CALCUTTA HIGH COURT

Sadar Ali

Vs.

Doliluddin Ostagar

(Rankin, C.J. , Suhrawardy and Page, J.C.C. Ghose and B.B. Ghose, JJ.)

17.07.1928

JUDGMENT

Rankin, C.J.

1. This is a rule calling upon the respondents to show cause why a certain memorandum of appeal presented to this Court on 30th April 1928 should not be accepted and registered. The question raised is whether or not the applicants have a right of appeal from the decision of a single Judge sitting in second appeal in the absence of a certificate from him that the case is a fit one for appeal. This question arises upon the new Letters Patent which came into effect on 14th January 1928.

2. The facts are that the suit was instituted on 7th October 1920 and that after an appeal to the District Court a second appeal was filed in this High Court by the present applicants on 4th October 1926. Under certain rules of this Court it was laid before Mallik, J. for disposal on or about 4th April 1928, and on that date the appeal was dismissed the learned Judge refusing to declare that the case was a fit one for a further appeal.

3. In these circumstances it is plain enough that the applicants have no right of appeal if the present ease is to be governed by the terms of the new clause which by the said Letters Patent has been substituted for the 15th clause of the Letters Patent of this High Court as they stood prior to 14th January 1928. The contention of the applicants is that the new clause cannot be applied to this case because to do so would be to apply it retrospectively, and so as to impair and indeed to defeat a substantive right which was in existence prior to 14th January 1928. For this proposition the judgment of the Judicial Committee in *Colonial Sugar Refining Co. v. Irving*[1] is cited and it is clear enough that the law as there laid down is applicable in India : *Delhi Cloth Co. v. Income-tax Commissioner*[2], and *Nana v. Sheku*[3],

4. The only Indian decision upon the effect of an amendment of the Letters-Patent as regards rights of appeal would appear to be that of *Framje v. Hormasji*[4], The case had been decided at first instance by two Judges and under the Letters Patent of 1862 an appeal lay within the High Court (in practice an appeal to three Judges). By the Letters Patent of 1865 no such appeal was provided and the appeal lay to the Privy Council. The decree not having been perfected before the coming into operation

[1][1905] A.C. 369
[2] AIR 1927 PC 242 : 1928-27-LW 179
[3][1908] 32 Bom. 337
[4][1866] 3 B.H.C.R. 49

of the Letters Patent of 1865 it was held that there was no right to appeal to the High Court.

5. The judgment of Sir Richard Couch proceeded upon the footing that the question was one of procedure and of the same character as the question of costs in *Wright v. Hale*[5], A suggestion was added, however, that Section 2 of the new Letters Patent, though it might bear a more limited meaning, pointed to an intention that pending suits should be treated as if they had been brought under the new Letters Patent. This decision was noticed in *Runjit Singh v. Meherban*[6], a case really governed by Section 6, General Clauses Act (1 of 1868). There Garth, C.J., noticed that the word "procedure" had been used by Sir Richard Couch in an extended sense but approved of the Bombay decision for other reasons which he did not specify.

6. It is urged for the applicants that the main ground of the decision in *Framji v. Hormasji*[7], is untenable in view of what was said by Lord Macnaghten in *Colonial Sugar Refining Co. v. Irving*[8], and that any other grounds upon which the decision may be defended are inapplicable to the present case. The applicants crave in aid the observation of Sir Richard Couch that in construing a charter of this kind the Court should, I think, be guided by the rules and principles upon which Acts of Parliament are construed : *Framji v. Hormasji*[9], Sir Richard Garth was apparently of the same opinion.

7. It is not contended that Section 6, General Clauses Act (10 of 1897) or Section 38, Interpretation Act, 1889 (52 and 53 vie. Cap. 63) applies to Letters Patent, but it is contended that these are but expressions of a common law presumption. Reliance is placed on the judgment of Garth, C.J., in *Runjit Singh v. Meherban*[10], and on other Indian decisions to the effect that a suit and all appeals from the decree made therein are to be regarded as one "legal proceeding" of. *Ratanchand Srichand v. Hanmat Rav*[11], *Deb Narain v. Narendra*[12] per Sir Arthur Wilson at p. 278 on the principle stated by West, J. in *Chinto v. Krishnaji*[13], that the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings connected by an intrinsic unity.

8. On these grounds the applicants claim that on 7th October 1920 when the suit was instituted their right to a Letters Patent appeal from the decision of a single Judge was a substantive right vested in them by the existing law and that an intention to interfere with it, to clog it with a new condition, or to impair or imperil it, cannot be presumed,, and cannot be affirmed, unless it has been clearly manifested by express words or necessary intendment.

