BOMBAY HIGH COURT

Badruddin Abdul Rahim

Vs

Sitaram Vinayak Apte

(Fawcett and Mirza, J.J.)

02.04.1928

JUDGMENT

Fawcett, J.

1. Clause 15 of the Letters Patent of this Court has been altered, so that no appeal from the judgment of one Judge of this Court lies to a Division Bench, if it is made in the exercise of second appellate jurisdiction, except in any case where such single Judge declares that it is a fit one for appeal. The question before us is whether this alteration has retrospective effect so as to apply to an appeal from the judgment of a single Judge on January 19, 1928, which was made on February 13, 1928, i.e., after the date, when the substituted 15th clause of the Letters Patent was published in the Bombay Government Gazette (February 2, 1928). Paragraph 2 of the Notification at page 197 of Part I of that Gazette says :And we do further ordain and declare that these Letters Patent shall he published in the Bombay Gazette shall have effect from the date of such publication.

1. Mr. Patwardhan contends that his client had a right of appeal to a Division Bench of this Court which had accrued to him on January 19, 1928; that this was not a mere matter of procedure but a substantive right, as ruled by the Privy Council in The *Colonial Sugar Refining Company Ltd. V. Irving*[1] and that therefore this amendment does not operate retrospectively so as to take away that right of appeal. He also relies on *Nana v. Sheku*[2] and *Ramakrishna Chetty v. Subbaraya Iyer*[3]. If this question arose out of an Act either of the All India Legislature or of a local Legislature, or oven an Act of Parliament, then in the absence of clear words in the enactment making it retrospective as to the right of continuing legal proceedings commenced before the enactment, there would be a good deal to support Mr. Patwardhan'a argument. In the case of a repeal by an enactment there are clear statutory authorities against retrospectivity of legislation in such a case; for instance Section 38 of the Interpretation Act, 1889 (52 & 53 Vic, c. 63), and Section 6 of the General Clauses Act, 1897. These provisions do not, however, cover an amendment to this Court's Letters Patent, which is made by His Majesty under the powers

conferred by Sub-section (1A) of s. "1QQ of the Government of India Act. There is also a ruling on this point which has to be considered. In *Framji Bomanji v. Hormanji Barjorji*[4] a question arose whether a light of appeal that existed under Section 14 of the Charter of 1862 was taken away by Section 15 of the amended Charter of 1865. It was decided by Sir Richard Couch C.J. and two other Judges that the intention of the framers of the new Charter was that the right of appeal was taken away. Reference is made in the judgment to Clause 2 of the present Letters Patent of 1865 which, among other things, says :That all proceedings commenced in the said High Court prior to the date of the publication of the Letters Patent shall be continued and depend in the said High Court, as if they had commenced in the said High Court after the date of such publication.

2. In regard to this Couch C.J. remarks (p. 53) :I do not say that these words may not bear a more limited meaning, although ifc does not appear to mo that they do; but the intention would appear to have been not to make any reservation in favour of suits brought before the publication of these Letters Patent, or to provide that they should be continued in the same way as they would have been continued before that time, and that the parties should have preserved to them any right of appeal which then existed. The intention was that at the time the Letters Patent were published every suit pending in the Court should be treated as if it had been a suit brought after the Letters Patent were published.

3. Having regard to this provision in the Letters Patent of 1865, it seems to mo probable that, when His Majesty directs the amendment to take effect from the date of its publication in the Bombay Government Gazette, the intention is that the amendment should be retrospective in regard to the continuance of proceedings in the High Court of the kind contemplated in this Clause 2.

4. No doubt, there is this to be said in favour of the contrary view that the decision of the Privy Council in The *Colonial Sugar Refining Company Ltd. v. Irving (1905) A.C. 369(Supra)* goes against the other ground on which the ruling in Framji Bomanji v. Harmasji Barjorji is based, viz., that the question whether a right of appeal is taken away by the new Letters Patent was a question of procedure only. So far as the decision rests on that view, it might be said to be overruled. But it is mainly based upon Clause 2, as if pointed out by Green J. in the Full Bench case of In the matter of the Petition of *Ratansi Kalianji and six others*[5] and (apart from that) there are, in my opinion, good grounds which are stated in my learned brother's judgment "for the view that the Privy Council judgment does not really apply to the particular question that arose in Framji Bomanji v. Hormasji Barjorji. No doubt, neither substituted Clause 15, nor paragraph 2 of the Notification contains any express provision such as was contained in Clause 2 of the Letters Patent of 1865. But, it seems to me that the direction of his Majesty that the substitution shall

have effect from the date of publication must be construed consistently with what was laid down in 1865 as to the retrospective operation of amendments made in the then new Letters Patent. It seems to me, in view of this, that there is a sufficiently clear intention that the amendment should operate retrospectively, so as to take the case out of the general rule against retrospectivity, which was followed in The *Colonial Sugar Refining Company Limited v. Irving (1905) A.C. 369(Supra).*

