Ramesh Chandra Das Vs. Kishore Chandra Das and ors.

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SooperKanoon Citation : sooperkanoon.com/533485

Court : Orissa

Decided On : Jun-22-2007

Reported in : AIR2007Ori146

Judge : A.K. Ganguly, C.J. and; N. Prusty, J.

Appellant : Ramesh Chandra Das

Respondent : Kishore Chandra Das and ors.

Disposition : Appeal dismissed

Judgement :

A.K. Ganguly, C.J.

1. The main 'question on which both these appeals were argued is whether they are maintainable after the insertion of Section 100A in the Civil Procedure Code by its amendment in 2002.

2. The material facts of the case are that both the appeals were filed by one Ramesh Chandra Das from the judgment and order dated 11 -10-2006 passed by a learned single Judge of this Court. Two appeals being F.A.O. No. 274 of 2006 and F.A.O. No. 286 of 2006 were filed from the order dated 3-7-2006 passed by the Civil Judge (Senior Division), Bhubaneswar in Title Suit No. 223 of 1990. By that order the learned trial Judge removed Ramesh Chandra Das, the appellant before us as Receiver and also declined to appoint any one of the plaintiffs as

Receiver. By that order, the learned trial Judge also discharged defendant No. 1, Kishore Chandra Das from Receivership. That part of the order discharging him as a Receiver was challenged by Kishore Chandra in F.A.O. No. 274 of 2006.

3. The learned Judge after hearing the parties and on a detailed consideration of the case passed the following order:

I, accordingly, direct that in place of defendant No. 1, plaintiff No. 2, Jyotish Chandra Das, be appointed as Receiver in respect of the property for which the defendant No. 1 had been appointed on the very same terms and conditions. The fixed deposits receipts and cash in hand, if any, with the defendant No. 1-Receiver be deposited before the trial Court within fifteen days from today. The fixed deposits receipts and cash in hand, if any, deposited before the trial Court shall be kept with the newly appointed receiver. The plaintiff No. 2 who is appointed as receiver shall be responsible for safe custody of the fixed deposit on rent. If there is any cash in hand of defendant No. 1 which is deposited before trial Court, the same shall be immediately kept in fixed deposit in any nationalized bank.

In view of the discussions made above, FAO No. 274 of 2006 is dismissed and FAO No. 286 of 2006 is allowed.

4. Since the point debated is one of maintainability of the present appeals, detail discussion of the factual aspects considered in the orders under challenge need not be gone into in this judgment. Here the date of filing these two appeals are relevant and admittedly both the appeals were filed on 27-10-2006 and that was much after Section 100A was incorporated in the Civil Procedure Code (hereinafter, the Code') by way of amendment in 2002. The amendment came into effect from 1-7-2002.

5. For a proper appreciation of the impact of that amendment on the maintainability of the present appeals, this Court sets out Section 100A of the Code, as amended in 2002.

100A. No further appeal in certain cases --Notwithstanding anything contained in 'any Letters Patent for any High Court or in any other instrument having the force

of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by single Judge of a High Court, no further appeal shall lie from the Judgment and decree of such single Judge.

Section 100A was first introduced by amendment by the Code of Civil Procedure (Amendment) Act, 1976. Section 97 of that Amending Act contained the provisions for Repeal and Savings. Section 97(2)(n) of the Amending Act which deals with Section 100A is in following terms:

(n) Section 100A, as inserted in the principal Act by Section 38 of this Act, shall not apply to or affect any appeal against the decision of a single Judge of a High Court under any Letters Patent which had been admitted before the commencement of the said Section 38, and every such admitted appeal shall be disposed of as if the said Section 38 had not come into force;

From a perusal of Section 97(2)(h) of the amending Act, it is clear that Section 100A shall not apply to or affect any appeal against the decision of a single Judge of the High Court which had been admitted before the commencement of the amending section and every such admitted appeal shall be disposed of as if the said amending section had not come into force. The amendment has come into force from 1-2-1977.

6. There has been a further amendment of Section 100A in 1999. After the 1999 amendment, Section 100A, as it stood then is as follows:

100A. No further appeal in certain cases.-

Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force,-

(a) where any appeal from an original or appellate decree or order is heard and decided.

(b) where any writ, direction or order is issued or made on application under Article 226 or Article 227 of the Constitution,

by a single Judge of a High Court no further appeal shall lie from the judgment, decision or order of such single Judge.

However, the 1999 amendment was not given effect to.

