

Satish Chander Sabharwal and anr. Vs. State and ors.

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Court : Delhi

Decided On : Jul-19-2005

Reported in : 122(2005)DLT170; 2005(83)DRJ40

Judge : B.C. Patel, C.J. and; Sanjay Kishan Kaul, J.

Acts : [Amendment Act, 2002](#); Bihar Land Encroachment Act - Sections 54; [Indian Succession Act, 1925](#) - Sections 299; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 2(9), 4, 35A, 91, 92, 95, 100A, 104, 104(1), 104(2) - Order 43, Rule 1

Appeal No. : LPA No. 1138/2004

Appellant : Satish Chander Sabharwal and anr.

Respondent : State and ors.

Advocate for Def. : A.K. Mata and ; Joydeep Sarma, Adv. for Rs. 2 to 7

Advocate for Pet/Ap. : H.L. Tiku, Sr. Adv.,; Mamta Mehra and; Yashmeet, Advs

Disposition : Appeal dismissed

Judgement :

Sanjay Kishan Kaul, J.

1. A family dispute and the consequent challenge to the Will dated 06.11.1990 of late Shri Shadi Lal Sabharwal has given rise to the present proceedings. The

appellants filed probate proceedings before the trial court, but learned Additional District Judge (ADJ) vide Order dated 06.03.2000 dismissed the petition holding that the Will was a suspicious document. The appellants aggrieved by the same preferred an appeal being FAO No. 181/2000, which was also dismissed by learned Single Judge on 14.10.2004 and the present Letters Patent Appeal has been filed aggrieved by the said Order.

2. The primary contention of learned senior counsel for the appellants was that there was no reasons really recorded for the conclusion arrived at by learned Single Judge and since it was a first appealable order, findings and discussion ought to have been made both on facts and law. A perusal of the Order showed that the facts recorded by learned ADJ had been reproduced by learned Single Judge verbatim and thereafter the contentions of the parties were noted. The evidence has thereafter been reproduced under the headings of different contentions raised. The conclusion is thereafter recorded only in para 6 stating that taking into consideration totality of the circumstances, the Will was a sham document. The same is recorded as under :-

'6. Taking into consideration the totality of the circumstances as also the material on record, where the Will has been drafted upon instruction of a person not produced in court as witness, the testator being infirm and in poor health, paralysed on the left side and died shortly after the alleged execution of the document as also the statement that the testator himself put his thumb impression creates grave doubt on the veracity of the Will. In view of the glaring contradictions and discrepancies amongst witnesses, this is definitely not a document that can be relied upon. I have no doubt that Will Ex.PW3/1 is a sham document. In this view of the matter, I uphold the impugned judgment under challenge. FAO 181/2000 is accordingly dismissed with costs quantified at Rs.10,000/-. CMs 878-879/2000 878-879/2000 are also disposed of.'

3. In view of the aforesaid plea and taking into consideration that it was a first appeal being heard by learned Single Judge and apart from the aforesaid conclusion, there was no other discussion on appreciation of evidence, it was put to learned counsel for respondents No. 2 to 7 whether they would be agreeable to

the impugned order being set aside and the matter being remanded back for fresh decision by learned Single Judge. However, learned counsel for respondents No. 2 to 7 stated that the said respondents are not agreeable to the same and he would like adjudication on the preliminary objection raised about the maintainability of Letters Patent Appeal. This was so as the contention of learned counsel for respondents No. 2 to 7 was that in view of the pronouncements of the Apex Court, the Letters Patent Appeal would not be maintainable. Faced with this situation, there was no option but to decide the issue first about the maintainability of the appeal.

4. The objection to maintainability of the appeal arises in view of the [Amendment Act, 2002](#) (Act No. 22 of 2002) made applicable w.e.f. 01.07.2002 in respect of Code of Civil Procedure, 1908 (hereinafter to be referred to as, 'the Code') in terms of the said amending Code. Section 100A of the Code was amended and reads as under :-

'100A. No further appeal in certain cases. A- 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 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 a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge.'

5. The contention, thus, is that in view of the said provision inserted, no Letters Patent Appeal after that date would be maintainable since the impugned judgment is of learned Single Judge of this Court in appeal.