5. Moreover, the present is not a case on all fours with the one just mentioned. There there was an enactment which was treated as equivalent to an "abolition" of a right of appeal. Such a deprivation or divestment of vested rights naturally attracts the presumption against retrospectivity, which is dwelt on by West-ropp C.J. and West J. in Ratansi Kallianji's case at pp. 180 and 181. But West J. points out at p. 210 that "there is, in one sense, an element of retroactivity in all laws, since no Jaw can operate except by changing or controlling what would else have been different capabilities, or a different sequence of acts and events having their roots and motives in the past." The alteration in Clause 15 does not entirely abolish a former right of appeal; it merely restricts it in a reasonable manner. The appellant can exercise the right of appeal, if he persuades the Judge that it is a (it case for appeal. It is really more on the footing of the alteration made in Section 195 of the Criminal Procedure Code by Act XVIII of 1923, which, in *Nataraja Filial v. Rangasuami Pillai*[6] was held to be merely a change in procedure. In my opinion the alteration in the law can properly be treated as one relating to procedure which is prima facie retrospective. Even the limitation of a right of suit under s. I of the Public Authorities Protection Act, 1893 (56 & 57 Vic. c. 61) has been held to relate to procedure only : The Ydun (1899) P. 236. That, like this, was a case of restricting a general right of bringing legal proceedings.

6. Will it also be contended that the amendment made in Clause 36 of the Letters Patent is one dealing with a substantive right and not mere procedure? There are only two alterations made, and both seem to me to be intended to "take effect" in every way from the date of publication.

7. In *Radhahrishna Ayyar v. Sundaraswamier*[7]. the Privy Council held the repeal of an Order in Council relating to Privy Council appeals to be effectual in regard to any appeal filed after the date of the appeal.

8. For all these reasons I think that the direction of his Majesty about the alterations taking effect from the date of publication mean that they are to take effect in a fall sense, and in the same way that the amended Letters Patent of 1865 were directed to take effect by Clause 2.

9. It is argued that this involves a hardship upon the appellant as he has been taken by surprise. On the other hand, he could have filed his appeal before the end of January 1928, and he has

only himself to blame for the delay, which has led to this result. No doubt, under Rule 8 at page 57 of the Appellate Side Rules he had sixty days within which to file his appeal, But, this cannot, in my opinion, justify disobedience to the order of His Majesty that the amended Letters Patent shall have effect from the date of publication, i.e., February 2, 1928. Moreover, as I have already said, the appellant does not necessarily lose his right of appeal. The Judge may declare it to be a fit case for an appeal, and in that event he will not suffer any hardship.

10. The order of the Court, therefore, is that we refuse to admit the appeal. Mr. Patwardhan says that the time for applying for a certificate that the case is a fit one for appeal has expired and asks us to extend the time. In our opinion, this is not a direction that we can give, as we are not considering an application to grant the declaration that the case is a fit one for appeal; but we may say that Mr. Patwardhan had some authorities in his favour which might naturally lead him to think that his attitude was correct, and that we see, no reason to think that he was not acting bona fide in pressing his contention that the amendment of the Letters Patent did not retrospectively affect his right of appeal under the former Clause 15.

11. I take this opportunity of saying that an application to the single Judge, who has disposed of a second appeal, for a declaration that the case is a fit one for appeal to a division bench can, in our opinion, be made straightaway orally by the pleader, who thinks that his client should appeal, and that no written application is necessary in such a case. In saying this I have the authority of the Chief Justice, who agrees with that view and who says that the pleaders should be encouraged to make such an oral application at the time, instead of later, when a written application will be necessary and arrangements will have to be made for a special sitting to hear the application by the Judge, who will probably then have forgotten the facts of the case. There is all the more reason for speed in these matters in view of the ruling of a Full Bench of the Rangoon High Court in *Ma Than v. Maung Ba Gyaw* [8]that the certificate that the case is a tit one for appeal can only be granted by the Judge who passed the judgment, against which it is proposed to appeal.

Mirza, J.

12. I agree. Clause 15 of the amended Letters Patent 1865, in my opinion, only lays down a rule of procedure and does not create or confer a substantive right. In a sense no doubt every rule of procedure may be said to confer a substantive right. In construing an enactment we must consider what its primary object is. The Letters Patent have reference mainly to the machinery of the High Court and how it is to be handled. Clause 15, before its present amendment, provided that if a second appeal from the mufassal was disposed of by a single Judge of the High Court sitting in appeal a further appeal would lie from the decision of the single Judge to a bench consisting of two or more Judges. Whether the judgment is of a single Judge sitting in appeal, or of two or more Judges sitting in appeal, the judgment is of the same tribunal, viz., the High Court

in the exercise of its appellate jurisdiction. The judgment of the single Judge in appeal, however, had not, so far as the High Court was concerned, the finality which the judgment of two or more Judges sitting in appeal had. The aggrieved party had the right to prefer a further appeal to an appellate bench consisting of two or more Judges. A provision like this is intended to regulate the procedure of the High Court regarding the constitution of its appellate benches and does not primarily contemplate the creation of a substantive right in favour of the disappointed party to the appeal before a Bench of one Judge. No doubt the remedial right thus conferred may be regarded by the party concerned as being valuable, but it does not on that account cease to be a matter of procedural law.

