

NAGPUR HIGH COURT

Bhagwantrao Shiwaji

Vs

Viswasrao Amritrao

Misc. Civil No. 3 of 1952

(Sinha, C.J. and Hidayatullah, J.)

16.02.1953

JUDGMENT

Hidayatullah, J.

1. This is an application for leave to appeal to the Supreme Court from our judgment in Second Appeal No.169 of 1947 by which we reversed the judgment and decree of the First Additional District Judge, Amravati, and restored that of the Court of Civil Judge, Class-I, Achalpur.

2. The applicant contends that he is entitled to appeal as of right under clause (a) of Section 109, Civil Procedure Code inasmuch as the value of the property at the date of the suit was Rs. 10,000/- and is now more than Rs. 20,000/- and the judgment reverses the judgment and decree of the Court below. The applicant, in the alternative, asks for a special certificate under Article 133(c) of the Constitution because, as he says, the case involves a question of great public or private importance.

3. On behalf of non-applicant 1 the value of the property is challenged and is stated to be Rs. 6,900/- only. It may be pointed out that in the Courts below the valuation was not based on the market value of the property but on the land revenue assessed.

4. A preliminary objection is taken by the non-applicant on the ground that the judgment sought to be appealed against was delivered on 27-11-1951, that is to say, long after the Constitution came into force. It is argued that the appeal is now governed by Article 133 of the Constitution, and not by the Code of Civil Procedure.

The non-applicant, therefore, contends that inasmuch as Article 133 gives a right of appeal in a case involving a claim above Rs. 20,000/- the present application, in view of the valuation given by the applicant himself, is incompetent. The non-applicant also contends that a special certificate cannot be granted in this case as the property is capable of being valued and the case is not one of public or private importance.

5. In - *'Nandlal v. Hiralalsao'*, Rao, J., and myself had to consider a similar Question. The judgment in that case was delivered on 25-9-1947 and the application for leave to appeal to the Federal Court was filed in 1948. The value of the claim involved was

¹ AIR 1950 Nag 222

Rs. 14,000/-. It was contended in that case that the appeal was incompetent by reason of Article 133 of the Constitution. In dealing with this point the Division Bench stated the law as follows :

"There can be no doubt that the Federal Court was exercising jurisdiction which the Privy Council exercised till the C.A. Act 5 of 1949 (The Abolition of Privy Council Jurisdiction Act) was passed. This application was pending on the date the Constitution of India was brought into force. A vested right existed in the applicants to file an appeal as of right before the Federal Court, and that right can only be taken away by express provision of law or by necessary intendment - see - '*Colonial Sugar Refining Co. v. Irving*²', Article 133 is not made retrospective either expressly or by necessary intendment, and an appeal which belonged to a party as of right in a pending case cannot be said to have been taken away. Indeed, by Article 395 read with Article 372(1), the Abolition of Privy Council Jurisdiction Act, 1949, is still on the Statute Book, and it must be held that the jurisdiction of the Federal Court under that Act still vests in the Supreme Court. To that extent Article 133 must be taken not to apply to this case, and the jurisdiction must be held to be preserved by virtue of Article 135."

6. It is contended that the case is distinguishable on the ground that the decision sought to be appealed from as well as the application for leave to appeal were filed before the present Constitution came into force and cannot govern cases in which the application for leave to appeal to the Supreme Court is filed after the inauguration of the Constitution, or at any rate, where the judgment sought to be appealed against is after that event.

7. The short question, therefore, in this application is whether in a suit commenced before the Constitution but decided in appeal after the Constitution, the right of appeal is governed by Article 133 and the limit of Rs. 20,000/- mentioned therein or by the Civil Procedure Code and the limit of Rs. 10,000/-.

8. There can be no doubt that a right of appeal is a vested right and arises when the suit is filed. See - '*Sardar Ali v. Dolimuddin*³', - '*Mt. Murtu v. Paras Ram*⁴', and - '*Kamal Nayan v. Bira Naik*⁵', Such a right can only be taken away by an express provision in a statute or by necessary intendment to that end. Article 133 of the Constitution is not made retrospective and there is no express provision which can be said to affect the right of appeal given by other statutes governing a particular suit. See - '*Netlal v. Ucheshwar*⁶', - '*Kamal Nayan v. Bira Naik*', (cit. sup.); - '*Ramaswami Chettiar v. Ramanathan Chettiar*⁷', - '*Batala Engineering Co. v. Custodian Evacuee Property*⁸', - '*Daji saheb v. Shankar Rao*⁹', - '*Sobhagchand v. Girdharlal*¹⁰', and - '*Mt. Murtu v. Parasram*', (cit. sup.). Indeed, by Article 372 all existing laws are preserved either with or without adaptations, unless they are repugnant to the Constitution, and the Adaptation of Laws Order, 1950, also provides in its twenty-seventh clause to the same effect.

