1951

RAM-CHANDRA HUKUM-CHAND *v.* TUKARAM SAVALARAM

Chagla C. J.

and he was not cultivating land in the State of Bombay. Therefore, his application was clearly not maintainable and was liable to be dismissed. I fail to see how the integration of Bhor in 1949 and the application of the B. A. D. R. Act on March 30, 1950, can possibly affect the maintainability of the application under s. 4 which has got to be determined at the moment when the application was made and not in the light of subsequent events. The only effect of applying the B. A. D. R. Act to the Bhor State was that agriculturists in Bhor also became entitled to the various reliefs given to agricultural debtors under the B. A. D. R. Act. But the application of the B. A. D. R. Act to Bhor State did not and could not mean that an application which was not maintainable in Mahad Court became maintainable by reason of the fact that Bhor in 1949 became part of the State of Bombay.

In my opinion, the learned Judge was in error in the conclusion that he came to. The result is that the order made by the learned Judge must be set aside and the order of the trial Court restored. Mr. Desai to have the costs of this Court. No order as to costs of the two lower Courts.

Rule absolute.

M. W. P.

APPELLATE CIVIL

Before Mr. Justice Bavdekar and Mr. Justice Chainani.

1951

August 9

MADHAVDAS DEVIDAS PUNEKAR AND OTHERS, APPELLANTS *v.* VITHALDAS VASUDEVDAS PUNEKAR AND OTHERS, RESPONDENTS.*

Arbitration Act (X of 1940), s. 39—Appeal to High Court from order refusing to set aside award—Disposal of appeal by single Judge of High Court—Further appeal under Letters Patent—Whether Letters Patent appeal is competent.

When a single Judge of the High Court disposes of an appeal preferred to it under s. 39 (*1*) of the Arbitration Act, 1940, there is no further right of appeal under the Letters Patent.

Radhakrishnamurthy v. *Ethirajulu Chetty & Co.*,[1] followed.

Hanuman Chamber of Commerce v. *Jassa Ram*[2] and *Banwari Lal* v. *Hindu College, Delhi*,[3] dissented from.

Hurrish Chunder Chowdhry v. *Kali Sundari Debia*,[4] and *Sardar Ali* v. Dalimuddin,[5] referred to.

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*Letters Patent Appeal No. 34 of 1950.

[1] [1945] Mad 564.

[2] [1948] A. I. R. Lah. 64.

[3] [1949] A. I. R. East Punjab 165.

[4] (1882) L. R. 10 I. A. 4.

[5] (1928) 56 Cal. 512.

1951

MADHAVDAS DEVIDAS *v.* VITHALDAS VASUDEV-DAS

Bavdekar J.

Letters Patent Appeal from the judgment of Shah J. on appeal against the decision of B. A. Chaugule, Esquire, Civil Judge (Senior Division) at Dharwar.

In a pending suit the matters in dispute were referred to arbitration by consent of the parties. The arbitrator gave his award on August 10, 1947, and the same was filed in Court on the next day.

Defendants Nos. 11 to 16 objected to the filing of the award on the ground that the arbitrator had misconducted himself in the arbitration proceedings. The trial Court rejected that contention and directed the award to be filed.

The defendants preferred an appeal to the High Court from the order refusing to set aside the award. The appeal was finally heard by Shah J. on March 9, 1950, when his Lordship confirmed the decision of the lower Court and dismissed the appeal.

The defendants appealed under the Letters Patent.

G. P. Murdeshwar, for the appellants.

K. G. Datar, for respondents Nos. 1 and 7.

G. R. Madbhavi, for respondents Nos. 2 to 6.

BAVDEKAR J. This is an appeal from a decision of Shah J. on appeal from an order refusing to set aside an award. It is not necessary to state the facts, because a preliminary point has been taken before us that Shah J. having dismissed the appeal, no appeal lies now under the Letters Patent to a Division Bench of this Court.

Now, an appeal lies to a Division Bench of this Court from a judgment of a single Judge under the Letters Patent; but it is contended on behalf of the respondents that this right of appeal given by the Letters Patent is taken away by the provisions of section 39 of the Arbitration Act. That section provides:

"An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order:—

An order

(*i*) superseding an arbitration;

(*ii*) on an award stated in the form of a special case;

(*iii*) modifying or correcting an award;

(*iv*) filing or refusing to file an arbitration agreement;

1951

MADHAVDAS DEVIDAS v. VITHALDAS VASUDEV-DAS

Bavdekar J.

