BOMBAY HIGH COURT

Raghunath Keshav Khadilkar

Vs.

Poona Municipality

(N.J. Wadia, J.)

16.12.1943

JUDGMENT

N.J. Wadia, J.

1. These are two Letters Patent appeals against a judgment of Macklin J. The appellant before us had made a petition to the Court of the District Judge of Poona under Section 15, Bombay Municipal Boroughs Act, 1925, in connexion with the triennial elections of the Poona City Municipality which were held on 23rd February 1942. The appellant was one of the candidates. The application was made against the Poona City Municipality and the three other candidates who had stood for election from ward No. 15 and who were declared elected. The petitioner alleged that the electoral roll prepared by the first opponent, the Municipality, contained names of persons who were dead and who were not available in Poona on the date of the election and that there were also-other defects in the electoral roll which facilitated personation and other malpractices, He also made certain allegations against some: of the opponents. The application was transferred to the Extra Assistant Judge for disposal. The learned Assistant Judge heard the application and after some evidence had been-led he made an order that the marked copies of the electoral roll should be inspected to verify if votes had been recorded in the names of voters mentioned in the application. He directed his bench clerk to inspect the copies and submit a report, the parties or their pleaders being allowed to remain present at the time of the inspection. Against this order two applications, Nos. 363 and 398 of 1942, were filed, one by the Municipality, the first opponent, and the other by Mr. G.M. Nalavade who had been opponent No. 4 in the original application. It was contended in both the applications that the learned Assistant Judge had acted without jurisdiction in ordering the inspection of the marked copies of the electoral roll and that Rule 45, Election Rules of the Municipality had been wrongly construed. The applicants prayed that a writ of certiorari should be issued and the record and proceedings called for or the order made by the Assistant Judge set aside under the revisional powers of the High Court under Section 115, Civil Procedure Code; or under the general powers of superintendence and revision vested in the High Court. Both applications were heard together by Macklin J., who held that under Rule 45, Poona City Municipal Election Rules the marked copies of the voters' lists could only be produced, opened and inspected under the orders of a competent Court", that a District Judge or Assistant Judge hearing an application made under Section 15 of the Act, was a persona designata and not a Court, and therefore the Assistant Judge who heard-the petitioner's application acted without jurisdiction in ordering the inspection of the

marked copies of the electoral roll. He therefore set aside the order. Against this decision the petitioner has filed appeals under the Letters Patent.

2. A preliminary objection has been taken by Mr. A.G. Desai on behalf of the first opponent, the Municipality, that no appeal lies under Clause 15, Letters Patent, against the decision of Macklin J. The relevant portion of Clause 15 provides that an appeal shall lie to the High Court from the judgment of a Single Judge of the High Court (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court, and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107, Government of India Act, or in the exercise of criminal jurisdiction). Macklin J.'s judgment was not given in the exercise of appellate jurisdiction, or in the exercise of the power of superintendence under Section 107, Government of India Act, or in the exercise of criminal jurisdiction. Mr. Desai's contention, however, is that it was given in the exercise of revisional jurisdiction and therefore no appeal can lie under the Letters Patent. The question therefore is whether the judgment of Macklin J. was one given in the exercise of the revisional jurisdiction.

3. The contention of the applicant is that Macklin J. acted in the matter not in the exercise of revisional jurisdiction but in the exercise of the power vested in the High Court to issue a writ of certiorari, and that this latter power is not in the nature of revisional jurisdiction. The writ of certiorari is the process by which the King's Bench Division, in the exercise of its superintending power over inferior jurisdictions, requires the Judges or officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Courts below (Short and Mellor's Practice on the Crown Side, page 69). When the Supreme Court of Judicature was established in Bombay in 1823, Clause 5, Letters Patent provided:

