Deva Vs. Durgashankar and ors.

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Court : Madhya Pradesh

Decided On : Apr-09-1986

Reported in : AIR1986MP195

Judge : J.S. Varma, Actg. C.J., ;G.G. Sohani and ;S.S. Sharma, JJ.

Acts : Constitution of India - Article 226; Government of India Act, 1915- Sections 108

Appeal No. : Letters Patent Appeal No. 17 of 1985

Appellant : Deva

Respondent : Durgashankar and ors.

Advocate for Def. : S.D. Sanghi and ;N.L. Agrawal, Advs.

Advocate for Pet/Ap. : Chafekar and ;B.L. Pavecha, Advs.

Judgement :

Sohani, J.

1. On a reference made by a Division Bench, this Full Bench has been constituted to decide the following question : --

'Whether an appeal under Clause 10 of the Letters Patent lies to a Division Bench of this Court against the judgment of a single Judge disposing of a petition under

Article 226 of the Constitution'?

1 The facts giving rise to this reference, briefly, are as follows : Under the rules of this High Court certain petitions under Article 226 of the Constitution are heard by a Single Judge ofthis Court. Aggrieved by the final decision given by a learned single Judge in such petition, an appeal was preferred under Clause 10 of the Letters Patent constituting this High Court When that appeal came up for hearing before a Division Bench of this Court, a preliminary objection was raised as to the maintainability of the appeal Reliance was placed on a decision of a Division Bench of this Court in L.P.A. 16/85 (reported in 1986 Lab 1C 640). (National Textile Corporation (MP) Limited, Indore v. Radheshyam Suroliya.) The Division Bench which heard this appeal, noted that on the question of maintainability of an appeal under CL 10 of the Letters Patent, from an Order disposing of a petition under Article 226 of the Constitution, there was a conflict in two Division Bench decisions of this Court In Laxmi Kumari Devi v. Radhakishan Mataram Marwadi, 1961 MPLJ 1403, a Division Bench had held that an appeal from the decision of a single Judge disposing of a petition under Article 226 of the Constitution was maintainable under CL 10 of the Letters Patent However, in LP.A. 16/85, another Division Bench of this court was of the opinion that an appeal under CL 10 of the Letters Patent from the decision of single Judge in a petition under Article 226 of the Constitution was not maintainable. As, there was thus, a conflict between the two Division Bench decisions of this Court, to resolve that conflict the aforesaid question was referred to a Larger Bench and that is how this question has come up before us for consideration,

3. Before we proceed to answer the question referred to us, it is necessary to note certain facts. Clause 10 of the Letters Patent constituting this court corresponds to CL 15 of the Letters Patent constituting the High Court of Bombay and Calcutta Under that clause an appeal lies from a judgment of one Judge of the High Court pursuant to Section 108 Government of India Act, 1915, provided the judgment does not fall in any such category as is specified in that behalf in Clause 10. It, therefore, follows that an appeal from a decision of a single Judge to a Division Bench is maintainable if two conditions are satisfied (1) that the decision amounts to a judgment not falling in any category specified in CL 10 of the Letters Patent,

from which no appeal lies and (2) that the judgment is pursuant to Section 108 of theGovernment of India Act, 1915. It was not and could not be disputed before us that a decision given by a single Judge disposing of a petition under Art 226 of the Constitution amounts to a judgment within the meaning of CL 10 of the Letters Patent Such judgment does not fall in any category excepted by Clause 10 from the purview of appeals. The main controversy in this case centres round the question as to whether such judgment is pursuant to Section 108 of the Government of India Act, 1915.

4. Now under Section 108 of the Government of India Act, 1915, each High Court was empowered to frame rules providing for the exercise by one or more Judges of the original and appellate jurisdiction vested in the Court The question as to whether the power vested in the High Court under Section 108 of the Government of India Act, 1915 could only be exercised in respect of the jurisdiction which the High Court possessed on the date when the Act of 1915 came into force, came up for consideration before the Supreme Court in National Sewing Thread Co. Ltd., Chidambaram v. James Chadwick and Bros Ltd. AIR 1953 SC 357. Dealing with that question, the Supreme Court held as follows :--

'It is thus difficult to accept the argument that the power vested in the High Court under Sub-section (1) of Section 108 was a limited one, and could only be exercised in respect to such jurisdiction as the High Court possessed on the date when the Act of 1915 came into force. The words of the sub-section 'vested in the Court' cannot be read as meaning 'now vested in the Court'. It is a well known rule of construction that when a power is conferred by a statute that power may be exercised from time to time when occasion arises unless a contrary intention appears. This rule has been given statutory recognition in Section 32, Interpretation Act The purpose of the reference to Section 108 in CL 15 of the Letters Patent was to incorporate that power in the charter of the Court itself, and not to make it moribund at that stage and make it rigid and inflexible. We are, therefore, of the opinion that Section 108 of the Government of India Act 1915 conferred power on the High Court which that Court could exercise from time to time with reference to its jurisdiction whether existing at the coming into force of theGovernment of India Act 1915 or whether conferred on it by any subsequent