²(1905) AC 369

⁴ AIR 1952 Him Pra 14

⁶ AIR 1951 Pat 612

³ AIR 1928 Cal 640

⁵ AIR 1951 Oris 141

⁷ AIR 1951 Mad 251

⁸ AIR 1951 Pun 412

¹⁰ AIR 1952 Sau 37

⁹ AIR 1952 Bom 303

9. The right of appeal which inhered in the litigants whose cases were above Rs. 10,000/- mark

can only be taken away either by express enactment or by necessary intendment; and all that we have to see is whether there is such a necessary intendment in the present Constitution. Examined carefully, the Constitution shows that there is no such necessary intendment and if any intendment is to be granted at all, it is to the effect that all previous rights of appeal are to continue.

10. Prior to the Indian Independence Act, 1947, the appeals in civil suits lay to the Privy Council under Sections 109 and 110, Civil Procedure Code, and were governed by Order 45 'ibid'. Appeals also lay to His Majesty in Council under the Letters Patent, but were subject to the same limitations as prescribed in the Civil Procedure Code in matters of pecuniary valuation. When the Indian Independence Act was passed, it was found necessary to enlarge the jurisdiction of the Federal Court to enable the Federal Court to entertain appeals which previously went to His Majesty in Council. For this purpose Act 1 of 1948 (Federal Court (Enlargement of Jurisdiction) Act, 1948) was passed and the first day of February 1948 was appointed for its commencement. Section 3 of that Act reads as follows:

" 'Enlargement of the Federal Court's jurisdiction'.

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As from the appointed day, - (a) an appeal shall lie to the Federal Court from any judgment to which this Act applies,

- (i) without the special leave of the Federal Court, if an appeal could have been brought to His Majesty in Council without special leave under the provisions of the Code of Civil Procedure, 1908, or of any other law in force immediately before the appointed day, and
- (ii) with the special leave of the Federal Court in any other case;

X x x x x

- (c) No direct appeal shall lie to His Majesty in Council, either with or without special leave, from any such judgment."

11. Under section 4 of the Act, all proceedings and steps taken in. and orders made and certificates granted by a High Court in connection with an appeal to His Majesty in Council from a judgment to which the Act" applied were deemed to be proceedings and steps taken in connection with an appeal from that judgment of the High Court to the Federal Court unless the record pertaining to such appeal had before 1-2-1948 been transmitted by the High Court to His Majesty in Council.

12. By section 6 the provisions of the Code of Civil Procedure, 1908, and of any other law in force immediately before 1-2-1948 stood modified and instead of 'His Majesty in Council' the references therein were to be read as to the Federal Court.

13. It would thus appear that from 1-2-1948 the appeals in those cases in which the appeal lay to the Privy Council were to be decided by the Federal Court.

14. This was followed in 1949 by the Constituent Assembly Act 5 of 1949 by which the jurisdiction of His Majesty in Council in respect of Indian appeals and petitions was finally

abolished. This Act came into force on 10-10-1949, which was the appointed day in respect to that Act. By section 2 of the Act, the jurisdiction of the Privy Council way. abolished, except in those cases in which special jurisdiction was conferred upon the Privy Council by section 4 of the Act. All other jurisdiction which the Privy Council exercised was vested in the Federal Court by Section 5. Section 5 reads as follows :

"As from the appointed day, the Federal Court shall, in addition to the jurisdiction conferred on it by the Government of India Act, 1935 (26 Geo. 5, c.2) and the Federal Court (Enlargement of Jurisdiction) Act, 1947 (1 of 1948), but subject to the provisions of this section, have the same jurisdiction to entertain and dispose of Indians appeals and petitions as His Majesty in Council has, whether by virtue of His Majesty's prerogative or otherwise, immediately before the appointed day."

The Exceptions which are mentioned in the section have no bearing upon the matter I am discussing and need not, therefore, be quoted.

15. By section 10 of the Act the provisions of the Code of Civil Procedure, 1908, and of any other law in force on the appointed day relating to Indian appeals and petitions were from that day to have effect as if in the said provisions, for all references to His Majesty in Council there had been substituted references to the Federal Court. This jurisdiction continued till immediately before the inauguration of the Supreme Court.

16. It would thus appear that except for those few cases which were to be heard by the Privy Council under section 4 of Act 5 of 1949, the entire jurisdiction of the Privy Council stood transferred to the Federal Court, subject only to the restrictions contained in the law then existing. In respect of civil suits that limitation was contained in Section 109, Civil Procedure Code which prescribed an appeal as of right in those cases in which the appellate judgment reversed the judgment of the Court below and the subject-matter in dispute, both in the suit as well as appeal to the Privy Council, was Rs. 10,000/- and above.