13. In *Framji Bomanji v. Hormasji Barjorji*[9] it was conceded by counsel that Clause 14 of the Letters Patent 1862 and Clause 15 of the amended Letters Patent 1865 both related to procedure. Under Clause 14 of the Letters Patent of 1862 an appeal lay to the High Courtmeaning a Court of Appeal of the High Courtfrom a decision of a bench of two Judges trying a case of first instance on the Original Side. That provision is omitted from the amended Letters Patent of 1865. Under circumstances similar to those in the application before us, the Court held that in respect of appeals the amended Letters Patent had substituted only a different procedure for the procedure under the old Charter.

14. The judgment of the Privy Council in The Colonial Sugar Refining Company Limited v. Irving (1905) A.C. has not, in my opinion, Sitaram overruled Framji Bomanji v. Hormasji Barorji. Under an Order in Council of 1860, an appeal lay from the Supreme Court of Queensland to His Majesty in Council. The right to appeal to his Majesty in Council had accrued to the party when the Australian Commonwealth Judiciary Act 1903, providing that the appeal lay only to the High Court of Australia, came into operation. Here the question was not one of the constitution of a Bench of the same Court of Appeal, from which the further appeal was made, hut it related to substituting an outside higher tribunal for another outside higher tribunal to which the further appeal was to be made. In the absence of a clear indication of the legislature to make the new Act retrospective, their Lordships held that the right to appeal to His Majesty in Council was not taken away in that case by the Act of 1903, The matter there did not relate merely to a procedural law. A right of appeal from one tribunal to another tribunal which is differently constituted stands on a different footing from the right to appeal from the judgment of a tribunal where only one Judge constitutes the tribunal, to the same tribunal where two or more Judges constitute the same tribunal. The former creates not merely a remedial but a substantive rightthe latter seems merely to regulate the procedure of the same tribunal. A substantive right to appeal to a higher tribunal had already been conferred by the Order in Council of 1860 on the aggrieved party and the Act of 1903 could not, in the absence of a provision to that effect, take away that right and substitute for it another. Their Lordships remark (per Lord Macnaughten, p.

372):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. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

15. If the amendment of Clause 15 of the Letters Patent of 1865 is to be taken as an amendment of the procedure on the subject, the amendment must be held to be retrospective although no words to that effect are to be found in it. Even apart from this consideration, the amended Clause 15 read with Clause 2 of the Letters Patent makes it clear that the legislature intended the provision to be retrospective.

16. We have been asked to construe retrospectivity of the amended Clause 15 strictly as it would deprive the applicant, it is said, of a valuable right of appeal to a bench of two or more Judges. I do not agree that the clause as amended is unreasonable or imposes an unnecessary burden on the applicant. Second appeals are admitted to this Court only on questions of law. The facts are taken as found by the lower appellate Court. If the single Judge deciding the question of law in second appeal feels some hesitation or doubt about his decision or is of opinion that the point is of such importance that more than one Judge should express an opinion on it he would, no doubt, grant leave to the applicant to appeal to a bench of two or more Judges. The applicant's right to appeal to the Privy Council, should he be otherwise entitled to do so, is not affected by the amended Clause 15. The amended clause is intended to weed out certain weak and futile matters from Letters Patent Appeals to a bench of two or more Judges, It appears clearly to have been the intention of the legislature that the amended clause should operate immediately on its notification in the Government Gazette and that it should have retrospective effect. The amended clause, of course, will not apply to those Letters Patent Appeals which were admitted prior to the notification and are now pending in this Court. If this is to be regarded as an anomaly, as Mr. Patwardhan argued it would be, it is an anomaly which cannot be helped. A similar argument was advanced in *Framji Bomanji v. Bormasji Barjorji (1866) 3 B.H.C.R. (O.C.J.) 49(Supra)* but found no favour with the bench.

Cases Referred.

1(1905) A.C. 369
2(1908) I.L.R. 32 Bom. 337, s.c. 10 Bom. L.R. 330
3(1912) I.L.R. 38 Mad. 101
4(1866) 3 B.H.C.R. (O.C.J.) 49
5(1877) I.L.R. 2 Bom. 148, 202, F.B
6(1923) I.L.R. 47 Mad. 384, 390, 391
7(1922) I.L.R. 45 Mad. 475, 481, p.c

8(1925) I.L.R. 3 Ran, 546 F.B
9(1866) 3 B.H.C.R. (O.C.J.) 49