(*v*) staying or refusing to stay legal proceedings where there is an arbitration agreement;

(*vi*) setting aside or refusing to set aside an award:

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court."

Then sub-section (*2*) provides:

"No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council."

Mr. Madbhavi, who appears on behalf of the respondents, contends that any right which there may have been in a person aggrieved by a decision of a single Judge in regard to refusing to set aside an award has been taken away by the categorical provisions of s. 39 (*2*), which says that no second appeal shall lie from an order passed in appeal under this section. The contention is that the word "second", which apparently was not in the section of the Civil Procedure Code which formerly dealt with the matter of an appeal from these and similar orders, must be interpreted in a numerical sense. The appeal which is provided by sub-s. (*1*) of s. 39 is a first appeal, and any appeal from a decision on an appeal under that sub-section to any Court or bench would be a second appeal. On the other hand, it is contended on behalf of the appellants that sub-s. (*2*) of s. 39 does not take away the right of appeal, which has been given under the Letters Patent.

Now, this matter has not come before this Court, so far as we are aware, before this. The question under s. 39 (*1*), however, did come up before this Court in Original Side Appeal in *Ranchhoddas Purshottam & Co.* v. *Ratanji Virpal and Co.*,[1] and the view which was then taken was that, where an order under the Arbitration Act did not come within the purview of cls. (i) to (vi) of s. 39 (*1*), it was not appealable. No reference seems to have been made to the Letters Patent; but inasmuch as prior to the Arbitration Act, which was an Act of 1940, an appeal under the Letters Patent lay to this Court, the learned Judges who disposed of the appeal must have had in their mind the appeal which was provided from a decision of a single Judge to a division bench of this Court under the Letters Patent. The question under sub-s. (*2*) of s. 39 has also been raised in the other High Courts, and there have been two views in regard

[1] (1942) O. C. J. Appeal No. 22 of 1942, decided by Beaumont C. J. and Chagla J., on October 8, 1942 (Unrep.).

to the question as to whether that sub-section takes away the right of appeal given by the Letters Patent. Whereas the Madras High Court in *Radhakrishnamurthy* v. *Ethirajulu Chetty & Co.*,[1] has taken the view that no appeal lies, the Lahore and the East Punjab High Courts have, in *Hanuman Chamber of Commerce* v. *Jassa Ram*,[2] and *Banwari Lal* v. *Hindu College, Delhi*,[3] taken the view that the right of appeal under the Letters Patent is not affected by the section.

Now, we are not concerned in this case with s. 39 (1); but inasmuch as both the sub-sections of s. 39 deal with rights of appeal, we think it would be proper to consider s. 39 (*1*) as throwing light upon the interpretation of the second sub-section. Prior to the Arbitration Act, appeals in regard to arbitration matters were provided for by s. 104 of the Code of Civil Procedure. Sub-section (*1*) of that section provided:

> "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......."

It appears that the words "and save as otherwise expressly provided in the body of this Code or by any law for the time being in force" were not in the Codes of 1877 and 1882, and when a question arose under s. 588 of the Code of 1877 as to whether the right of appeal under the Letters Patent was taken away because of these provisions, their Lordships of the Privy Council held in *Hurrish Chunder Chowdhary* v. *Kali Sundari Debia*[4] (p. 17):

> "It only remains to observe that their Lordships do not think that s. 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the full Court."

This decision led to a conflict of view between the High Court of Calcutta, Madras and Bombay on the one hand, and Allahabad High Court on the other, as to whether the right of appeal under cl. 15 of the Letters Patent was taken away by s. 588 of the old Code of Civil Procedure, and it was in order to set aside this conflict that the Legislature, while enacting s. 104 of the Code of 1908, put in the words "and save as otherwise expressly provided in the body of this Code or by any law for the time being in force." It is obvious that s. 39 (*1*) of the Act is modelled upon s. 104, and we notice that the words, which were added deliberately in order to save the right under the

[1] [1945] Mad. 564.
[2] [1948] A. I. R. Lah. 64.
[3] [1949] A. I. R. East Punjab 165.
[4] (1882) L. R. 10 I. A. 4.

1951

MADHAVDAS DEVIDAS v. VITHALDAS VASUDEVDAS

Bavdekar J.