9. Now there is a certain paradox in regarding the right to appeal within the High Court from the decision of a single Judge as a right "vested" in the litigant at the date of the suit, since it is in no way certain that the case will ever be decided by a single Judge. Again as the right of second appeal is the right given by Section 100, Civil Procedure Code, to appeal "to the High Court" it does not seem unreasonable that a litigant should take the internal arrangements of the High Court as he finds them when he gets there. If under the Letters Patent all second appeals had been required to come before two Judges and a new

[5][1861] 30 L.J. Ex. 40
[6][1878] 3 Cal. 662
[11]6 B.H.C.R. 166
[12][1889] 16 Cal. 267 (F.B)
[7][1866] 3 B.H.C.R. 49
[8][1905] A.C. 369
[13][1879] 3 Bom. 214 at 216
[9][1866] 3 B.H.C.R. 496
[10][1878] 3 Cal. 662

Letters Patent had provided that one Judge should be competent to exercise this jurisdiction, leaving the right of appeal to the High Court and from the High Court as before, it would have been difficult, in my opinion, to hold that any litigant had a right to a hearing before two Judges. Again it is difficult to suppose that the amendment made by the Letters Patent which came into force in January last was made with any other view than to obviate unreasonable, or unreasonably prolonged, litigation, or to suppose that the date of the suit has any rational bearing upon that object or as distinguishing one case from another for this purpose. It may also be thought difficult to arrive at any opinion that the reform introduced is reasonable and necessary, but that it should in effect be postponed for years. The whole weight of these considerations has to be borne by the applicant's argument that the Letters Patent as they stood on 7th October 1920 conferred upon him at that date an existing right.

10. Now the reasoning of the Judicial Committee in the *Colonial Sugar Refining Co. v. Irving*[14], is a conclusive authority to show that rights of appeal are not matters of procedure and that the right to enter the superior Court is for the present purpose deemed to arise to a litigant before any decision has been given by the inferior Court. If the latter proposition be accepted I can see no intermediate point at which to resist the conclusion that the right arises at the date of the suit. It does not arise as regards Court B alone, when the suit is instituted in Court A and as regards Court C when the first appeal is lodged before Court B. A "present right of appeal" (of. Section 154, Civil Procedure Code) is a different matter. The principle must I think involve that an admixture of different systems is not to be applied to a single case. It is quite true that the suitor cannot enter Court G without going through Court B, but neither can he enter Court B till Court A has given its decision. The right must be a right to take the matter to Court G in due course of the existing law.

11. In the present case, however, there is a further element or contingency in that the case might never have been dealt with by a single Judge, and the right claimed under Clause 15 of the unamended Letters Patent might never have arisen at all. Whether this element would make the reasoning of the Judicial Committee in the *Colonial Sugar Refining Co. v. Irving*[15] inapplicable to the present case is a question which must be answered in the negative, if, as I think, the applicant at the date of the suit had a right to the use of the then existing system of appeals. But this question is I think academic in view of the effect of Section Ill of the Code upon the change introduced by the new Letters Patent. The new clause treats all second appeals in the same way, though it is in the power of the Court by its rules, and of the Chief Justice by administrative action, to ensure that only those second appeals shall be laid before a single Judge in which the value of the subject-matter is below a given limit. Nothing can be founded therefore in the circumstance that by the rules of this Court L 1,000 is imposed as a limit, that in practice L 50 is the limit and that any single Judge can direct the case to be laid before a Bench. Theoretically cases are brought to this Court on second appeal only if they are valued at less than L 5,000. This valuation, however may under the Suits Valuation Act be of an artificial character, and second appeals do from time to time go to the Privy Council either under Section 110 of the Code because the real value is over L 10,000 or because the decree affects property of that value or in special reasons under Section 109(c).

[14][1905] A.C. 369

[15][1905] A.C. 369

12. Section 111 of the Code, however, definitely prohibits an appeal to the Privy Council

from a single Judge and to this extent overrides Clause 39 of the Letters Patent. The section is not a mere provision that nothing in the previous sections shall be deemed to give a right of appeal from the decision of a single Judge. The provisions of Clause (a) of Section Ill may have been motived originally by the existence of the right of Letters Patent appeal of *Sabhapathi v. Narayanasami*[16], or by the opinion that it is not reasonable in Indian cases that the Privy Council should be called upon to decide cases until a Bench has dealt with them. But in any case the effect of Section Ill, upon Clause 39, Letters Patent, cannot now be controlled by such considerations : *Satya Narayana v. Venkata*[17], It appears to me, therefore, that the new clause in the Letters Patent takes away in all second appeals decided by a single Judge (without his giving a certificate that the case is a fit one for appeal) the right to go to the Privy Council under the ordinary law, though the right of the Judicial Committee to give special leave is not of course affected. That right was a limited and qualified right; but such as it was, it was open to the party prior to 14th January 1928. It depended upon no contingency but merely on his prosecuting his case up to that point. It is reasonably clear that to determine the effect of the new Letters Patent upon pending cases these cannot be distinguished according as they are or are not fit to be taken on appeal to the Privy Council.

