

Chamaru Etc. Vs. Khazan Singh Etc.

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Court : Himachal Pradesh

Decided On : Sep-29-1977

Reported in : AIR1978HP58

Judge : R.S. Pathak, C.J. and; T.U. Mehta, J.

Acts : [Constitution of India](#) - Articles 226 and 227; ;[Constitution of India](#) (Forty-Second Amendment) Act, 1976 - Sections 40 and 58

Appeal No. : Civil Misc. Petn. (Main) Nos. 23 of 1972, 5 of 1973 and 14 and 21 of 1974

Appellant : Chamaru Etc.

Respondent : Khazan Singh Etc.

Advocate for Def. : H.S. Thakur,; K.D. Sud and; H.K. Paul, Advs.

Advocate for Pet/Ap. : Indar Singh and; D.K. Khanna, Advs.

Judgement :

R.S. Pathak, C.J.

1. This is a defendant's petition under Article 227 of the Constitution arising out of a suit for the recovery of Rs. 45.

2. The respondent Khazan Singh filed a suit against the petitioner Chamaru before the Nyaya Panchayat for the recovery of Rs. 45. The suit was transferred to another Nyaya Panchayat, which on April 21, 1970 decreed the suit. A revision petition before the learned Sub-Divisional Judge was dismissed on Nov. 23, 1972. The petitioner now applies under Article 227 of the Constitution for relief.

3. When the petition came on for hearing, before one of us, a question was raised whether the addition of Clause (5) in Article 227 of the Constitution by the Constitution (Forty-Second Amendment) Act had resulted in depriving this Court of its jurisdiction to interfere judicially in respect of judgments and orders of inferior courts. The case was referred to a larger Bench in view of the importance of the question.

4. Section 238 of the Himachal Pradesh Panchayati Raj Act provides for a revision to the Sub-Divisional Judge from any order or decree passed by the Nyaya Panchayat in a case or a suit. No appeal or revision lies to the High Court.

5. When this petition was filed, Article 227 of the Constitution provided:

'227. Power of superintendence over all Courts by the High Court.

(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may-

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts,

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders

practising therein:

Provided that any rules made, forms prescribed or tables settled under Clause (2) or Clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor,

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.'

Subsequently, the Constitution (Forty-Second Amendment) Act, 1976 was enacted, and Section 40 thereof, which was brought into force from Feb. 1, 1977, substituted the existing Clause (1) by the following clause:

'(1) Every High Court shall have superintendence over all courts subject to its appellate jurisdiction.' And after the existing Clause (4), the following clause was inserted:

'(5) Nothing in this article shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision.'

6. Two points have been raised before us. They are :

(1) Do the amendments introduced in Article 227 of the Constitution affect petitions filed under Article 227 before the amendments were effected?

(2) Has the power of judicial superintendence hitherto enjoyed by a High Court in respect of courts and tribunals within its jurisdiction been totally withdrawn by the amendments introduced in Article 227 of the Constitution?

7. At the outset, it will be noticed that while the original Clause (1) of Article 227 gave to a High Court the power of superintendence over all courts and tribunals throughout the territories over which it exercised jurisdiction, the substituted Clause (1) confines the power of superintendence over courts subject to its appellate jurisdiction. Tribunals are now excluded from the superintendence which a High Court enjoys under Article 227. The power of superintendence has also

been withdrawn over those courts which are not subject to the appellate jurisdiction of the High Court. With these preliminary observations, the two points may be considered. Point No. (1)

8. It is a well-settled rule of law that the provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, but provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. The principle was enunciated authoritatively by the Privy Council in the Colonial Sugar Refining Co. v. Irving, (1905) AC 369 and was subsequently reaffirmed by the Board in Delhi Cloth & General Mills Co. v. Income-tax Commr., Delhi, AIR 1927 PC 242. Substantive law, as distinct from procedural law, has been uniformly held to operate prospectively only, unless the law expressly declares or necessarily implies a retrospective character. Even where the Act operates retrospectively, its retrospective operation must be strictly limited within the bounds set by it. In United Provinces v. Mt. Atiqah Begum, AIR 1941 FC 16 the Federal Court observed:

'Undoubtedly, an Act may in its operation be retrospective, and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have undoubtedly leaned very strongly against applying a new Act to a pending action, when the language of the statute does not compel them to do so. It is a well-recognized rule that statutes should, as far as possible, be so interpreted as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly expressed. Ambiguities in it should not be removed by Courts, nor gaps filled up in order to widen its applicability. It is a well-established principle that such statutes must be construed strictly, and not given a liberal interpretation.'