7. Section 100A suffered a further amendment in 2002 by Act 22 of 2002. After the 2002 amendment, the section as it stands now, has been set out above. This 2002 amendment of the Code has come into effect also on 1-7-2002 and which is much before the present two appeals were filed.

8. Now, the question is whether in view of Section 100A of the Code, as amended in 2002, these two appeals are barred and not maintainable ?

Somewhat similar questions came up for consideration before several Division Benches of this Court. Once in the case of The Special Land Acquisition Officer, Talcher v. Tankadhar Manabhoi, reported in (2003) Supp OLR 337 and again in the case of Birat Chandra Dagra v. Taurian Exim Private Limited, reported in 2006 (2) OLR 344. Then again in V.N.N. Panicker v. Narayan Pati, repprted in 2006 (2) OLR 349.

9. In the Special Land Acquisition case (supra) the Division Bench, after considering the provision of Section 100A of the Code, as iintroduced by the amending Act 104 of 1976, and then by amending Act 46 of 1999, which was never enforced, came to the conclusion that in the amending Act 22 of 2002, there is no transitory provision, as was there in 1976 amendment (vide Section 97(2)(n) of the amending Act) and in 1999 amendment (vide Section 32(2)(g) of the amending Act). The learned Judges held that the amended provision of Section 100A as brought about in 2002 applies prospectively, that is from 1-7-2002.

10. The learned Judges held that even though the right of appeal is a creature of statute it is a vested right and once such a right is conferred, it is not a mere matter of procedure. So the learned Judges held that 'in all suits instituted prior to 1-7-2002 the right to appeal under Clause 10 of the Letters Patent survives and

the bar is attracted only in cases where suits are instituted after 1-7-2002'. While coming to the said conclusions, the learned Judges differed from the decision of Andhra Pradesh High Court in the case of Shiva Raja Reddy v. S. Raghu Raj Reddy reported in : 2002(5)ALD181 .

11. Relying on the said judgment, the learned Counsel for the appellant submitted that the present appeals are maintainable since they arise out of a suit filed in 1990.

12. In Birat Chandra Dagra v. Taurian Exim Private Ltd. (supra) a Division Bench of this Court after referring to the decision of Supreme Court in P. S. Sathappan v. Andhra Bank Ltd. held that Letters Patent appeal is maintainable against the judgment of the learned single Judge of this Court. In coming to the conclusion, the learned Judges merely referred to paragraphs 22, 29, 30, 31, 32 of the judgment in Sathappan and came to the finding that the Letters Patent Appeal in the facts of that case was maintainable.

13. In V.V.N. Panicker v. Narayan Pati (supra), a Division Bench after noticing the judgment of the Division Bench in Birat Chandra Dagara (supra) and the Supreme Court judgment in P.S. Sathappan (supra) held that the appeal from the judgment of the learned single Judge of this Court is not maintainable inasmuch as the order impugned before the learned single Judge of this Court in FAO was passed in 2005 and Section 100A was introduced by way of amendment on 1-7-2002.

14. Though in this case also the orders impugned before the learned single Judge were passed in 2006, and the order of the learned single Judge was also passed in 2006, the learned Counsel for the appellant argued that in view of the decision of the Supreme Court in Garikapati Veeraya v. N. Subbiah Choudhury reported in : [1957]1SCR488 and the decision of this Court in the Special Land Acquisition Officer (supra), these appeals are maintainable as the suit was filed in 1990.

This Court is unable to accept the aforesaid contentions for the reasons discussed below.

15. In Garikapati Veeraya (supra), the Constitution Bench of the Apex Court after considering various decisions on the right of appeal formulated the following propositions in paragraph 23 and those propositions are set out at page 553 of the report.

(ii) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as one and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

16. Clause (v) of paragraph 23 in Garikapati clearly contemplates that the vested right of appeal can be taken away by subsequent legislative enactment either expressly or even by necessary intendment.

17. A right of appeal being a creature of statute, it can be controlled, modified or even taken away by statute. This principle is far too well settled to be debated now. The legality of Section 100A, as introduced by 2002 amendment was upheld by the Supreme Court in Salem Bar Association's case.

18. The learned Counsel for the appellant placed reliance on the decision in the case of State of Bombay v. Supreme General Films Exchange Ltd. reported in : [1960]3SCR640 . In that case, the suit was filed prior to 1-4-1954 and the Court-fees (Bombay Amendment Act, 1954 imposing higher Court-fees came into effect from 1-4-1954 and the amendment Act had no retrospective effect. In that context, it was held by the Apex Court that in respect of suits filed before 1-4-1954, the amended provisions will not apply. That case was not concerned with the question of the right of appeal being taken away by any law. It was only about the payment of Court-fees in filing the appeal. Therefore, the fact situation was totally different.

