

In the Matter of Patrick MartIn and anr.

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Court : Chennai

Decided On : Feb-24-1989

Reported in : AIR1989Mad231

Judge : David Annoussamy and ;Janarthanam, JJ.

Acts : [Family Courts Act, 1984](#) - Sections 2, 7, 8 and 20; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 2(4) and 15; [Constitution of India](#) - Article 372

Appeal No. : O.S. Appeal No. 186 of 1988

Appellant : In the Matter of Patrick MartIn and anr.

Advocate for Def. : Adv. General

Advocate for Pet/Ap. : G.M. Nathan, Adv. for M.B. Dominique, Adv. and ;S. Ramakrishnan, Adv.

Disposition : Appeal dismissed

Judgement :

1. This is an appeal under Clause 15 of the Letters Patent against an order passed on 9-11-1988 by a learned single Judge of this Court.
2. Two matters came before him. The first one is having Diary No. 18070 of 1988 in an unnumbered Original Petition of 1988, Since the papers were returned by the office of this Court on the ground that after the establishment of the Family Court,

the petition would lie only before that Court, the mailer was placed before the learned single Judge, upon the contention of the petitioner's counsel that the High Court has not lost jurisdiction on the matter.

3. The second matter is Application No. 5607 of 1988 in O.M.S. No. 26 of 1987. O.M.S. No. 26 of 1987 was filed by a Christian husband for a decree for divorce from his Christian wife, the first defendant therein. By way of Application No. 5607 of 1988, the wife prayed for the transfer of O.M.S. No. 26 of 1987 to the Family Court on the contention that the High Courts jurisdiction in the matter has been put an end to by the [Family Courts Act, 1984](#), hereinafter referred to as the Act.

4. Learned single Judge took up for determination the point whether the abovesaid two matters could be tried only by the Family Court or whether this Court had still jurisdiction to try them. After elaborately going through the matter, learned single Judge in a well considered Judgment held that this Court had no jurisdiction to entertain them and that both the matters were necessarily to be transferred to the Family Court for disposal in accordance with law. There is no appeal in respect of the second matter, viz., the matter relating to divorce. The present appeal is by the petitioners in the unnumbered O. P. carrying Diary No. 18070 of 1988 which, was filed for appointment of the petitioners therein (foreign nationals) as guardian of an Indian minor female child.

5. Learned single Judge who has reviewed all the decisions cited by the parties came to his conclusion on the following lines : --

As per Explanation (g) to Section 7(1) of the Act, the Family Court has jurisdiction to deal with a suit or proceeding in relation to the guardianship of the person or the custody of or access to any minor. As per Section 8 of the Act, from the time of the establishment of a Family Court for any area, no District Court will have jurisdiction in respect of any suit or proceedings of the nature referred to in the Explanations to Sub-section (1) of Section 7 of the Act. As per Section 2(e) of the Act, all words and expressions used, but not defined in the Act and defined in the Civil P.C., 1908, shall have the meanings respectively assigned to them in the Code. Section 2(4) of the Civil P.C. defines 'district' as meaning the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court")

and includes the local limits of the ordinary original civil jurisdiction of a High Court. Therefore, the original civil jurisdiction of the High Court has been excluded by virtue of Section 8 of the Act. Learned single Judge further added that as per Section 20 of the Act, the provisions thereof shall (have) effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the Act. He referred also to the Constitution. The original jurisdiction of the High Court is not a normal jurisdiction of a High Court in the scheme of the Constitution: such original jurisdiction is a precarious one susceptible of being terminated at any time by a law of the appropriate legislature; such jurisdiction was allowed to continue as an interim measure till alternative arrangements were made, as per Article 225 of the Constitution. He therefore concluded that the original jurisdiction which vested in the High Court in respect of minors had come to an end after the [Family Courts Act, 1984](#), Courts Act, 1984, has come into effect in the City of Madras.

6. Since this is a matter related to question of jurisdiction and since there was no respondent in the case, learned Advocate General also was heard.