The principle has been applied to petitions under Articles 226 and 227 of the Constitution. There is a stream of cases where the courts in India have held that Articles 226 and 227 of the Constitution do not have retrospective operation, and

transactions which are passed and closed and liabilities accrued and vested before the Constitution came into force cannot be disturbed by invoking Articles 226 and 227; some of them are *State of U. P. v. Mohammad Nooh*, AIR 1958 SC 86, *Ranjit Singh v. Commr, of Income-tax*, AIR 1962 SC 92, *Bimla Prasad Ray v. State of West Bengal*, AIR 1951 Cal 258 (SB) and *Rajaram Dadu v. State*, AIR 1951 Nag 443 (FB).

9. A number of cases have been cited on behalf of the respondents, but in our opinion none of them deviates from the principle to which we have referred.

10. The question is whether the amendments now introduced in Article 227 affect the decision of a petition filed before the amendments were brought into force. There is nothing in Section 40 of the Constitution (Forty-Second Amendment) Act from which retrospective operation can be attributed to those amendments. On its plain language, Section 40 operates prospectively only. There is no other provision in the Amendment Act which leads to a contrary conclusion. There is no provision in respect of a petition under Article 227 as are to be found in Section 58 of the Amendment Act in respect of petitions under Article 226.

11. Accordingly, we hold that the amendments introduced in Article 227 of the Constitution by the Constitution (Forty-Second Amendment) Act do not affect petitions filed under Art, 227 of the Constitution before the amendments were brought into force.

12. As this and the connected petitions were filed in this Court before February 1, 1977, the amended Article 227 does not come into play and the petitions are governed by Article 227 as originally enacted. In the circumstances, it is not necessary to enter into the controversy raised by the second point. But out of deference to the very able submissions made at the Bar, we proceed to consider that point also. Point No. (2)

13. The High Courts Act, 1861, by Section 15, conferred on a High Court the power of superintendence over all courts subject to its appellate jurisdiction. Subsequently, Section 107 of the Government of India Act, 1915 set forth the same provision. Section 224 of the Government of India Act, 1935 also conferred

the power of superintendence on a High Court over all courts subject to its appellate jurisdiction, but Sub-section (2) provided;

'(2) Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior court which is not otherwise subject to appeal or revision.' When the [Constitution of India](#) was enacted, Article 227 gave wider jurisdiction to the High Courts, A High Court now enjoyed the power of superintendence not only over all courts subject to its appellate jurisdiction, but indeed over all courts and tribunals throughout the territories in relation to which it exercised jurisdiction. Moreover, the restrictive provision contained in Sub-section (2) of Section 224 of the Government of India Act. 1935 was absent from Article 227. By the amendments now introduced in Article 227 Parliament, it would seem, intends to bring those provisions within the same circumscribed limits as were found in Section 224 of the Act of 1935.

14. It was at one time thought that Section 15 of the High Courts Act, 1861 conferred administrative superintendence only and not judicial superintendence. As long ago as *Tej Ram v. Harsukh*, (1875-77) ILR 1 All 101 (FB) a Full Bench of the Allahabad High Court observed that the power of superintendence conferred on a High Court had to be confined to the exercise of administrative authority and did not extend to judicial power to interfere with or set aside the judicial proceedings of a subordinate Court. That case was considered by another Full Bench of the Allahabad High Court in *Muhammad Suleman Khan v. Fatima*, (1887) ILR 9 All 104, but the learned Judges differed between them whether the power of superintendence did not include judicial superintendence. A third Full Bench of the same Court considered the point again in *Mukand Lal v. Gaya Prashad*, AIR 1935 All 599 where reference was made to *Mohammad Suleman Khan* (supra). Subsequently, a Division Bench of that Court in *Motilal v. State*, AIR 1952 All 963 construing the scope of Article 227 of the Constitution had occasion to refer back to the earlier Full Bench cases, and while Agarwala J. seemed to read in *Mukand Lal* (supra) an observation that *Muhammad Suleman Khan* (supra) proceeded on a concession that the High Court under Section 15 of the High Courts Act, 1861 was not confined to administrative superintendence only but included powers of a judicial character, Sapru J. held to the contrary. Harries, C.

