1955

R. N. JHUNJHUNWALA & CO., LTD. v. N. JIWANLAL & CO., LTD.

Chagla C. J.

time, then his remedy must be held to be barred and ignorance cannot constitute sufficient cause to entitle the Court to condone delay.

In our opinon, therefore, to the extent that this appeal raises the question of the date of the breach, it is not maintainable by reason of the provisions of s. 97 of the Civil Procedure Code.

Attorneys for Appellants: *Mulla & Mulla* and *Cragie Blunt & Caroe.*

Attorneys for Respondents: *Bhaishankar Kanga & Girdharilal.*

Order accordingly.

P. M. P.

2. (1921) 45 Bom. 627.

APPEAL FROM ORIGINAL CIVIL AND INHERENT JURISDICTION

1955
Nov. 28

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Dixit.

K. B. SIPAHIMALANI, ASSISTANT CUSTODIAN OF EVACUEE PROPERTY, BOMBAY AND ANOTHER, APPELLANTS (ORIGINAL RESPONDENTS) *v.* FIDAHUSSEIN VALLIBHOY, RESPONDENT (ORIGINAL PETITIONER).*

Administration of Evacuee Property Act, (XXXI of 1950), ss. 27 & 28 : 18 (1)—Order of Custodian Confirming order of assistant Custodian an appeal—Application for revision against Custodian's order to Custodian General—Petition for Writ of Certiorari *against Custodian's order pending revisional application—Eventual dismissal by Custodian General of such revisional application—Whether High Court had jurisdiction to entertain writ—Contention that 'final order' was the order of Custodian General—Distinction between Appellate and revisional jurisdiction—Effect of dismissal of revisional application explained—Whether statutory tenancy is occupancy right under s. 18 (1) ?*

An appeal is a continuation of a suit with the result that where the Appellate Court dismisses the appeal, it only confirms the order of the Lower Court and the order of the Lower Court becomes merged in the decision of the Court of Appeal. On the other hand, an application for revision is an independent proceeding; when the Revisional Court dismisses such application, the effect in law is that it refuses to exercise its revisional jurisdiction with the result that the final order is the order of the Lower Court itself.

*Appeal No. 13 of 1955 : Miscellaneous Application No. 141 of 1953.

Mohamed Oomar v. *Nooridin*,[1] *Hussain* v. *Sitaram*[2] *Gauri Shankar* v. *Jagat Narain*,[3] and *Ganesh Lal* v. *Mool Chand*,[4] referred to.

Hafiz Mahomed Yusuf v. *Custodian General*,[5] dissented from.

Venugopal Mudali v. *Venkatasubbish Chetty*,[6] and *Sawaldas Madhavdas* v. *Arati Cotton Mills, Ltd*,,[7] agreed with.

The respondent who had filed an application for revision to the Custodian General against the order of the Custodian confirming on appeal the order of the Assistant Custodian, presented a petition to the High Court for a *Writ of Certiorari* against the order of the Custodian pending the hearing of the revisional application by the Custodian General. The High Court stayed the hearing of the petition till the disposal of the revisional application. The Custodian General eventually dismissed the application. At the hearing of the petition, a preliminary objection was raised that the High Court at Bombay had no jurisdiction to entertain the petition as the final order against the respondent was the order of the Custodian General whose office being in Delhi was outside the jurisdiction of the Court. The trial Court negatived the contention and on merits allowed the petition : On appeal.

Held, confirming the order of the trial Court that the petitioner was challenging the order of the Custodian which was the effective and subsisting order and hence the Court had jurisdiction to hear the petition.

A statutory tenancy is a personal right which does not vest in the Custodian; it is not an occupancy right within the meaning of s. 18 (*1*) of the Administration of Evacuee Property Act, 1950.

Facts material to this report are set out in the Judgment.