> ... That the said Chief Justice and the said Puisne Justices shall, severally and respectively, be, and they are, all and every of them, hereby appointed to be Justices and Conservators of the Peace, and Coroners, within and throughout the Settlement of Bombay, and the Town and Island of Bombay, and the limits thereof, and the factories subordinate thereto and all the Territories which now are, or hereafter may be subject to, or dependent upon, the Government of Bombay aforesaid, and to have such jurisdiction and authority as our Justices of our Court of King's Bench have and may lawfully exercise, within that part of Great Britain called England, as far as circumstances will admit.
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> 2. It is under this provision that the High Court derives the power to issue writs of certiorari. Clause 55, Letters Patent empowered and authorized the Supreme Court of Judicature at Bombay to award and issue writs of Mandamus, Certiorari Procedendo, or error to the Courts subordinate to it. As has been pointed out in a recent judgment of this Court, 41 Bom. L. B. 984,1 this clause was not intended to curtail the wider powers conferred upon the Supreme Court by Clause 5, Letters Patent. The powers conferred by Clause 55 related only to Courts subordinate to the High Court, whereas the wider powers conferred by Clause 5 apply not merely to Courts subordinate to the High Court, but also

to any tribunals which perform any kind of judicial function.3. The power to issue writs of certiorari was: conferred on the Supreme Court of Judicature when it was created in 1823 by Clause 5, Letters Patent. This power was reserved by Section 106, Government of India Act, 1915, and by Section 223, Government of India Act, 1935. The powers of revision and superintendence are provided for by another section of the Government of India Act, Section 224, corresponding to Section 107 of the Act of 1915. As has been pointed out in 41 *Muljee Sicka & Co. v. Municipal Commissioner*[1] sub-cl. (2) of Section 224, which provides that nothing in that section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision, cannot curtail any of the wider powers possessed by the High Court before the passing of the Government of India Act of 1935. The fact that the revisional powers of the High Court over subordinate Courts and the power to issue writs of certiorari are covered by different sections of the Act, suggests that the two powers are different in origin and extent and supports the contention that the issuing of writs of certiorari is not done in the exercise of the revisional jurisdiction of the High Court. In Halsbury's Laws of England, vol. 9, p. 874, the power to issue writs of certiorari is stated to be part of the original jurisdiction of the High Court of Justice. In *Dinshaw Shroff v. Commissioner of Income Tax, Central*[2], in dealing with the question whether in view of Section 226, Government of India Act, the High Court was competent to issue a writ of certiorari to challenge the validity of an Income Tax assessment purporting to be made under the Indian Income Tax Act, 1922, the learned Chief Justice observed (page 37):There is no doubt that the issue of a writ of certiorari is within the competence of this Court in a proper case, and that such issue is in the exercise of the original jurisdiction of this Court.

4. Both because of its origin and because of its extent the power to issue a writ of certiorari cannot therefore be regarded as part of the revisional jurisdiction of the High Court. Our attention has been drawn to the fact that Sir Dinshah Mulla refers to the power of the High Court to issue a writ of certiorari in his commentary on Section 113, but he does so merely in order to point out that the provisions of Section115 are not exhaustive, that there may be rare cases which do not fall under that section and that such cases could be dealt with under the power to issue writs of certiorari which the High Court has inherited from the Supreme Court. Clause 15, Letters Patent, provides that no appeal shall lie to the High Court from an order of a single Judge made in the exercise of revisional jurisdiction or in the exercise of the power of superintendence conferred by Section 107, Government of India Act. The fact that orders made under Section 107 are mentioned separately from revisional orders shows (that the words "Revisional Jurisdiction" in that clause were intended to apply only to the revisional powers conferred on the High Court by Section 115, Civil Procedure Code They cannot therefore include the power of issuing writs of certiorari which is not derived from Section 115 and which is not a revisional power at all, but original [jurisdiction exercisable not merely over sub-jordinate Courts, but over other tribunals also. Although no case has arisen in this Court of an appeal

having been heard under the Letters

[1] A.I.R. 1939 Bom. 471

[2] AIR 1943 Bom 77 : [1943] 11 ITR 172 (Bom)

Patent from an order of a single Judge issuing or refusing to issue a writ of certiorari, our attention has been drawn to a case in the Madras High Court in which an appeal was heard by a Division Bench from a judgment of a Single Judge refusing to issue a writ of eortiorari. *Emberumanar Jeer Swamignl v. H.B.E. Board, Madras*[3] In our opinion Macklin J.'s order was not made in the exercise of revisional jurisdiction, and an appeal against his order can therefore lie under Clause 15, Letters Patent.