J., speaking for a Special Bench of the Calcutta High Court in *Bimla Prasad Ray* (AIR 1951 Cal 258) (supra) was also inclined to believe that ordinarily 'a power of superintendence would not normally involve a power of judicial interference'. However, a long line of cases, which we do not consider necessary to mention here, has now held that the power of superintendence, such as that given by Article 227, covers both administrative superintendence and judicial superintendence. And the law has been authoritatively declared in favour of that view by the Supreme Court in *Waryam Singh v. Amarnath*, AIR 1954 SC 215, when it rejected the contention that Clause (1) of Article 227 conferred the power of administrative superintendence only, and thereafter it reaffirmed in *Hari Vishnu Kamath v. Ahmad Ishaque*, AIR 1955 SC 233 that the power of superintendence under Article 227 was both judicial and administrative.

15. Taking the position from there, it is appropriate now to consider whether a provision such as that contained in Clause (5) of Article 227 leaves any judicial superintendence at all to the High Courts,

16. A broad conspectus of the cases cited before us indicates that most of the courts in India have adopted what may, for convenience, be described as an historical approach and have favoured the view that such a provision takes away judicial power altogether from the content of the High Court's power of superintendence. A few other courts have preferred the view that the provision, although it deprives the High Courts of the power to interfere with judgments not subject to appeal or revision nevertheless permits such superintendence in respect of judgments which are open to appeal or revision.

17. The position taken by the adherents of the historical approach may be examined first. In a catena of cases the courts in India have held that Sub-section (2) of Section 224 of the Government of India Act, 1935 removed from the High Courts the power of judicial superintendence which they formerly enjoyed under Section 15 of the High Courts Act, 1861 and Section 107 of the Government of India Act, 1915. Some of them may be mentioned. The Calcutta High Court in *Jahnabi Prosad Banerjee v. Basudeb Paul*, AIR 1950 Cal 536, *Bimla Prosad Ray v. State of West Bengal* (AIR 1951 Cal 258) (SB) (supra), the Allahabad High

Court in *Motilal v. State* (AIR 1952 All 963) (supra), the Patna High Court in *Bhutnath Khawas v. Dasrathi Das*, AIR 1941 Pat 544, the Nagpur High Court in *Dattatraya v. Emperor*, AIR 1944 Nag 286, the Lahore High Court in *Mahomed Abdul Latif v. Secretary, Bar Association, Gujranwala*, AIR 1947 Lah 313 (FB) and the Orissa High Court in *Jadumani Behera v. Jadumani Sahu*, AIR 1952 Ori 244 have laid down that because of Sub-section (2) of Section 224 of the Act of 1935 the High Courts did not possess the power to interfere judicially by way of superintendence under Section 224. The Special Bench of the Calcutta High Court in *Bimala Prosad Ray* (supra) found close similarity between the provisions of Section 107 of the Government of India Act, 1915 and the unamended Article 227 of the Constitution, and contrasted them with Section 224 of the Government of India Act, 1935 with specific reference to Sub-section (2) of that section. That eminent Judge, Harries C. J, observed (at p. 260):

'It is, therefore, clear that whilst the Government of India Act, 1935 was in force the power of superintendence over courts subject to our appellate jurisdiction did not give this court a right to interfere with judicial orders of such courts. The power of superintendence is again given to this Court and other High Courts by Article 227 of the Constitution and it is to be observed that the provisions of Sub-section (2) of Section 224 restricting the powers of this Court find no place in Article 227 of the Constitution. The powers of superintendence given to the High Courts under Article 227 of the Constitution are somewhat similar to the powers given to High Courts by the Government of India Act, 1915, which were, as I have said, later restricted by Sub-section (2) of Section 224, Government of India Act, 1935. It seems to me that it was the intention of the Constituent Assembly to restore the law to what it was before the Government of India Act, 1935 was enacted. That is the only inference which can be drawn from the omission of the provisions of Sub-section (2) of Section 224, Government of India Act, 1935, from Art, 227 of the Constitution.'