M. P. Amin, Advocate-General, with *R. M. Kantawala*, for the Appellants.

K. H. Bhabha, with *S. J. Sorabji*, for the Respondents.

Chagla C. J.—This is an appeal from a judgment of Mr. Justice Desai who issued a writ of certiorari on a petition presented by the respondent. By this petition he challenged an order of the Custodian who held that one Kassam Abba was an evacuee and his tenancy right in rooms Nos. 13 to 16 on the first floor of Haji Yusuf Building had vested in him.

The first order in these proceedings was made by the Assistant Custodian on January 2, 1953, and he held that Kassam Abba was an evacuee and that the tenancy rights in these premises vested in the Custodian. From that order the respondent appealed to the Custodian and the Custodian passed the order, to which reference has been made, on February 10, 1953, confirming the order of the Assistant Custodian and dismissing the appeal. On April 10, 1954, the respondent went in revision to the Custodian General and on April 10, 1954, the revision application was dismissed, and the present petition was filed on April 7, 1953.

The first contention urged by the Advocate General is that the petition is not maintainable on the ground that it is the final order which must be challenged by the respondent in

1. [1952] 54 Bom. L. R. 28.
2. [1952] 54 Bom. L. R. 947.
3. [1934] 56 All. 608.
4. [1935] 57 All. 781.
5. [1954] A. I. R. All. 433.
6. (1916) 39 Mad. 1196.
7. (1955) 57 Bom. L. R. 394.

1955

K. B. SIPAHIMALANI v. FIDAHUSSEIN VALLIBHOY VALLIBHOY

Chagla C. J.

order to succeed, which is the order of the Custodian General passed on April 10, 1954, and as the Custodian General's office is in Delhi this Court has no jurisdiction to issue a writ against him. The Advocate General is right, and now it is well settled, that if the order which must be quashed by this Court is the order of the Custodian General, this Court has no jurisdiction to issue a writ against a person or a tribunal which is situated outside its jurisdiction. But what has been urged by the other side is that it is not incumbent upon the petitioner to challenge the order of the Custodian General. The order which is challenged is the order of the Custodian which was passed within jurisdiction and which admittedly can be quashed by this Court. What is urged by the Advocate General is that the order of the Custodian General was passed after consideration of the merits of the matter, that it was not a decision given on any preliminary point but it was given after the Custodian General had considered the order of the Custodian, and, therefore, according to the Advocate General the order of the Custodian became merged in the order of the Custodian General, dated April 10, 1954.

In support of this contention reliance has been placed on a decision of this Court in *Mohamed Oomar* v. *Noorudin*.[8] In that case we were dealing with an appeal and not with a revision application, and what we held there was that it is only on a judicial determination that the order of the lower Court becomes merged in the decision of the Court of appeal. But no merger takes place when the Court of appeal does not judicially determine the appeal but dismisses it on any preliminary ground like limitation or maintainability. Then, on the dismissal by the appellate Court, the order that still stands is the order of the lower Court and not the order of the Court of appeal. In the same volume there is another decision repored at page 947, (*Hussain Sab* v. *Sitaram*), and there it was held that when an appeal is summarily dismissed by the High Court under O. XLI, r. 11 of the Civil Procedure Code, the original decree from which the appeal was preferred remains untouched and it is the original decree which is the substantive decree. The Advocate General wants us to apply the same test to revision applications and what he says is that if there is a judicial determination by the revisional Court then the order of the Court from which the revision application is preferred becomes merged in the order passed by the revisional Court.

One has to bear in mind the important difference between an appellate jurisdiction and a revisional jurisdiction. A right of appeal is a vested right in the litigant, it is a substantive right, and if the appellant satisfies the Court of appeal that he

8. (1952) 54 Bom. L. R. 28.