17. Now, we have to see whether by the enactment of Article 133 of the Constitution this right, which cannot but be described as a vested right, in view of what I have stated above, has been taken away by necessary intendment. Article 133 of the Constitution reads as follows:

"(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies -
(a) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or
(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or
(c) that the case is a fit one for appeal to the Supreme Court.

X x x x"

18. There can be no doubt that in those cases to which this article applies the pecuniary limit is Rs. 20,000/- and upwards. The short question is whether this limit applies even to those cases which would have gone to the Federal Court but for the substitution of the Federal Court by the Supreme Court. Here, Article 135 expresses a clear intention. It reads as follows:

"Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of Article 133 or Article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law."

It is pertinent to note that while all parliamentary-legislation was abolished relating to the Federal Court, neither the Abolition of the Privy Council Jurisdiction Act nor the Enlargement of the Federal Court Jurisdiction Act has been abrogated. The former is expressly preserved on the Statute Book by an express provision in the Constitution in Article 395 which says :

"The Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing the latter Act but not including the Abolition of Privy Council Jurisdiction Act, 1949, are hereby repealed."

19. Article 135 of the Constitution enlarges the jurisdiction of the Supreme Court notwithstanding the provisions of Article 133. Indeed, it specifically mentions that article as well as Article 134. It preserves all existing appeals because the word "matter" used in the article is a word of very large import, and coupled with the words "jurisdiction and powers", it enables one to see that the entire jurisdiction of the Federal Court still vests in the Supreme Court. In dealing with this subject, Subba Rao and Panchapakesa Ayyar, JJ., in - 'AIR 1951 Madras 251', observed as follows :

" 'Matter' in Article 135 is a word of wide connotation. It may include subject-matter not dealt with by Articles 133 and 134 but governed by specific Acts in regard to which appeals lay to the Federal Court immediately before the commencement of the Constitution. But there is no reason to exclude from its operation subject-matter below the pecuniary limits prescribed under Article 133 of the Constitution if the jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of the Constitution. It would certainly be a subject-matter in regard to which the provisions of Article 133 or Article 134 do not apply."

I am in entire agreement with the observations made and respectfully dissent from the subsequent view propounded in the same Court in - '*Ramaswami v. Official Receiver*¹¹', by Govinda Menon and Basheer Ahmed Sayeed, JJ., The learned Judges in dealing with the earlier case observed as follows :

"On this aspect of the question, in a recent case decided by us, we have not agreed with the view taken by another Bench in - 'AIR 1951 Madras 251', regarding the interpretation

of Article 135, vide judgment in C.M.P. Nos. 3345, 3346 and 3347 of 1950. We adhere to our view expressed therein, which is in the following terms :

'By a process of reasoning based upon necessary and explicit exclusion, if we are to consider the meaning of the word 'matter' in Article 135, it seems to us that the word 'matter' used in Article 135 should not be understood as meaning a civil or criminal proceeding, because both these subjects were specifically dealt with under Articles 133 and 134. Article 132 refers to civil, criminal or other proceeding and is all comprehensive and therefore in whatever nature of proceedings, be it civil, criminal, admiralty, intestate or matrimonial, a question regarding the interpretation of the Constitution arises, then an appeal will lie under Article 132. So far as other proceedings are concerned, Article 133 lays down the scope and limit of the right of appeal in civil appeals. In the same way, does Article 134 provide for the scope and limit of the right of appeal in a criminal proceeding?

Therefore it seems to us that the matter referred to in Article 135 should be understood as meaning a matter which is neither civil nor criminal and by the application of the maxim 'expressio unius est exclusio alterius'. - the express mention of one thing implies the exclusion of another - it seems to us that the word 'matter' in Article 135 should be deemed to exclude both civil and criminal proceedings."

Such being the case, though by the Federal Court (Enlargement of Jurisdiction) Act, Act 1 of 1948, in all cases where an appeal lay to the Privy Council it was provided that an appeal shall lie to the Supreme Court (sic.) and therefore even where the order is not a final one special leave can be granted in exceptional cases under Section 109, clause (c), still we feel that Article 372 read with Article 135 does not retain that right where the provisions of Articles 133 and 134 can be invoked. We have to recognize the fact that prior to the Constitution there was no enactment in force except the Civil Procedure Code and the Letters Patent of the High Courts conferring and regulating the rights of appeals from the High Courts. But now as a result of Chap.4 of Part 5 of the Constitution the right of appeal to the Supreme Court is crystallized in clear cut terms. If Article 133 prohibits an appeal to the Supreme Court where the decision is not a final order it cannot be said that any earlier statutory provisions repugnant to that Article can hold the field any further despite Article 372. In our opinion Article 135 does not refer to civil or criminal proceedings and has therefore to be excluded from consideration when taking into account the subject-matter of the present appeal. We are alive to the circumstance that a right of appeal which existed to the Federal Court under the Federal Court (Enlargement of Jurisdiction) Act, Act 1 of 1948, is, by this process of reasoning, rendered non-existent. But to compensate for that there is always the right to the party to apply to the Supreme Court for special leave as contemplated by Art, 135 of the Constitution."