That was also the view taken by the Patna High Court in *Mohammad Umair v. Ram Charan Singh*, AIR 1954 Pat 225, where Article 227 was considered with reference to its historical ancestry. The position was summarized by the Supreme Court in *Waryam Singh* (AIR 1954 SC 215) (supra) when it said (at p. 217):

'The material part of Article 227 substantially reproduces the provisions of Section 107 of the Government of India Act, 1915 except that the power of superintendence has been extended by the. Article also to Tribunals..... Further, the preponderance of judicial opinion in India was that Section 107 which was similar in terms to Section 15 of the High Courts Act, 1861, gave a power of judicial Superintendence to the High Court apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Court.

In this connection it has to be remembered that Section 107 of the Govt. of India Act, 1915 was reproduced in the Govt. of India Act, 1935 as Section 224. Section 224 of the 1935 Act, however, introduced Sub-section (2), which was new, providing that nothing in the section should be construed as giving the High Court any jurisdiction to question any judgment of any inferior court which was not otherwise subject to appeal or revision. The idea presumably was to nullify the effect of the decisions of the different High Courts referred to above. Section 224 of the 1935 Act has been reproduced with certain modifications in Article 227 of the Constitution. It is significant to note that Sub-section (2) to Section 224 of the 1935 Act has been omitted from Article 227.

This significant omission has been regarded by all High Courts in India before whom this question has arisen as having restored to the High Court the power of judicial superintendence it had under Section 15 of the High Court's Act, 1861 and Section 107 of the Government of India Act, 1915.'

The Supreme Court observed that as then advised it saw no reason to take a different view.

18. There is one case in which it was held that Sub-section (2) of Section 224 of the Government of India Act, 1935 did not deprive the High Courts of judicial superintendence in respect of judgments which were otherwise subject to appeal or revision. That case was not placed before the Supreme Court in *Waryam Singh* (supra). In *Kavasji Pestonji v. Rustomji Sorabji Jamadar*, AIR 1949 Bom 42 the Bombay High Court observed that while Sub-section (2) imposed a prohibition in respect of judgments of an inferior court which were not otherwise subject to appeal or revision to the High Court, the prohibition did not apply to judgments

which were subject to appeal or revision. Chagla, C, J. observed that if a judgment was subject to appeal or revision, the High Court would still have power to interfere judicially 'apart from and over and above merely dealing with those judgments in appeal or revision', Tendolkar, J. agreed, and declared that 'where an appeal or revision against a judgment is permissible under the law, whether or not such an appeal or revision application is in fact filed, the High Court has power under Section 224 of judicial character on such judgments'. Both learned Judges disagreed with the construction that the High Court had been deprived of its power of judicial superintendence. They pointed out that the conclusion reached in earlier cases turned almost entirely on the circumstance that while in Section 107 of the Government of India Act, 1915 the marginal note read 'Powers of High Court with respect to subordinate Courts', the marginal note of Section 224 of the Government of India Act, 1935 was limited to 'Administrative functions of High Courts'. Chagla C. J. commented: 'the marginal note is permitted to play a more important and significant part... ..than it has any right to do'. In passing, we may mention that the conclusion expressed by the Bombay High Court in *Kavasji Pestonji* (supra) was not accepted by the Calcutta High Court in *Jahnabi Prosad Banerjee* (supra), but with great respect to the Beared Judges who decided the latter case we have been unable to appreciate the reasons expressed by them for disagreeing with that conclusion. A number of other cases have been cited for the petitioner, including *Bon Behari Mukherjee v. Makhan Lal Mukherjee*, AIR 1938 Cal 768, *In re Perianna Pillai*, AIR 1940 Mad 183, *Mula Singh v. Emperor*. AIR 1941 Lah 1 and *Rajaram Dadu v. State*, AIR 1951 Nag 443 (FB). None of them really touch the point in issue; they do not bring out the distinction between the two contending constructions.