19. But the legal position in the present appeals is totally different. It is an accepted legal position in view of the propositions formulated in Garikapati (supra) that a right of appeal, even though a vested one, can be taken away by law and it can affect, depending on the statutory mandate, appeals to be filed from suits which are pending when the law has come. The question whether it will affect such a right of appeal depends, as noted above, on the statutory provision in question. The statutory provision in this case, namely Section 100A, as introduced by 2002 amendment of the Code has been set out hereinabove and it starts with a non-obstante clause.

20. The purpose of a non-obstante clause is to give the enacting part of the statute an overriding effect in the case of a conflict with the laws mentioned in the non-obstante clause. This amounts to expressing a legislative intent that in spite of enactment mentioned in the non-obstante clause, the law enacted following it will have full operation and the provisions mentioned in the non-obstante clause will not be an impediment. (See the decision of the Apex Court in Union of India v. G.M. Kokil reported in : (1984)IILLJ20SC). In paragraph 10 at page 1026 of the report the Hon'ble Court held:

10. Section 70, so far as is relevant, says 'the provisions of the Factories Act shall, notwithstanding anything contained in that Act, apply to all persons employed in and in connection with a factory'. It is well-known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same

enactment or some other enactment that is to say, to avoid the operation and effect of all contrary provisions. Thus the non-obstante clause in Section 70, namely, 'notwithstanding anything in that Act' must mean notwithstanding anything to the contrary contained in that Act and as such it must refer to the exempting provisions which would be contrary to the general applicability of the Act. In other words, as all the relevant provisions of the act are made applicable to a factory notwithstanding anything to the contrary contained in it, it must have the effect of excluding the operation of the exemption provisions. Just as because of the non obstante clause the Act is applicable even to employees in the factory who might not be 'workers' under Section 2(1), the same non obstante clause will keep away the applicability of exemption provisions qua all those working in the factory. The Labour Court, in our view, was, therefore, right in taking the view that because of the non obstante clause Section 64 read with Rule 100 itself would not apply to the respondents and they would be entitled to claim overtime wages under Section 59 of that Act read with Section 70 of the Bombay Shops and Establishments Act, 1948.

21. In Chandavarkar Sita Ratna Rao v. Ashalata S. Guram reported in : [1986]3SCR866 (at paragraph 68, page 134 of the report) the Hon'ble Court held:

68. Clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract' is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict and overriding effect over the provision of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that in spite of the provisions of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in South India Corporation (P) Ltd. v. Secretary, Board of Revenue, Trivandrum : [1964]4SCR280 .

22. In South India Corporation (P) Ltd. v. Secretary, Board of Revenue, Trivandrum, reported in : [1964]4SCR280 (at paragraph 19, page 215 of the report) the Hon'ble Court held:

19. That apart, even if Article 372 continues the pre-Constitution laws of taxation, that provision is expressly made subject to the other provisions of the Constitution. The expression 'subject to' conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject. Further Article 278 opens out with a non-obstante clause. The phrase 'notwithstanding anything in the Constitution' is equivalent to saying that in spite of the other articles of the Constitution, or that the other articles shall not be an impediment to the operation of Article 278. While Article 372 is subject to Article 278, Article 278 operates in its own sphere in spite of Article 372. The result is that Article 278 overrides Article 372; that is to say, notwithstanding the fact that a pre-Constitution taxation law continues in force under Article 372, the Union and the State Government can enter into an agreement in terms of Article 278 in respect of Part B States depriving the, State law of its efficacy. In one view Article 277 excludes the operation of Article 372, and in the other view, an agreement in terms of Article 278 overrides Article 372. In either view, the result is the same, namely, that at any rate during the period covered by the agreement the States ceased to have any power to impose the tax in respect of 'works contracts'.

23. In Section 100A, introduced by 2002 amendment of the Code, right of filing further appeal under Letters Patent has expressly been taken away in respect of a matter where an 'appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court'. This Court therefore has to hold in view of the aforesaid legislative intent, that the present appeals are expressly barred.

24. The Supreme Court in P.S. Sathappan v. Andhra Bank reported in : AIR 2004 SC5152 , held in paragraph 30, page 5177 of the report that by Section 100A which was introduced by 2002 amendment 'a specific exclusion was provided'. It was made clear in the said paragraph 'that now by virtue of Section 100A no Letters Patent Appeal would be maintainable'. It may be noted that in P.S.