Letters Patent, were specifically omitted when s. 39 (*1*) of the Act of 1940 was enacted. It is our view, therefore, that, even though a right of appeal, which is conferred by an enactment, must, if it is to be taken away, be taken away either expressly or by necessary implication by another, s. 39 (*1*) by necessary implication takes away the right of appeal given by cl. 15 of the Letters Patent. It is obvious that, if all that was intended to provide by sub-s. (*1*) of s. 39 was to give a right of appeal, there was no necessity, in the first instance, to add to it the words "and from no others." Mr. Murdeshwar, who appears on behalf of the appellant, contends, however, that even though the Code of 1877 did not contain the words "and save as otherwise expressly provided in the body of this Code or by any law for the time being in force," it did contain words corresponding to the words "and from no others." in s. 39 (*1*) of the Act, and yet that did not come in the way of their Lordships of the Judicial Committee observing that s. 588 would not affect the right of appeal given by the Letters Patent. Whatever force this argument might have had, it is obvious that it loses all force, when we remember that the words which were deliberately added in enatcing s. 104 of the Code of 1908 to save the rights of appeal given either by other provisions of the Code of Civil Procedure, or by any other law for the time being in force, like the Letters Patent, were omitted in enacting s. 39 (*1*). The combined effect of the words "and from no others" and the omission of the words "and save as otherwise expressly provided in the body of this Code or by any law for the time being in force" is, so far as s. 39 (*1*) is concerned, to take away the right of appeal given under cl. 15 of the Letters Patent. That, as a matter of fact, was the view which was taken by this Court in Original Side Appeal in *Runchhoddas Purshottam & Co.* v. *Ratanji Virpal & Co.*,[1] and even though the judgment did not give any reasons, nor did it refer to the Letters Patent, we are respectfully in agreement with that view.

Mr. Murdeshwar contends, however, that whatever justification there may be for holding that s. 39 (*1*) of the Arbitration Act takes away the right of appeal given under cl. 15 of the Letters Patent, sub-s. (*2*) of s. 39 does not take away the right. The first contention which he makes is that, in the first instance, just as the wording of sub-s. (*1*) of s. 39 differs from the wording of sub-s. (1) of s. 104 of the Code, similarly the wording of

[1] (1942) O. C. J. App. No. 22 of 1942, decided by Beaumont C. J. and Chagla J., on October 8, 1942 (unrep.)

sub-s. (2) of s. 39 of the Arbitration Act differs from the wording of sub-s. (2) of s. 104 of the Code of 1908. He points out that the Legislature has added the word "second" between the words "no" and "appeal", which occurred in sub-s.(*2*) of s. 104, and it is his contention that this word was added specifically in order to show that the appeal which was excluded was the second appeal, which is referred to in the Code of Civil Procedure in s. 100 and s. 102. Now, it is quite true that if it was intended to provide that "no appeal shall lie from any order passed in appeal under this section," it was not necessary to put in the word "second". We would be prepared, therefore, to give the words the meaning which Mr. Murdeshwar says that they bear, provided the words were capable of bearing that meaning. Now, the words "second appeal" are well-known to everyone, who uses the Code of Civil Procedure, and the marginal note of s. 100 shows that the draftsman of the Code intended that the appeal which was provided for by s. 100 should be technically known as a second appeal. Their Lordships of the East Punjab High Court, as a matter of fact, in *Banwari Lal* v. *Hindu College, Delhi,*(1) took the view that the words "second appeal" were used as a technical expression to denote certain appeals, which were defined and known as second appeals in the Code of Civil Procedure of 1908. The difficulty which we find, however, with regard to this interpretation is that, whereas the Code of Civil Procedure uses the words "second appeal" in regard to a well defined set of appeals, which all lay to the High Court, and which are all appeals from decrees, if we look at the appeals which would lie, if an appeal was provided from an order passed in appeal under s. 39 (*1*) of the Arbitration Act, with rare exceptions, the appeals will be appeals from orders, and will not be appeals from decrees. We fail to understand how then we can possibly give the words "second appeal" the interpretation which it is sought to be placed upon them by the learned advocate who appears on behalf of the appellants. It would be seen further that sub-s. (*2*) of s. 39 excepts from the operation of that section, by the concluding words of the section, appeals to His Majesty in Council. Now, if the words "second appeal" were used in the sense in which that appeal is defined in s. 100 of the Code of Civil Procedure, it was obvious that it was unnecessary to exclude from the operation of sub-s. (2) of s. 39 an appeal to His Majesty in Council. A second appeal by definition would be an appeal which lies to the High Court, and it

(1) [1947] A. I. R. East Punjab 164.