6. On the other hand, the plea of learned senior counsel for the appellants is based on the provisions of Section 104 of the Code, which reads as under :-

'104. Orders from which appeal lies. A- (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders :-

(ff) an order under Section 35A;

(ffa) and order under Section 91 or Section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92, as the case may be;

(g) an order under Section 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules;

Provided that no appeal shall lie against any order specified in clause (f) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section.'

7. The aforesaid provision has been relied upon to contend that an appeal is to lie from the orders stipulated in Sub-section (1) of Section 104 and not from any other order, but the same is qualified 'by any law for the time being in force'. It is, thus, submitted that Letters Patent Appeal would be maintainable in view of the provisions contained in the Letters Patent.

8. Learned counsel for the parties have, in fact, relied upon the same judgments of the Apex Court and it is only the effect of the same which has to be considered.

9. In *Garikapati Veeraya v. N. Subbiah Choudhry & Ors.*, AIR 1957 S.C. 540, it was held that the right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on 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 institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of filing of appeal. It was, however, further clarified that this vested right of appeal can be taken away only by subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

10. The plea of learned senior counsel for the appellants is that all appeals are continuation of the original proceedings and since the the amendment came into being in the year 2002, the same cannot apply to the case of the appellants since the original proceedings were initiated prior to the said amendment and the appeal is only a continuation of the original proceedings. This plea is opposed by learned counsel for respondents No. 2 to 7 on account of the fact that such vested right of appeal can be taken away if the subsequent enactment so provides expressly or by necessary intendment. It is, thus, submitted that the amended provision of Section 100A of the Code itself begins by 'notwithstanding' and makes it clear that no appeal would lie from the appellate decree decided by learned Single Judge notwithstanding anything contained in the Letters Patent Appeal of any High Court.

11. In our considered view, there can be no doubt about the proposition that the appeal provisions are continuation of the original proceedings. However, it has been clarified in Garikapati Veeraya's case (supra) that the vested right can be taken away by a subsequent enactment. The very phraseology of Section 100A of the Code itself shows that the provisions have to apply notwithstanding anything contained in the Letters Patent.

12. It has to be appreciated that in view of the various pronouncements, there would be no doubt that prior to the amendment of Section 100A of the Code, an appeal would be maintainable. Thus, the judgments dealing with the position prior to the said amendment would not be of much assistance to the appellants and the reliance placed by learned senior counsel for the appellants on judgment of the Supreme Court in Sharda Devi v. State of Bihar : [2002]2SCR404 is of no assistance where it was held that there was no bar to maintainability of Letters Patent Appeal from an appeal order passed under Section 54 of the Bihar Land Encroachment Act. It was, however, observed in para 8 as under :-

'8 ...

A letters patent is the charter under which the High Court is established. The powers given to a High Court under the letters patent are akin to the constitutional powers of a High Court. Thus when a letters patent grants to the High Court a power of appeal, against a judgment of a single Judge, the right to entertain the

appeal would not get excluded unless the concerned statutory enactment excludes an appeal under the letters patent.'

The aforesaid judgment also, thus, makes it clear that there can be exclusion of the Letters Patent Appeal by a provision made in the concerned statutory enactment.

13. The Apex Court has also considered this issue in respect of the [Indian Succession Act, 1925](#) (hereinafter to be referred to as, 'the said Act') itself in *Subal Paul v. Malina Paul & Anr.* : [2003]1SCR1092 wherein it was held that a Letters Patent Appeal challenging the decision of single Judge would be maintainable. It was held that Section 104 of the Code specifies the matters which would be appealable and no other and the appeals from orders are provided for in Order XXXIII Rule 1 of the Code which contain a full list of appealable orders. However, it does not contemplate orders or decrees passed under a special statute. Section 299 of the [Indian Succession Act, 1925](#) provides for appeals from the orders of District Judge before the High Court in accordance with the provisions of the Code. A final order passed in respect of proceedings under the said Act were, thus, held to be judgment within the meaning of Section 2(9) of the Code. Sub-section (2) of Section 104 of the Code provides that no appeal shall lie from any order passed in appeal under that Section. It was, thus, held that if the appeal is provided under any other law, Section 104 of the Code would have no application. It was, thus, held that the Orders passed by learned single Judge was appealable to the Letters Patent Bench.