legislation. It was argued that simultaneously with the repeal of Section 108, Government of India Act 1915 and of the enactment of its provisions in Section 223, Government of India Act of 1935 and later on in Article 225 of the Constitution of India there had not been any corresponding amendment of CL 15 of the Letters Patent and the reference to Section 108 in CL 15 of the Letters Patent could not therefore, be taken as relating to these provisions, and that being so, the High Court had no power to make rules in 1940 when the Trade Marks Act was enacted under the repealed section and the decision of Mr. Justice Shah, therefore, could not be said to have been given pursuant to Section 108. This objection also in our opinion is not well founded as it overlooks the fact that the power that was conferred on the High Court by Section 108 still subsists and it has not been affected in any manner whatever either by the Government of India Act 1935 or by the new Constitution. On the other hand, it has been kept alive and reaffirmed with great vigour by these statutes. The High Courts still enjoy the same unfettered power as they enjoyed under Section 108 of the Government of India Act 1915 of making rules and providing whether an appeal has to be heard by one judge or more judges or by Division Courts consisting of two or more judges of the High Court It is immaterial by what label or nomenclature, that power is described in the different statutes or in the Letters Patent The power is there and continues to be there and can be exercised in the same manner as it could be exercised when it was originally conferred'. In spite of the aforesaid observations it was strenuously contended before us by Shri Sanghi and Shri Saxena, the learned counsel for the respondents, that a judgment given by a single Judge of this court in pursuance of rules framed by this High Court providing for the exercise of jurisdiction vesting in this Court under Art 226 of the Constitution, could not be held to be a judgment pursuant to Section 108 of the Government of India Act, 1915 and hence, was not appealable under CL 10 of the Letters Patent In our opinion, the aforesaid contention cannot be upheld in view of the fact that the matter is concluded by the decision of the Supreme Court in AIR 1953 SC 357Government of India Act, 1915. It was not and could not be disputed before us that a decision given by a single Judge disposing of a petition under Art 226 of the Constitution amounts to a judgment within the meaning of Clause 10 of the Letters Patent Such judgment does not fall in any category excepted by Clause 10 from the purview of appeals.

The main controversy in this case centres round the question as to whether such judgment is pursuant to Section 108 of the Government of India Act, 1915.

4. NowunderS. LOSofthe Governmentof India Act, 1915, each High Court was empowered to frame rules providing for the exercise by one or more Judges of the original and appellate jurisdiction vested in the Court The question as to whether the power vested in the High Court under Section 108 of the Government of India Act, 1915 could only be exercised in respect of the jurisdiction which the High Court possessed on the date when the Act of 1915 came into force, came up for consideration before the Supreme Court in National Sewing Thread Co. Ltd., Chidambaram v. James Chadwick and Bros Ltd. AIR 1953 SC 357. Dealing with that question, the Supreme Court held as follows :--

'It is thus difficult to accept the argument that the power vested in the High Court under Sub-section (1) of Section 108 was a limited one, and could only be exercised in respect to such jurisdiction as the High Court possessed on the date when the Act of 1915 came into force. The words of the sub-section 'vested in the Court' cannot be read as meaning 'now vested in the Court'. It is a well known rule of construction that when a power is conferred by a statute that power may be exercised from time to time when occasion arises unless a contrary intention appears. This rule has been given statutory recognition in Section 32, Interpretation Act The purpose of the reference to Section 108 in CL 15 of the Letters Patent was to incorporate mat power in the charter of the Court itself, and not to make it moribund at that stage and make it rigid and inflexible. We are, therefore, of the opinion that Section 108 of the Government of India Act 1915 conferred power on the High Court which that Court could exercise from time to time with reference to its jurisdiction whether existing at the coming into force of theGovernment of India Act 1915 or whether conferred on it by any subsequent legislation. It was argued that simultaneously with the repeal of Section 108, Government of India Act, 1915 and of the enactment of its provisions in Section 223, Government of India Act of 1935 and later on in Article 225 of the Constitution of India there had not been any corresponding amendment of Clause 15 of the Letters Patent and the reference to Section 108 in Clause 15 of the Letters Patent could not, therefore, be taken as relating to these provisions, and that being so,