Sathappan the issue was interpretation of Section 104 of the Code visa-vis Clause 15 of the Letters Patent but even then those observations was clearly made in connection with Section 100A of the Code.

25. In Gandla Pannala Bhulaxmi v. Managing Director, APSRTC and Anr. reported in : AIR 2003 AP458 , Section 100A came up for consideration. The learned Judges of the Full Bench in Gandla Pannala Bhulaxmi (supra) held in paragraph 14:

We have already noticed that the newly incorporated Section 100-A of the Code in clear and specific terms prohibits further appeal against the decree and judgment or order of a learned single Judge to a Division Bench notwithstanding anything contained in the Letters Patent....

The question of interpretation of Section 100A of the Code also came up for consideration before the Full Bench of Madhya Pradesh High Court in the case of Laxminarayan v. Shivlal Gujar reported in : AIR 2003 MP49 . After discussing various cases which are relevant to the issue, the learned Judges of the Full Bench held in paragraph 41, page 65 of the report:.Section 100A of the Code employs the words that where any appeal from an original or appellate decree or order is heard and decided' by a single Judge of a High Court no further appeal shall lie from the judgment and decree from such single Judge. The words which are of immense signification in this provisions are 'is heard and decided'. These words are used absolutely in praesenti. That apart the words 'no further appeal shall lie' are also to be conjointly read with 'is heard and decided'.

In paragraph 45 (page 66 of the report) the learned Judges of the Full Bench concluded by holding:.Thus, we are of the considered opinion, that no appeal which is covered within the ambit and sweep of the language used under Section 100A of the Code would lie after 1-7-2002....

The Full Bench of Kerala High Court in Kesava Pillai Sreedharan Pillai v. State of Kerala reported in : AIR2004 Ker111 also expressed the same view. In paragraph 18, page 116 of the report, the learned Full Bench of Kerala High Court held:.we are of the view that after the amendment of Section 100A of the Code of Civil

Procedure, no litigant can have a substantive right for a further appeal after 1-7-2002 on the ground that the proceedings from which that appeal arises was initiated prior to 1-7-2002.

This Court is in respectful-agreement with the views expressed by the Full Bench decisions of Andhra Pradesh, Madhya Pradesh and Kerala High Courts,

26. In Kamal Kumar Dutt v. Ruby General Hospital Ltd. reported in (2006) 7 SCC 613 : 2006 AIR SCW 4594 the Supreme Court, after referring to the Full Bench decision of the Andhra Pradesh High Court. In Gandla Pannala Bhulaxmi (supra) and the Full Bench decision of Kerala High Court in Kesava Pillai Sreedharan Pillai (supra) in paragraph 19 at page 627 of the report, approved the ratio of those Full Bench judgments in paragraph 28 at page 630 of the report.

27. Apart from that the Apex Court after setting out in paragraph 22 at page 628 of the report Section 100A of the Code, as amended in 2002, held in paragraph 23:

Therefore, where appeal has been decided from an original order by a single Judge, no further appeal has been provided and that power which used to be there under the Letters Patent of the High Court has been subsequently withdrawn. The present order which has been passed by CLB and against that an appeal has been provided before the High Court under Section 10-F of the Act, that is, an appeal from the original order. Then in that case no further letters patent appeal shall lie to the Division Bench of the same High Court. This amendment has taken away the power of the Letters Patent in the matter where the learned single Judge hears an appeal from the original order...(pages 628-629 of the report).

Recently also the Supreme Court in Kamala Devi v. Khushal Kanwar reported in : AIR 2007 SC663 , held that only a Letters Patent Appeal filed prior to coming into force of the 2002 Amendment Act would be maintainable. (See para 20 at page 667 of the report).

28. In the instant case, these appeals have been filed much after coming into effect of 2002 amendment. The 2002 amendment has come into effect on 1-7-2002 and the appeals have been filed in 2006.

29. For the reasons discussed above, the preliminary objection about the maintainability of these two appeals succeeds. Both th e appeals are clearly not maintainable in view of the clear statutory mandate of Section 100A as incorporated by 2002 amendment of the Code. Both the appeals are dismissed as not maintainable. All the interim orders are vacated. The order of the learned single Judge dated 11-10-2006 will govern the field.

30. There will be no order as to costs.

N. Prusty, J.

31. I agree.