4. It was next contended by Mr. Desai for the' respondent municipality that,' Macklin J.'s order is not a judgment for the purposes of Clause 15. The meaning to be attached to that word was considered by the Calcutta High Court in the well-known case in The Justices of the Peace for *Calcutta v. The Oriental Gas Co*[4]. Couch C.J. held that the word "judgment" in Clause 15 means a decision which affects the merits of the question between, the parties by determining some right or liability, and that the decision may be either final, or preliminary, or interlocutory. The same view was taken in a later decision of the Calcutta High Court in *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub*[5] This view was accepted by our High Court in *Miya Maho med v. Zorabi*[6] in which Scott C.J. observed that for a considerable number of years the decision of the Calcutta High Court in the two cases referred to above had been regarded as a leading decision to be followed on the question whether an order in any particular case was or was not a judgment within the meaning of Clause 15, Letters Patent. The same view has been taken in several subsequent decisions of this Court. To contend, as Mr. Desai does, that Macklin J.'s order is merely an order refusing inspection of documents and is not therefore a judgment is to look merely at the form of the order and not at its substance and effect. The only way in which the plaintiff can prove his allegations that votes had been cast in the names of persons who were dead is by asking the Court to inspect the marked voters' list in which, under Rule 26, the Polling Officer after satisfying himself as regards the identity of voters has to score, out the voters' names from the voters' list. If the plaintiff is prevented1 from asking the Court to inspect the marked; voters' list he would be prevented from proving the case in the only way in which it could be proved. The order of Macklin J. is one which affects the merits of the case between the parties, since it necessarily involves the failure of the plaintiff's suit. It is therefore a judgment for the purposes of Clause 15.

5. After the arguments in this appeal had been heard on 7th September 1943, a judgment recently delivered by the Privy Council on 10th May 1943, in *Byots of Garabandho v. Kamindar of Parlakimedi*[7], was published. The question of the power of the Madras, High Court to issue writs of certiorari in matters arising outside the Presidency town was considered and it was held that that High Court had no jurisdiction to issue a writ of certiorari in connexion with a decision of the Board of Revenue at Madras affecting lands situate in the mofussil. As the question arising in the two appeals before us appeared to us to be fully covered by this judgment of their Lordships, which was not before us when the appeals had been first argued, we had the appeals set down again for arguments and have heard the advocates on both sides. Dealing with the origin and nature of the writ of certiorari their Lordships observed:

[3] A.I.R. 1939 Mad. 511 [5]13 Beng. L.R. 91 [7] AIR 1943 PC 164 : 1943-56-LW 460

[4]8 Beng. L.E. 433 [6]2 I.C. 157

> The ancient writ of certiorari in England is an original writ which may issue out of a superior Court requiring that the record of the proceedings in some cause or matter pending before an inferior Court should be transmitted into the superior Court to be there dealt with. This writ does not issue to correct purely executive acts, but, on the other hand, its application is not narrowly limited to inferior Courts in the strictest sense. Broadly speaking, it may be said that if the act done by the inferior body is a judicial act, as distinguished from being a ministerial act, certiorari will lie: (p. 165).

6. Their Lordships after a very exhaustive examination of the origin of the power of the Madras High Court to issue writs of certiorari, and after considering Clause (8) of the Charter of 26th December 1800, establishing the Supreme. Court at Madras, came to the conclusion that the power of that High Court to issue writs of certiorari was confined to the Town of Madras. Clause 5, Letters Patent by which the Supreme Court of Judicature at Bombay was established is in exactly the same terms as Clause (8) of the Charter of 1800 by which the Supreme Court at Madras was established, and the decision of their Lordships that the power of the Madras High Court to issue writs of certiorari was limited to the Town of Madras applies with equal force to this High Court. On this view this Court would have no jurisdiction to issue writs of certiorari with regard to the decisions of tribunals outside the area of its original jurisdiction, namely the Town and Island of Bombay. We must, therefore, bold that Macklin J., could not act in exercise of the powers of certiorari with regard to the decision of the Assistant Judge in these two cases, and on this ground the appeals must succeed. The appeals are allowed and the orders made by Macklin J., in the two revision applications set aside. The case is sent down to the Assistant Judge for disposal according to law. The appellant will get his costs from the opponents in this Court and before Macklin J.

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