13. Considering the several safeguards that are provided the joint effect of the new clause in the Letters Patent and of Section 111 of the Code is doubtless admirable, but it prevents me from holding that the new Letters Patent can be applied to pending cases without taking away existing rights of appeal. Nor can I doubt that when the legislature has authorized His Majesty to legislate by Letters Patent upon questions which include rights of appeal the same principles of construction must be applied as would at common law be applicable to a statute dealing with the like subject-matter.

14. In this view the only question which remains is the question whether the new clause can be given retrospective effect. The provision that the new Letters Patent shall come into force on the date of publication in the Gazette does not operate to give it such effect. Nor does the fact that the jurisdiction and authority of the Court is the primary subject of the Letters Patent found a valid argument to the effect that after the date of commencement the Court can have no authority to entertain such an appeal as this. Unless the contrary can be shown the provision which takes away jurisdiction is itself subject to the implied saving of the litigants' rights. Indeed that there is an implied saving of such rights in some cases cannot well be denied. It will not be supposed, for example, that jurisdiction is taken away as regards cases heard by a single Judge on second appeal prior to the date of commencement, viz., 14th January 1928, on which date for the first time the Judge had any duty or right to determine whether the case wa3 fit for further appeal.

15. The question before us is thus narrowed down to this : Whether it is any necessary part of the intendment of the Letters Patent that they should operate upon appeals arising out of suits instituted before 14th January 1928, when such appeals were heard after that date?

[16][1902] 25 Mad. 555

[17] AIR 1924 Mad 399: AIR 1924 Mad 617

16. As there is nothing in the language of the Letters Patent to evidence this intention, we must enquire whether it is manifest from the subject-matter.

> Baron Parke said *Lord Hatherly in Pardo v. Bingham*[18], did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the

section which had to be construed and said that the question in each case was whether the legislature had sufficiently expressed that intention. In fact we must look to the general scope and purview of the Statute and at the remedy sought to be applied and consider what was the former state of the law and what it was that the legislature contemplated.

17. A strong instance of an inference of this character was the decision in *Quilter v. Mapleson*[19], where Jessel, M.R., held that the right given by the Conveyancing Act, 1881, to obtain relief against for feiture could be claimed in a suit that had been instituted and tried at first instance before the Act came into operation. There, however, a similar right under the Common Law Procedure Act had been abrogated by the Act of 1881 and was thus lost to the lessee.

18. Now in this case I cannot say that it appears to me that there is much material upon which to base a definite conclusion that the intention was to bring pending suits under the new system. The long postponement of a desirable reform may have been thought wise and it would hardly be correct for a Court of law to proceed merely upon its own opinion as to the degree of respect to which the right of a third appeal is entitled. In this aspect the present case may reasonably be thought less strong than the case of *Bourke v. Nutt*[20], where a similar argument was ultimately negatived. If bankrupts may continue to become members of School Boards I cannot say that litigants may not continue to have a third appeal unless it otherwise appears that this construction of the Letters Patent is not reasonably possible. Far be it from me to distinguish between such forms of excess or to divide such claims to toleration.

19. There is, however, another ground which should be mentioned. Clause 15 of the Letters Patent is not read with what is now Section 108, Government of India Act, (formerly Sections 13 and 14, High Courts Act of 1861). It puts a limit to the power that can be entrusted by the Court to the discretion of a single Judge, and both the rules of the Court and the administrative action of the Chief Justice have to be controlled by its provisions. It follows that when the amended clause begins to operate at all, it may well become necessary that second appeals should be differently dealt with according as they arise from suits filed before or after the 14th January 1928. This is likely to cause much inconvenience which would be avoided by treating the clause as applicable to all second appeals heard by a single Judge after the said date. Such an argument, however, falls obviously short of what is required to entitle the Court to draw the inference that retrospective effect must have been intended by the new clause.

20. No clear inference can, in my opinion, be drawn from that part of the new Letters Patent which deals with difference of opinion between the Judges of a Division Bench and I do not think it necessary to discuss this subject.

[18][1870] 4 Ch. App. 735 [20][1894] 1 Q.B. 725

[19][1882] 9 Q.B.D. 672

21. I cannot see any logical reason which would on the authorities entitle U3 to hold that the date of presentation of the second appeal to this Court is the date which determines the applicability of the amended clause and I very regretfully assent to the argument of the applicants that as the matter now stands the date of institution of the suit is in each case the determining factor.

22. The rule should therefore be made absolute but without costs.

C.C. Ghose, J.

23. I agree

Suhrawardy, J.

24. I agree.

B.B. Ghose, J.

25. I agree.

Page, J.

26. I agree.
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