7. Learned counsel for the appellants would point out that as per Clause 11 of the Letters Patent dt. 28-12-1865 this High Court has got civil original jurisdiction of general nature with local limits which is analogous to the jurisdiction of a District Court and that the reasoning of the learned single Judge would apply to such jurisdiction. In fact, he accepted that this Court cannot exercise any jurisdiction under Clause 11 of the Letters Patent dt. 28-12-1865 in respect of matters covered by the Act from the time of the commencement of the Act. But his main contention was that this Court under the abovesaid Letters Patent possessed in addition to territorial general jurisdiction under Clause 11, a special jurisdiction relating to infants and lunatics under Clause 17, that such jurisdiction was not affected since the High Court in exercise of that jurisdiction could not be equated to a District Court and that Section 8 of the Act would not operate. He further added that jurisdiction once conferred could be taken away only by an express provision, that since Section 8 did not take away the special jurisdiction under Clause 17, Section 20 of the Act would be also effectual. This is therefore the point which we have to determine.

8. Clause 17 of the Loiters Patent dt. 28-12-1865 reads as follows :--

"And we do further ordain that the said High Court of Judicature at Madras, shall have the like power and authority with respect to the persons and estates of infants, idiots, and lunatics within the Presidency of Madras, as that which was vested in the said High Court, immediately before the publication of these presents."

Since the jurisdiction is one which vested in the High Court immediately before the publication of the abovesaid Letters Patent, we have to refer to the previous Letters Patent. The relevant provision viz., Clause 16 of the Charter dt.26-6-1862 reads as follows : -

"And we do further ordain that the said High Court of Judicature at Madras, shall have the like power and authority with respect to the persons and estates of infants, idiots and lunatics, whether within or without the Presidency of Madras, as that which is now vested in the said Supreme Court of Madras."

Since hereagain there is reference to the power which was at that time vested in the pre-existing Supreme Court, we have to refer to the relevant provisions in the Charter creating the Supreme Court. In that Charter dated 26-12-1800 the corresponding clause, viz., Clause 32 reads as follows :--

"And we do hereby authorize the said Supreme Court of Judicature at Madras to appoint Guardians and Keepers for Infants, and their Estates, according to the Order and course observed in that Part of Great Britain called England; and also Guardians and Keepers of the Persons and Estates of natural Fools, and of such as are or shall be deprived of their Understanding or Reason, by the Act of God, so as to be unable to govern themselves and their Estates, which we hereby authorize and empower the Supreme Court of Judicature at Madras to enquire, hear, and determine, by inspection of the Person, or by such other Ways and Means, by which the Truth may be best discovered and known."

The phrase 'according to the Order and Course observed in that Part of Great Britain called England' shows that the jurisdiction vested in the Supreme Court by

the abovesaid Clause does not relate to natives, but only to Europeans. Obviously, appointment of guardians in respect of Hindus or Muslims could not be according to the 'Order and Course observed in England'. Further, when we take a look at the Clause relating to the general jurisdiction of the Supreme Court viz., Clause 21, we find the following sentence in the beginning :--

"And we do further direct, ordain, and appoint, That the Jurisdiction, Powers, and Authorities of the said Supreme Court of Judicature at Madras, shall extend to all such Persons as have been heretofore described and distinguished in Our Charters of Justice for Madras by the Appellation of British Subjects, who shall reside within any of the Factories subject to, or dependent upon, the Government of Madras;"

The whole Clause 21 is to the effect that the Supreme Court has a general jurisdiction in respect of British subjects and a limited jurisdiction in respect of suits and actions against those subjects and also against the inhabitants of Madras. When we peruse the different clauses of the Charter of the Supreme Court and also the Charters which created British Courts prior to the Supreme Court, we find always a clear distinction, viz., on one side the British subjects and on the other the natives of the inhabitants of Madras.

9. The reasons for such distinction is historical. It is very well summarised in the Law of Citizenship and Aliens in India by A. N. Sinha, issued under the auspices of the Indian Council of World Affairs in 1962 at Pages 71 and 72 as follows : --

"British India came into existence partly through concessions granted by or wrested from the rulers of the country and partly by conquest. Between 1765 and 1858 the country was administered by what has been called double government, viz., the East India Company and the British Crown. Complete sovereignty was assumed by the Crown under the Government of India Act, 1858. People of India who came under the rule of the Company apart from any question of race or subjugation, stood on a different footing from that of natural born British subjects then living in India. Courts had to be different and so were the laws. The Company, in the exercise of the Sovereign Power which is derived from the Moghul Emperor, had no, power over those who owed no allegiance, to the

Moghul. It had no sovereign authority over Englishmen and Europeans."