is right in his contention, the Court of appeal has no discretion not to make the order in his favour. In the second place, when a Court of appeal hears the appeal, the appeal constitutes a continuation of the suit. A decree having been passed by the trial Court, on an appeal being preferred against that decree the appeal in effect is the rehearing of the suit by the Court of appeal. In the case of revision, the revision application does not constitute a continuation of the suit or the rehearing of the suit. A right is given to the revisional Court to exercise its powers of supervision over subordinate Courts or Tribunals and it is in the exercise of that right that the revisional Court passes its orders. It is not obligatory upon the revisional Court to interfere with the order under revision even though the order may be improper or even illegal. When the revisional Court does interfere with the order of the Court below, the result is not that the order of the lower Court is merged in the order passed by the revisional Court, but the result is that the order of the revisional Court sets aside or modifies the order of the lower Court. Whereas in the case of an appeal when the appeal is dismissed the appellate Court confirms the decree of the trial Court, in the case of a revisional Court when it dismisses the petition in revision all that it does is that it does not interfere with the order of the Court below. The effect of the dismissal of the petition in revision is not to confirm the order of the trial Court because no confirmation is necessary from the revisional Court. When the revisional Court dismisses the petition, the true effect in law is that it refuses to exercise the revisional jurisdiction conferrred upon it. Whereas, when the appellate Court dismisses the appeal it is exercising its appellate jurisdiction and in exercise of that jurisdiction it dismisses the appeal and confirms the order of the lower Court. Therefore, it will be noticed that the distinction between an appellate jurisdiction and a revisional jurisdiction is vital and it does not necessarily follow that the principles which apply to an appeal must necessarily apply to a revision. The basis of the decisions that the order of the trial Court becomes merged in the order of the appellate Court is that there is a continuation of the suit and a rehearing of the suit by the appellate Court. It is also based on the fact that the appellate Court has no discretion not to admit an appeal if an appeal lies or not to give the relief to the appellant if he is entitled to the relief in law.

The Advocate General has drawn our attention to the provisions in the Evacuee Property Act with regard to revision and s. 27 provides :

"The Custodian-General may at any time, either on his own motion or on application made to him in this behalf, call for record of any proceeding in which any District Judge or Custodian has passed an order for

1955

K. B. SIPAHIMALANI v. FIDAHUSSEIN VALLIBHOY

Chagla C. J.

the purpose of satisfying himself as to the legality or propriety of any such order and may pass such order in relation thereto as he thinks fit."

Therefore, the exercise of the power of revision by the Custodian General is discretionary and the language is very similar to the language used in the Code in s. 115. Two provisions of the law relating to the administration of evacuee property is relied upon by the Advocate General as constituting a difference between the revisional powers conferred upon the Custodian General and the revisional powers conferred upon the High Court under s. 115 of the Code. In the first place, attention is drawn to s. 28 which provides :

"Save as otherwise expressly provided in this Chapter, every order made by the Custodian General, Authorised Deputy Custodian, Deputy Custodian or Assistant Custodian shall be final and shall not be called in question in any Court by way of appeal or revision or in any original suit, application or execution proceeding."

What is relied upon is the expression "final" it is said that the order that becomes final is the order of the Custodian General and not of the Custodian. The purpose of enacting this section is to oust the jurisdiction of the Civil Court, and the order of the Custodian General is final in the sense that whatever his decision might be it cannot be challenged either by way of appeal or revision or in any original suit. But what we have to consider is whether this order of the Custodian General supersedes the order passed by the Custodian. Section 28 does not throw any light on the decision of that question.

Reliance is then placed on the rules framed under this Act and the rule relied upon is r. 31. Sub-rule (*9*) of that rule is material and it provides :

"Any authority hearing any appeal or an application for revision may admit additional evidence before its final disposal or may demand the case for admission of additional evidence and report or for a fresh decision, as such authority may deem fit."

What is contended by the Advocate General is that this rule confers a power upon the revisional authority, which power is not conferred upon the High Court under s. 115 of the Code. It is difficult to understand how the jurisdiction exercised by a particular Court or Tribunal or authority can be affected by the powers conferred upon that Court, Tribunal or authority. If the revisional jurisdiction is of the nature which we have indicated, the fact that the Legislature has conferred wider powers upon the revisional authority than it has done upon the High Court under s. 115 of the Code cannot possibly affect the question as to its revisional jurisdiction. If the Advocate General's contention is that this rule constitutes the Custodian General an appellate Court and that there is no distinction between an appellate Court and a revisional Court, then the

simplest thing for the Legislature to have done was to have conferred upon a person affected a right to have a second appeal to the Custodian General. But the very fact that in this Act a distinction is made between an appeal and a revision clearly shows that the Legislature was conscious of the distinction between appellate jurisdiction and revisional jurisdiction.