the High Court had no power to make rules in 1940 when the Trade Marks Act was enacted under the repealed section and the decision of Mr. Justice Shah, therefore, could not be said to have been given pursuant to Section 108. This objection also in our opinion is not well founded as it overlooks the fact that the power that was conferred on the High Court by Section 108 still subsists and it has not been affected in any manner whatever either by the Government of India Act, 1935 or by the new Constitution. On the other hand, it has been kept alive and reaffirmed with great vigour by these statutes. The High Courts still enjoy the same unfettered power as they enjoyed under Section 108 of the Government of India Act, 1915 of making rules and providing whether an appeal has to be heard by one judge or more judges or by Division Courts consisting of two or more judges of the High Court It is immaterial by what label or nomenclature, that power is described in the different statutes or in the Letters Patent The power is there and continues to be there and can be exercised in the same manner as it could be exercised when it was originally conferred'. In spite of the aforesaid observations it was strenuously contended before us by Shri Sanghi and Shri Saxena, the learned counsel for the respondents, that a judgment given by a single Judge of this court in pursuance of rules framed by this High Court providing for the exercise of jurisdiction vesting in this Court under Article 226 of the Constitution, could not be held to be a judgment pursuant to Section 108 of the Government of India Act, 1915 and hence, was not appealable under CL 10 of the Letters Patent In our opinion, the aforesaid contention cannot be upheld in view of the fact that the matter is concluded by the decision of the Supreme Court in AIR 1953 SC 357Judge to hear a petition under Article 226 of the Constitution. The Supreme Court did not want to express any opinion on that question as the Supreme Court in AIR 1981 SC 1786 (supra) was dealing with the question of maintainability of an appeal from an interlocutory order passed in a civil suit on the original side of the Bombay High Court, which is constituted by Letters Patent. With a view to clarify this position, the Supreme Court observed in para 125 of its judgment in AIR 1981 SC 1786 (Supra) as follows : -- 'Before closing this judgment, we may indicate that we have refrained from expressing any opinion on the nature of any order passed by a trial Judge in any proceeding under Article 226 of the Constitution which are not governed by the Letters Patent but by rules framed under the Code of Civil

Procedure under which, in some High Courts, writ petitions are heard by a Division Bench. In other High Courts, writ petitions are heard by a Single Judge and a right of appeal is given from the order of the Single Judge to the Division Bench after preliminary hearing.'

The aforesaid observations cannot be construed to mean that the Supreme Court was laying down the principle that even though certain High Courts might have been constituted by the Letters Patent, proceedings under Article 226 of the Constitution in those High Courts, are not governed by Letters Patent and that an appeal from a decision of a Single Judge in such High Court in a petition under Article 226 of the Constitution would, in no case, be maintainable under the Letters Patent It is true, as urged on behalf of the respondents, that even an obiter 'dictum of the Supreme Court is binding on this Court but before it could be held to be binding, it should be possible to spell out such dictum from the judgment of the Supreme Court. In our opinion, the Supreme Court has not decided any principle whatsoever in para 125 of its judgment All that the Supreme Court has observed is that having formulated tests to decide whether an order passed in a suit should or should not be treated as judgment, the Supreme Court should not be held to have expressed any opinion on the question as to whether any order passed by a trial Judge, in such proceedings, under Article 226 of the Constitution of India as are governed by rules framed under the Civil PC and not by theLetters Patent, would or would not amount to judgment. As already observed, many High Courts are not constituted by Letters Patent, and that rules under Civil PC have been framed by these High Courts to govern proceedings under Article 226 of the Constitution. In deciding the question of maintainability of appeals from orders arising out of those proceedings, the guidelines formulated by the Supreme Court for deciding the question as to whether any order passed in any suit would or would not amount to judgment, were likely to be pressed into service. The Supreme Court, however, wanted to leave that question open and with a view to make it very clear that it was leaving that question open, the Supreme Court expressly stated that it was refraining from expressing any opinion in that behalf. With great respect to the learned Judges, who decided Letters Patent Appeal No. 16 of 1985 (reported in 1986 Lab IC 640) (Madh Pra), we are of the opinion that from the observations of the Supreme Court in para 125 of its judgment in AIR 1981 SC 1786 (supra), it

cannot be deduced that the Supreme Court has expressed any opinion on the question of maintainability of an appeal under Letters Patent from a decision of a single Judge in a proceeding under Article 226 of the Constitution in a High Court, constituted by a Letters Patent

8. The decision in Mt Sabitri Thakurain v. Savi, AIR 1921 PC 80, referred to in the decision in Letters Patent Appeal No. 16 of 1985, dealt with the question of applicability of the regulations duly made by orders and rules under the Code of Civil Procedure, 1908, to the jurisdiction exercisable under the Letters Patent It was for this reason that a reference was made to that decision in AIR 1981 SC 1786 (supra). Neither the decision in AIR 1921 PC 80 (supra) nor the decision in AIR 1981 SC 1786 (supra) has, in our opinion, any bearing on the question of maintainability of an appeal under Clause 10 of the Letters Patent from the decision of a single Judge disposing of a petition under Article 226 of the Constitution.

9. Having given our anxious consideration to the matter, we have come to the conclusion that the decision in Letters Patent Appeal No. 16 of 1985 (reported in 1986 Lab IC 640) does not lay down correct law. Therefore, our answer to the question referred to us is that an appealunder Clause 10 of the Letters Patent lies to a Division Bench of this Court from the judgment of a Single Judge disposing of a petition under Article 226 of the Constitution. The matter shall now be placed before the Division Bench for deciding the appeal. In the circumstances of the case, parties shall bear their own costs of this reference.