In fact, the pattern of judicial dispensation at that time was as follows :--

a) An hierarchy of Indian courts, spread all over the Presidency, having as apex Courts, Suddar Awdalut and Foujdary Awdalut, having general jurisdiction except the matters and persons subject to jurisdiction of the Supreme Court;

b) The Supreme Court having jurisdiction only on the British subjects in respect of litigations in re or as between them or in suits directed against them or the inhabitants of the Presidency Town.

10. N. Arunachalam in his erudite Article 'Judicial Institutions of the State of Madras since the commencement of the British Rule' would state as follows : --

"Until the British Parliament passed the Indian High Courts Act, 1861, it was never the intention of the British Administrations of India to bring native Indians within the jurisdiction of the British Courts functioning in the three Presidency Towns of Calcutta, Madras and Bombay."

Therefore, the jurisdiction of the High Court under Clause 17 in the last Charter dt. 28-12-1865 which is the same as the one which the Supreme Court possessed, is limited to British subjects and does not extend to others.

11. In his attempt that the benefit of Clause 17 of the Letters Patent dated 28-12-1865 extends to Indians as well, learned counsel for the appellants placed before us three decisions. The first decision is one of Bombay High Court in Julieta v. Lila Coutinho, in which it was held that for the purpose of Clause 17, the jurisdiction of the High Court would mean not merely the ordinary original civil jurisdiction but would extend to the entire State of Maharashtra. If the person concerned came within the jurisdiction of the High Court, that jurisdiction, as per the abovesaid clause of the Letters Patent, would extend to the entire State. Therefore, this decision which deals only with the territorial extent of the jurisdiction does not in any manner help the case of the appellants, since that is not the point at issue.

12. The second decision is one reported in the matter of A. T. Vasudevan, AIR 1949 Mad 260 where the main question was whether the Manager of the Joint Hindu Family would be competent to alienate joint family property, by getting appointed as guardian for the purpose of sale of the minor's share. In that case, it was held that the Manager had such a power and the Court purported to act under Clause 17 of the Letters Patent to appoint him as guardian. So the question was approached in an oblique way and the Court did not in fact examine the question whether Clause 17 applied or not to natives, since it appears that the matter was not in controversy in that case. Therefore, reliance cannot be placed on that decision to determine our issue.

13. Heavy reliance was placed by the learned counsel for the appellants on the third decision reported in *In Re. Lovejoy Patell*, AIR 1944 Cal

433. In that decision, the Court observed that in the early statutes relating to India including Regulating Act, 1773, the expression "British subject, meant subject of the King of British birth, but it does not follow that in 1862 the expression 'British subject' continued to be confined to such a subject, because after the assumption of direct control by the Crown by Act dt. 2-8-1858 every native of British India became ipso facto a British subject. The meaning of the expression 'British subject' being thus enlarged, the jurisdiction of the Supreme Court also got consequently enlarged so as to bring within its ambit all native Indian infants, is the conclusion in the decision third cited. The ratio of this decision is that the words 'British subjects' found in the Charter of the Supreme Court should be given the meaning they had at the time of the decision. If this ratio is adapted, it will not promote the case of the appellants, because the child to be adopted is not British now and Clause 17 of the Charter will have no application.

14. Let us now turn to examine how the words 'British subjects' in the Supreme Court Charter should be construed. As per the well known Canon of Interpretation, the word has to be given the meaning at the time the statute was passed. This can be gathered from the following cases reported by Maxwell on *The Interpretation of Statutes*, 12 Edition : "For instance, a private Act which provided that 'no action in any of His Majesty's Courts of Law' should be brought against certain ship-owners

without a month's notice, has been held not to apply to proceedings in the Admiralty Division of the High Court, for when the Act was passed by (sic) the Admiralty Court was not one of His Majesty's courts, nor were proceedings there called actions. (The Longford (1889) 14 P.D. 34.) (p. 85)

"The words 'public religious worship' in Section 7(2) of the Rating and Valuation (Miscellaneous Provisions) Act 1955 were first found in the Poor Rate Exemption Act 1833. "These words were repealed by the Act of 1955, and unless the context requires, or unless in the intervening years there have been legal decisions or other matters affecting their meaning, they bear the same meaning in 1955 as they bore in 1833....." (Church of Jesus Christ of Latter-Day v. Henning, (1964 AC 420, per Lord Pearce at pp. 438, 439)) (pp. 85, 86)