14. The important fact to note is that the controversy arose in respect of the judgment of learned single Judge of the High in respect of the proceedings filed under Section 299 of the said Act. It is against that Order that a Letters Patent Appeal was held to be maintainable. The position, in the present case, is not the same. The probate petition was filed before the trial court and learned single Judge was hearing the first appeal and not an original petition filed under the said Act.

15. The challenge laid to the various amendments made by the [Amendment Act, 2002](#) to the Code was adjudicated upon by the Supreme Court in *Salem Advocate*

Bar Association, T.N. v. Union of India : AIR 2003 SC189 . Section 100A of the Code was also discussed and the restriction placed by the said Section was held not to be unreasonable. It was observed in para 15 as under :-

'15. Section 100-A deals with two types of cases which are decided by a Single Judge. One is where the Single Judge hears an appeal from an appellate decree or order. The question of there being any further appeal in such a case cannot and should not be contemplated. Where, however, an appeal is filed before the High Court against the decree of a trial court, a question may arise whether any further appeal should be permitted or not. Even at present depending upon the value of the case, the appeal from the original decree is either heard by a Single Judge or by a Division Bench of the High Court. Where the regular first appeal so filed is heard by a Division Bench, the question of there being an intra-court appeal does not arise. It is only in cases where the value is not substantial that the rules of the High Court may provide for the regular first appeal to be heard by a Single Judge. In such a case to give a further right of appeal where the amount involved is nominal to a Division bench will really be increasing the workload unnecessarily. We do not find that any prejudice would be caused to the litigants by not providing for intra-court appeal, even where the value involved is large. In such a case, the High Court by rules, can provide that the Division Bench will hear the regular first appeal. No fault can, thus, be found with the amended provision Section 100-A.'

16. A reading of the aforesaid observations of the Apex Court, thus, makes it clear that there has been specific approval of the provision restricting a second intra-court appeal in the High Court. In the present case also, the first decision is by the trial court and the learned single Judge was sitting in an appeal as the first appellate court over the said decision. Thus, the Letters Patent Appeal would fall in the nature of a second intra-court appeal before the High Court, this is what has been prohibited by Section 100A and this is notwithstanding anything contained in the Letters Patent.

17. The last judgment to be referred to in this behalf is in the case of P.S. Sathappan (Dead) By L.R.s v. Andhra Bank Ltd. & Ors. : AIR 2004 SC5152 . It may, however, be noticed that the appeal decided by the Supreme Court was

against the judgment of the High Court dated 22.08.1997 whereby it was held that the Letters Patent Appeal is not maintainable against an order passed by the single Judge of the High Court sitting in appellate jurisdiction. Thus, the position prior to the amendment of Section 100A would prevail. In such a case, Section 104 of the Code would save the Letters Patent Appeal since out of the three types of orders from which appeals are provided in sub-section (1) of Section 104, the Letters Patent Appeal would fall in the category of appeals provided by any law for the time being in force. There are certain observations which are material even for the present controversy. In para 30 of the judgment while discussing the issue arising from the provisions of Section 100A after the amendment, it was observed that when the Legislature wanted to exclude a Letters Patent Appeal, it specifically did so by the said amendment to Section 100A. This was so since the Legislature was aware that it had incorporated a saving clause in Section 104(1) and incorporated Section 4 in the Code, but for the specific exclusion of the particular wording of the amendment to Section 100A, Letters Patent Appeal would not be barred. The Supreme Court went on to observe that the Legislature had provided for a specific exclusion and, thus, it must be stated that now by virtue of Section 100A, no Letters Patent Appeal would be maintainable.

18. In view of the aforesaid legal position, we are of the considered view that in view of the amendment to the provision of Section 100A of the Code, no Letters Patent Appeal would now be maintainable from the orders passed by learned single Judge in first appeal being an appealable order, which in turn arose out of the proceedings initiated under Section 299 of the said Act. We have, thus, no option, but to dismiss the appeal as not maintainable.

19. Parties are left to bear their own costs.