¹¹ AIR 1951 Mad 1051

20. Regarding with the last observation, if I may respectfully point out, it is a poor consolation to the litigant to lose his vested' right and hope to get special leave from the Supreme Court itself. In considering Article 135 'vis-a-vis' Articles 133 and 134, the provisions with regard to special leave in Article 136 have no relevancy whatever.

21. In my opinion, the learned Judges - and I say it respectfully - overlooked the fact that what was preserved by Article 135 was the entire jurisdiction and power exercised by the Federal Court immediately before the commencement of the Constitution. The two Acts of which the

learned Judges make mention, namely, the Federal Court (Enlargement of Jurisdiction) Act, 1948, and the Abolition of Privy Council Jurisdiction Act, 1949, both deal with jurisdictions to entertain appeals. If these jurisdictions are something different from the jurisdiction granted by Article 133, then by the express mention of Article 133 in Article 135 no notice can be taken of the provisions of the former article. What Article 135 requires is that we must leave out of account altogether Article 133 in determining the further jurisdiction which the Supreme Court can exercise, and that jurisdiction is co-terminus with the jurisdiction and power exercisable by the Federal Court immediately before the commencement of the Constitution. I have shown above that the jurisdiction of the Federal Court was extended before the Constitution came into force to entertain appeals between the Rs. 10,000/- and Rs. 20,000/- marks. That jurisdiction must 'ex facie' be taken to be preserved by Article 135. Indeed I find it so obvious that on the earlier occasion, namely, - 'AIR 1950 Nagpur 222', I did not feel it necessary to express myself in an elaborate Judgment. I have now done so in view of the dissent expressed in - 'AIR 1951 Madras 1051', I may point out that the view which Rao, J., and I propounded in the earlier Nagpur case has found approval in some of the High Courts, particularly in - 'AIR 1952 Bombay 303', where not only the Nagpur view but also that of Subba Rao and Panchapakesa Ayyar, JJ., has been expressly followed in preference to the view taken earlier in the same Court. It may also be stated that the distinction made in some cases that the appeal is available because the application for leave to appeal was filed before the present Constitution came into force, is merely to reinforce the argument and not a statement of the law.

22. The law is that the right of appeal accrues on the day the 'lis' commences and continues till the law itself takes it away either by express enactment or necessary intendment. This is brought into relief by their Lordships' decision in - *Delhi Cloth and General Mills Co. v. Income-tax Commr., Delhi*¹², where a new right of appeal was not held to touch vested rights. Their Lordships quoted with approval the dictum of Lord Macnaghten in - '(1905) AC 369 (B)' and emphasized that laws touching vested rights are not to be regarded as retrospective in the absence of an express provision or necessary intendment. In the - *Colonial Sugar Refining Co. case*, their Lordships pointed out that this principle applies also to a change of Court. Lord Macnaghten observes :

"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

¹² AIR 1927 PC 242

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."

This is also held in a long track of cases to which it is not necessary to refer here.

23. There is no express enactment, Article 133 of the Constitution notwithstanding, because there is an express mention of that article in Article 135 and the necessary intendment as also the express provision is that the Supreme Court shall exercise the jurisdiction hitherto exercised by the Federal Court immediately before the commencement of the Constitution. It is argued that

the words of Article 135 of the Constitution are

"if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law" and that this was not a matter in which the Federal Court was exercising any jurisdiction immediately before the commencement etc. The words "were exercisable by the Federal Court"

are wide enough, not only to cover such cases as were before the Federal Court on the commencement of the Constitution, but also such cases as would have gone to the Federal Court under the existing law but for the commencement of the present Constitution. See - *'Moeapitso Bathoven v. The King'*¹³, For these reasons I think the point raised by Shri Mangalmurti must be answered in the negative.

24. The application for leave to appeal cannot be rejected on the ground that it admittedly concerns a matter the value of which falls between Rs. 10,000/- and Rs. 20,000/-. Whether or not the valuation given by the applicant is right is necessarily a matter for further investigation; and I would make the order that the case be sent back to the lower Court to give a decision on –

- (a) What was the value of the subject-matter of the property on the date of the institution of the suit? and
- (b) What was the value of the suit on the date the judgment of this Court was delivered), namely, 27-11-195?

After the findings are received, parties shall have an opportunity of filing objections within fifteen days. The question whether a special certificate be granted under Article 133 (c) of the Constitution will be left open for the present.

Sinha, C.J.

13. I agree.

Order accordingly.

¹³(1917) AC 207