

Sushilabai Laxminarayan Mudliyar and Others

Vs

Nihalchand Waghajibhai Shaha and Others

Civil Appeal Nos. 781 and 781-A of 1991

(N.M. Kasliwal, K. Ramaswamy JJ)

30.07.1991

ORDER

1. Both these appeals can be disposed of on a short ground. Aggrieved against the order of learned Single Judge of Bombay High Court dated April 26, 1988, the appellants before us, filed a Letters Patent Appeal before the Division Bench of the High Court. The Division Bench referred the matter to a Full Bench. The Full Bench by order dated July 18, 1989 in Sushilabai Laxminarayan Mudliyar v. Nihalchand Waghajibhai Shaha [1989 Mah LJ 695] after dealing with the question referred, sent the case back to the Division Bench for deciding the question of the maintainability of the Letters Patent Appeal. The Full Bench referred to decisions of this Court is Umaji Keshao Meshram v. Radhikabai [1986 Supp SCC 401 : (1986) 1 SCR 731] and an unreported judgment of this Court in Civil Appeal No. 520 of 1989 Ratnagiri District Central Co-operative Bank Ltd. v. Dinkar Kashinath Watve [1993 Supp (1) SCC 9] decided on January 27, 1989 and observed as under :

"Even when in the cause title of an application both Article 226 and Article 227 of the Constitution have been mentioned, the learned Single Judge is at liberty to decide, according to facts of each particular case, whether the said application ought to be dealt with only under Article 226 of the Constitution. For determining the question of maintainability of an appeal against such a judgment of the Single Judge the Division Bench has to find out whether in substance the judgment has been passed by the learned Single Judge in exercise of the jurisdiction under Article 226 of the Constitution. In the event in passing his judgment on an application which had mentioned in its cause title both Articles 226 and 227, the Single Judge has in fact invoked only his supervisory powers under Article 227, the appeal under clause 15 would not lie. The clause 15 of the Letters Patent expressly bars appeals against orders of Single Judges passed under revisional or supervisory powers. Even when the learned Single Judge's order has been passed under both the articles, for deciding the maintainability against such an order what would be relevant is the principal or main relief granted by the judgment passed by learned Single Judge and not the ancillary directions given by him. The expression 'ancillary' means, in the context, incidental or consequential to the main part of the order.

Thus, the determining factor is the real nature of the principal order passed by the Single Judge which is appealed against and neither the mentioning in the cause title of the application of both the articles nor the granting of ancillary orders thereupon made by learned Single Judge would be relevant. Thus, in each case, the Division Bench may consider the substance of the judgment under appeal to ascertain whether the Single Judge has mainly or principally exercised in the matter his jurisdiction

under Article 226 or under Article 227. In the event in his judgment the learned Single Judge himself had mentioned the particular article of the Constitution under which he was passing his judgment, in an appeal under clause 15 against such a judgment it may not be necessary for the appellate bench to elaborately examine the question of its maintainability. When without mentioning the particular article the learned Single Judge decided on merits the application, in order to decide the question of maintainability of an appeal, against such a judgment, the Division Bench might examine the relief granted by the learned Single Judge. When more than one relief are granted by the Single Judge, for maintainability of an appeal, the determination would be the main and not the ancillary relief. When a combined application under Articles 226 and 227 of the Constitution is summarily dismissed without reasons, the appeal court may consider whether the facts alleged warranted filing of the application under Article 226 or under Article 227 of the Constitution."

2. The matter then went back to the Division Bench and the Division Bench by a short cryptic order held the impugned order of learned Single Judge indicated that in truth and substance it is passed under Article 227 of the Constitution of India. The Division Bench held that the appeal was not maintainable and in that view of the matter dismissed the appeal.

3. We have heard learned counsel for the parties and have also perused the writ petition filed by the respondents in the High Court. In our view the Division Bench was totally wrong in holding that the impugned order of the learned Single Judge indicated that in truth and substance it was passed under Article 227 of the Constitution. The grounds taken in the writ petition unmistakably go to show that it was a petition under Article 226 and the order passed by the learned Single Judge was also under Article 226. This Court in Umaji case [1986 Supp SCC 401 : (1986) 1 SCR 731] had laid down as under : (SCC p. 473, para 107)

"Petitions are at times filed both under Articles 226 and 227 of the Constitution. The case of Hari Vishnu Kamath v. Syed Ahmad Ishaque [(1955) 1 SCR 1104 : AIR 1955 SC 233 : 10 ELR 216], before this Court was of such a type. Rule 18 provides that where such petitions are filed against orders of the tribunals or authorities specified in Rule 18 of Chapter XVII of the Appellate Side Rules or against decrees or orders of courts specified in that rule, they shall be heard and finally disposed of by a Single Judge. The question is whether an appeal would lie from the decision of the Single Judge in such a case. In our opinion, where the facts justify a party in filing an application either under Articles 226 and 227 of the Constitution, and the party chooses to file his application under both these articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. Such was the view taken by the Allahabad High Court in Aidal Singh v. Karan Singh [AIR 1957 All 414 : 1957 All LJ 389 (FB)] and by the Punjab High Court in Raj Kishan Jain v. Tulsi Dass [AIR 1959 Punj 291 : 61 Punj LR 315] and Barham Dutt v. Peoples' Co-operative Transport Society Ltd., New Delhi [AIR 1961 Punj 24 : 62 Punj LR 916 : ILR (1961) 1 Punj 283] and we are in agreement with it."

4. The Full Bench of the Bombay High Court wrongly understood the above Umaji Kesho Meshram case [1986 Supp SCC 401 : (1986) 1 SCR 731]. In Umaji case [1986 Supp SCC 401 : (1986) 1 SCR 731] it was clearly held that where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution of India and the party chooses to file his application under both these articles in fairness of justice to party and in order not to deprive him of valuable right of appeal the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. Rule 18 of the Bombay High Court Appellate Side Rules read with clause 15 of the Letters Patent provides for appeal to the Division Bench of the High Court from a judgment of the learned Single Judge passed on a writ petition under Article 226 of the Constitution. In the present case the Division Bench was clearly wrong in holding that the appeal was not maintainable against the order of the learned Single Judge. In these circumstances we set aside the impugned order of the Division Bench and direct that the Letters Patent Appeal filed against the judgment of the learned Single Judge would now be heard and decided on merits. In view of the fact that it is an old matter we request the High Court to decide the Letters Patent Appeal within six months. It is further directed that till the final disposal of the Letters Patent Appeal the operation of the order of the Single Judge shall remain stayed. The appeals are allowed in part with no order as to costs.

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