1951

MADHAVDAS DEVIDAS *v.* VITHALDAS VASUDEVDAS

Bavdekar J.

could not, therefore, by any possible stretch of imagination, be taken to include an appeal to His Majesty in Council. The reason why, therefore, the Legislature has chosen to exclude the appeals to His Majesty in Council from the operation of sub-s. (*2*) of s. 39 is that they wanted to exclude these appeals, because a literal interpretation of the words "second appeal" would include an appeal to His Majesty in Council, when the appeal to the High Court was a first appeal. It is true that it can be argued that appeals to His Majesty in Council were excluded from the operation by sub-s. (*2*) of s. 39 by way of abundant caution and the proviso is really a proviso to both sub-sections intended to save appeals under cl. (*b*) of s. 109 which are however now rare. But the argument does not stand alone. It has to be taken with what we just pointed out above, and that is that the second appeals defined by s. 100 of the Code of Civil Procedure are all appeals from decrees. Very often there lie to this Court appeals from orders which are passed by the Subordinate Courts; for example, a District Court. These appeals are not second appeals; they are appeals from orders. In our view, therefore, no interpretation can be given to the words "second appeal" other than the literal interpretation. The appeal referred to in s. 39 (*1*) was a first appeal. Any appeal from a decision in that appeal would consequently be a second appeal.

Mr. Murdeshwar says that if that is our view, we should exclude, when counting one and two, an appeal which lies from one Judge of a Court to a division bench of the same Court. He says that such an appeal is an intra-Court appeal and in counting the number of appeals starting from the trial Court it must be excluded from the count. In support of this contention, he relies upon the two decisions of the Lahore and the East Punjab High Courts in *Hanuman Chamber of Commerce* v. *Jassa Ram*[1] and *Banwari Lal* v. *Hindu College, Delhi.*[2] Now, it is quite true that in these decisions the view has been taken that an intra-Court appeal must be distinguished from an appeal from one Court to another. In the case of the East Punjab High Court, besides, reliance was placed upon the words of s. 39 (*1*), which provide that whenever an appeal lay, it lay to "a Court authorised by law to hear appeals from the original decrees" of the Court passing the order. It was said that this showed that the appeal which this section contemplated, and which presumably was a first appeal, was an appeal

(1) [1948] A. I. R. Lah. 64.

(2) [1947] A. I. R. East Punjab 164.

from one Court to another, and apparently by analogy it was argued that the second appeal referred to in sub-s. (*2*) of s. 39 was also an appeal from one Court to another. Now, it is not necessary for us to go into the question as to whether s. 39 (*1*) necessarily provides that, when an appeal does lie under the provisions of that section, the Court to which it lies has got to find out by an inquiry into the question as to which is the Court from which appeals of that Court, as distinguished from appeals from the particular Judge, will lie. If the interpretation which was accepted in East Punjab were to be accepted, apparently in the case of an Assistant Judge in this State a first appeal would not lie to the District Judge even when the subject-matter is less than Rs. 5,000 in value. It seems to us quite possible that in such cases appeals from a decision of an Assistant Judge would lie to the District Judge as they do whenever there is an appeal provided for from the decisions of the Assistant Judge and the subject-matter of the suit does not exceed Rs. 5,000 in value. But assuming for the purpose of argument for the present that there is something in s. 39 (*1*) which compels us to exclude from the computation an appeal from one Judge of a Court to the other Judges of the Court, we cannot understand how that would throw any light upon sub-s. (*2*) of s. 39. There are words in sub-s. (*1*) of s. 39, which make the interpretation plausible, that an appeal which that section contemplates is an appeal from one Court to another Court, as distinguished from an appeal from a decision of one Judge of one Court to one or more Judges of the same Court; but there are no such words in sub-s. (*2*) of s. 39. We fail to understand, then, why when interpreting the words "no second appeal" in that sub-section we must exclude an appeal which is called an intra-Court appeal, that is, an appeal from one Judge of a Court to one or more Judges of the same Court.

In that case, there are only two possible interpretations which can be placed on the words "second appeal". The first of these we have excluded, because s. 100 of the Code of Civil Procedure is concerned only with appeals from a decree. In that case, the only other meaning which can be given to the words "second appeal" is the dictionary meaning. When there is an appeal provided from an order in appeal from an order, then, that appeal would be numerically and in the dictionary meaning of the word "second" a second appeal. If that interpretation is given to the word, then there is no doubt that sub-s. (*2*) of s. 39 specifically provides that no second appeal

1951

MADHAVDAS DEVIDAS *v.* VITHALDAS VASUDEV-DAS

Bavdekar J.

shall lie from an order passed in appeal under this section. As in the case of sub-s. (*1*) of s. 39, it is necessary to point out that this sub-section must have been enacted in order to take away a right of appeal, if any, given by any other enactment. If all that it was intended was not to give by the Arbitration Act any second appeal, it was not necessary to enact sub-s. (*2*) of s. 39 at all. If the section had stopped with the end of s. 39 (*1*), the result desired, namely, not providing a second appeal, would have been achieved. Sub-section (*2*) of s. 39 is obviously, therefore, intended to take away any right of appeal which may lie under any other enactment, and in our view, therefore, the right of appeal, which was given by cl. 15 of the Letters Patent, is by necessary implication taken away by sub-s. (*2*) of s. 39.

