carries with it the implication that all right of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

> [4] The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.
>
> [5] This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

and learned counsel particularly laid stress on the third proposition. We are in respectful agreement with what has been laid down by this court. But it is difficult to appreciate what benefit the appellant can obtain from what has been laid down by this court. For this is not a case where any right of appeal conferred by law upon the appellant has been taken away. The right to prefer an appeal from the judgment of the court of fist instance is derived from the provisions of s. 96 of the Code of Civil Procedure. The learned counsel, however, contended that in the instant case it is traceable to the provisions of Travancore-Cochin High Court Act of 1949. That Act as is preamble shows was enacted for making provision regulating the business of the High Court of Travancore-Cochin for fixing the jurisdiction of single Judges, Division Benches and Full Benches and for certain other matters connected with the functions of the High Court. It did not purport to confer a right of appeal on the parties, but merely dea

An objection somewhat similar to the one raised by the appellant before us was raised before this court in Ittavira Mathai v. Varkey Varkey and another. Dealing with it this court has observed at p. 514:

> "That reason is that an appeal lay to a High Court and whether it is to be heard by one, two or a larger number of judges is merely a matter of procedure. No party has a vested right to have his appeal heard by a specified number of judges. An appeal lay to the High Court and, therefore, no right of the party has been infringed merely because it was heard by two judges and not by three judges. No doubt in certain class of cases, as for instance, cases which involve an interpretation as to any provision of the Constitution, the Constitution, the Constitution provides that the Bench of the Supreme Court hearing the matter must be composed of judges who will not be less than five in number. But is does not follow form this that the legal requirements in this regard cannot be altered by a competent body. We, therefore, overrule the contention of the learned counsel and hold that the appeal was rightly heard and decided by a Bench of two judges."

In the circumstances, therefore, we must reject the appellant's contention based upon the decision in Radhakishan's case.

Learned counsel, however, contended that by depriving the appellant of the right to have his appeal heard by a Division Bench his further right of appeal to this Court Under Art. 133 was affected and that sine that right also vested in him when he instituted the suit it could not be taken away retrospective except by an express provision. There is a simple answer to this contention. The answer is that once it is held that no party has a vested right to have his appeal to be heard by more than one judge of the High Court, no right to prefer an appeal under Art. 133 can be said to vest in him, the right under which being unavailable in case heard and disposed of by a single judge of the

High Court. The argument of learned counsel thus fails.

One more point was sought to be urged by learned counsel for the appellant. The point is based upon the fact that one of the contesting respondents had raised a question as to the maintainability of the suit. According to learned counsel that person being in pari delicto with the plaintiff, ought not to have been permitted to raise that question. Since the point was not raised by the appellant in either of the two courts below we declined to permit it to be raised for the first time before us.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

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