19. We have considered the matter carefully, and it seems to us that the appropriate test is supplied by the primary rule, that unless the context warrants the contrary you must take the language of the statute as it is and attempt to arrive at its plain meaning, Clause (1) of Article 227, as amended, gives to every High Court superintendence over all courts subject to its appellate jurisdiction. There is nothing in that provision to suggest any limitation on the content of the High Court's power of superintendence. Clauses (2), (3) and (4) remain what they were, and therefore, they do not help in deciding the question. Clause (5) of Article 227

declares that nothing in that Article shall be construed as conferring jurisdiction on a High Court to question any judgment of any inferior court which is not otherwise subject to appeal or revision. The only class of cases excluded from the operation of Clause (1) of Article 227 is the class which is 'not otherwise subject to appeal or revision'. If no appeal or revision lies to the High Court against a judgment, Clause (5) excludes it from the scope of Article 227. But there is no exclusion in respect of a judgment which is otherwise subject to appeal or revision. If, as the cases cited by the respondent say, the unamended Article 227 gave judicial superintendence to the High Courts over judgments subject to appeal or revision, as well as over judgments not subject to appeal or revision, after the amendment the former class of cases remains in the residue of jurisdiction. We are unable to discover anything in the provisions of the amended Article 227 itself which deprives the High Courts of that residue of judicial superintendence. As for the marginal note, we are entirely in agreement with the comment of the learned Judge in *Kavasji Pestonji* (AIR 1949 Bom 42) (*supra*). We find it difficult to accept the contention that a marginal note can determine the essential scope of a constitutional provision. Besides this, its significance of a kind has to be conceded to a marginal note, it will be noticed that despite the amendments in Article 227 the marginal note to that Article continues to remain the same. It was 'Power of superintendence over all courts by the High Court' before, and it is still so now.

20. It is urged for the respondents that the Supreme Court, in *Waryam Singh* (AIR 1954 SC 215) (*supra*) has laid down that the power of judicial superintendence was taken out from Section 224 by Sub-section (2) of that section and, he says, that concludes the matter. A careful reading of the judgment of the Supreme Court shows that the opinion expressed there does not appear to represent its final view. All that it has done is to specifically refer to the construction which had found favour with the High Courts in the cases brought to its notice, and to adopt their view but, as will be apparent, only tentatively. For it observed: 'our attention has not been drawn to any case which has taken a different view and, as at present advised, we see no reason to take a different view'. We are of opinion that the reservation attached by the Supreme Court to its expression of opinion leaves the matter open to further consideration. In any event, it is pertinent to note that the opinion was expressed in regard to Section 224 of the Government of India Act,

1935 and inasmuch as it proceeded on the view taken by the High Courts it must be taken to rest on the significance attached to the marginal note to that section. It will be recalled that the marginal note was contrasted with the marginal note set forth against Section 107 of the Government of India Act, 1915. In the present case, we are not concerned with the construction of Section 224 of the Government of India Act, 1935. We are concerned with Article 227 of the Constitution, and there the marginal note continues as before even after amendment of the Article.

21. The respondents have drawn our attention to *Pashupati Bharti v. Secretary of State*, AIR 1938 FC 1 but it seems to us that what the Federal Court said in that case was that Sub-section (2) of Section 224 of the Government of India Act, 1935 negatived the assertion that cases which were not open to appeal or revision could be brought within the scope of Section 224. The judgment goes no further than that. It does not lay down that Sub-section (2) of Section 224 has the effect of excluding those cases also which are open to appeal or revision.

22. Accordingly, we hold:

(1) Article 227 as amended by the Constitution (Forty-Second) Amendment Act, 1976 does not govern petitions filed under Article 227 before Feb. 1, 1977.

(2) Article 227, even after its amendment, continues to confer on a High Court the power of judicial superintendence over a court subject to its appellate jurisdiction in respect of a judgment otherwise subject to appeal or revision. The High Court is now deprived of its power of judicial superintendence in respect of a judgment not otherwise, subject to appeal or revision.

23. We direct that the cases placed before us be sent back to a learned single Judge for decision on the merits in view of the opinion expressed by us.