It is necessary now to consider an anomaly which has been pointed out to us in case we accept this interpretation. Under the rules of this Court, an appeal under s. 39 (*1*) can be disposed of by a single Judge, though it is open to him, if he so deems fit, to refer it to a division bench. If we hold that when he disposes of it himself no appeal lies, then, under art. 133, sub-art. (*3*), of the present Constitution, no appeal lies to the Supreme Court, except, of course, by special leave granted by it. On the other hand, if the same appeal were to be disposed of by a division bench of this Court, because a single Judge refers the appeal to a division bench, an appeal will lie to the Supreme Court, with leave of course, under the provisions of s. 109 of the Code of Civil Procedure as well as art. 133 (*1*) of the Constitution. Their Lordships of the East Punjab High Court pointed to this anomaly, and as a matter of fact we have also been pressed by it. But, in the first instance, if the only interpretation which can be placed upon s. 39 (*2*) is the one which we have mentioned above, we are not concerned with any anomaly which may be caused by the interpretation. The anomaly has got to be removed by those who have powers to legislate, and the easiest course would be for this Court to change its rule by which appeals under s. 39 (*1*) of the Arbitration Act lie to a single Judge, but it is not as if anomalies of this kind have not arisen before. When a single Judge of a High Court disposes of a second appeal, his decree is not appealable, except on a certificate granted by him. In case he does not give a certificate, any appeal to the Privy Council formerly, and to the Supreme Court now, is barred under s. 111 of the Code of Civil Procedure and under

art. 133 (*3*) of the Constitution. On the other hand, if the same second appeal had been disposed of by a division bench of the High Court, an appeal under s. 109 would lie to the Privy Council though, of course, when leave under s. 109 (*c*) has been given. In *Sadar Ali* v. *Dalimuddin,*[1] Rankin C. J. pointed out how this anomaly arose and the way in which it was to be dealt with. He observed (p. 519):

"......Section 111 of the Code, however, definitely prohibits an appeal to the Privy Council from a single Judge and to this extent overrides clause 39 of the Letters Patent. The section is not a mere provision that nothing in the previous section shall be deemed to give a right of appeal from the decision of a single Judge. The provisions of clause (*a*) of section 111 may have been motived originally by the existence of the right of Letters Patent appeal (cf. *Sabhapathi Chetti* v. *Narayanasami Chetti*),[2] or by the opinion that it is not reasonable in Indian cases that the Privy Council should be called upon to decide cases until a Bench has dealt with them. But in any case, the effect of s. 111 upon clause 39 of the Letters Patent cannot now be controlled by such considerations (*Satvanarayana Varaprasada* v. *Venkata Bhashya-Karla.*[3] It appears to me, therefore, that the new clause in the Letters Patent takes away in all second appeals decided by a single Judge (without his giving a certificate that the case is a fit one for appeal) the right to go to the Privy Council under the ordinary law, though the right of the Judicial Committee to give special leave is not of course affected. That right was a limited and a qualified right; but such as it was, it was open to the party prior to the 14th January, 1928."

In our view, the effect of s. 111 enacted in different circumstances may sometimes lead to anomalies of the kind which is mentioned out in the present case, but just as the considerations under which that section was enacted cannot be permitted to affect the interpretation of the section, in our view, its effect cannot be allowed to affect the interpretation of a section like s. 39 (*2*) of the Arbitration Act. In our view, therefore, after the enactment of s. 39 (*2*) of the Arbitration Act, there is no further right of appeal under the Letters Patent, when a single Judge of the High Court disposes of an appeal under s. 39 (*1*) of the Arbitration Act.

The appeal must, therefore, be dismissed. There will be no order as to costs.

Appeal dismissed.

M. W. P.

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[1] (1928) 56 Cal. 512.
[2] (1901) 25 Mad. 555.
[3] (1923) 46 Mad. 958.