"Similarly, in two other cases, it was held that a private act conferring exemption from 'all taxes whatsoever' applied only to such taxes as were in force at the time of the passing of the Act, and not to those subsequently introduced." (Perchard v. Heywood, (1800) 101 ER 1494; Sion College v. London (Corporation), (1901) 1 KB 617.) (p. 262)

Another important canon of interpretation is that the words are to be construed in accordance with the intention of law maker. It has been already made clear that at the time of the Supreme Court there was a dual system of judicial administration; one for the British subjects and some other limited cases and another for the natives; and the purpose of Clause 12 of Charter dt. 26-12-1800 was to vest jurisdiction upon the Supreme Court in respect of British subjects alone.

15. Though after the assumption of the governance of the country directly by the Crown by Act dt. 2-8-1858, all inhabitants of British India became British subjects in the eye of International Law, the distinction between Indian British subjects and European British subjects continued in several fields. The Government of India Act, 1915, in : Section 84(1)(c) referred clearly to European British subjects and other British subjects. Till the enactment of Criminal P. C., 1872, the general exemption of the Europeans from the criminal jurisdiction of the provincial courts remained. In the Cr. P. C., 1872 and that of 1882, the Indian Legislature referred to (European British subject) to retain some of the privileges. Chapter XXXIII of the

Cr. P. C., 1882, is dealing with criminal proceedings against European British subjects. The same provisions were continued in the Code, 1898 and also in the Criminal Amendment Act, 1923. Therefore, for historical and other reasons, the British law maker has been throughout keen of reserving, in respect of certain matters in favour of persons of European origin, special forum separate from those available to persons of Indian origin. At any rate, it is obvious that such an intention was paramount at the time of the Charter of the Supreme Court in the year 1800 and the intention manifested in the Charters of 26-6-1862 and 28-12-1865 is to maintain the same distinction. Therefore, as per the well accepted norms of interpretation, the jurisdiction of Clause 17 of the Charter dt. 28-12-1865 extended only to British subjects as was understood at the time of the Charter of the Supreme Court dt. 26-12-1800, viz., to British subjects of European origin, and was not open to natives. In fact, Clause 17 is a remnant of the dual system of judicial administration created in the interest of the colonial power. We are therefore constrained to differ from the view taken by the Calcutta High Court in 1944.

16. Pursuing the matter still further, we have to observe that even that jurisdiction of the High Court under Clause 17 limited as it was to Britishers is no longer available even for them. No doubt, as per Article 372 of the Constitution, all the law in force in the territory of India immediately before the commencement of the constitution was to continue to be in force until altered or repealed or amended by a competent legislature or competent authority. But the Supreme Court has held in *State of Madras v. C.G. Menon*, , that any

provisions of law which were incompatible with the status of India as an independent State had to be considered as having become extinct. In that case their Lordships dealing with the Fugitive Offenders Act, 1881, observed that the situation has completely changed when India became a Sovereign Democratic Republic, that the provisions of the Act could only be made applicable to India by incorporating them with appropriate changes into an Act of the Indian Parliament and by enacting an Indian Fugitive Offenders Act, that by the very nature of the Act it cannot be said to remain in force by reason of the provisions of Article 372 of the Constitution and that India having ceased to be a British possession the whole

basis of the applicability of the Fugitive Offenders Act has gone. Similarly, in this case, India having become independent there cannot be a special Forum for the Britishers in the matter of adoption. They have to subject themselves to the law of the land and therefore Clause 17 of the Letters Patent dt, 28-12-1865 has no application whatsoever and has become a dead letter.

17. Even assuming that the jurisdiction of the High Court under Clause 17 still existed, it would be as per the appellants a jurisdiction of general nature applicable to all; then Section 15 of the Civil P. C. will come into play, and the appellants should approach the lowest grade Court competent, viz., the Family Court. The proper forum for the parties in the matter is the Family Court wherever and whenever it is established and till then the respective District Courts, with of course the right of appeal before this Court.

18. In the result, the appeal is dismissed.

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