Reliance was then placed on certain judgments of the Allahabad High Court. The first is *Gauri Shankar* v. *Jagat Narain.*[9] In that case an *ex parte* decree for money was passed by a Court of Small Causes and on an application in revision to the High Court by the plaintiff for future interest the decree was modified after contest by the defendant and future interest was allowed, and after the decree of the High Court the defendant applied to the Small Causes Court under O. IX, r. 13 to have the original *ex parte* decree set aside, and it was held that the original *ex parte* decree of the Small Cause Court had merged in that of the High Court and it was no longer open to the trial Court to entertain the application to set its decree aside. It will be noticed that the High Court modified the decree passed by the Small Cause Court. Therefore, it exercised its revisional jurisdiction and the effective order which remained was not the decree of the Small Cause Court but the decree or order passed by the High Court in revision. With respect, we do not agree that the decree of the Small Cause Court was merged in the decree passed by the High Court. What happened in law was that the decree passed by the Small Cause Court, against which there was no appeal but against which a revision lay, was replaced by the decree of the High Court in revision.

Then we have a later decision of the Allahabad High Court in *Ganesh Lal* v. *Mool Chand.*[10] This decision, which is also of a single Judge, distinguishes the judgment in *Gauri Shankar* v. *Jagat Narain.* In this case upon the dismissal of an application in revision against a decree passed by a Small Cause Court, it was held that the decree remained the decree of the Small Causes Court and was not merged in the decree of the High Court, and Mr. Justice Bennett who decided this case points out that in *Gauri Shankar* v. *Jagat Narain* the High Court allowed the revision and modified the decree, and, therefore, the learned Judge takes the view that in that case there was a merger. As we have pointed out, we do not agree with the expression that the decree of the Small Cause Court was merged, but undoubtedly, inasmuch as the High Court modified the decree, the order of the High Court was the only order which was effective and enforceable.

9. [1934] 56 All. 608.

10. [1935] 57 All. 781.

1955

K. B. SIPAHIMALANI v. FIDAHUSSEIN VALLIBHOY

Chagla C. J.

The Advocate General has strongly relied on an earlier decision of the Allahabad High Court in *Hafiz Mahomed Yusuf* v. *Custodian General.*[11] There, the High Court was considering the Evacuee Property Act itself and the learned Judges held that for all practical purposes the powers of the Custodian General were indistinguishable from those of an appellate authority under the Act, and according to the learned Judge, upon the general principle that the order of a Court merges in that of an appellate authority, the order of the Assistant Custodian merged in the order passed by the Custodian General, and, therefore, in that particular case they held that as the order was passed by the Custodian General which was in Delhi, the Allahabad High Court had no jurisdiction to issue a writ. With very great respect, the learned Judges have proceeded more on the question of power rather than of jurisdiction and they failed to appreciate the difference between appellate jurisdiction and revisional jurisdiction.

The Advocate General argues that there is no distinction in principle between a revisional Court dismissing the revision application and passing an order reversing or modifying the order challenged in revision. According to the Advocate General if when the revisional Court reverses or modifies the order, that order becomes effective there is no reason why when the revisional Court dismisses the application that order should not be the effective order. As we have already pointed out, when the revisional Court reverses or modifies the order challenged, it exercises its revisional jurisdiction, when it dismisses the application it refuses to exercise that jurisdiction and it is only an order passed in the exercise of the revisional jurisdiction of the revisional Court that supersedes the order passed by the subordinate Court or Tribunal. The test laid down in *Mohamed Oomar* v. *Noorudin,*[12] of judicial determination, cannot apply even though the revisional Court may dismiss the application on merits, because the revisional Court is exercising a different jurisdiction from the appellate Court.

A similar view seems to have been taken in a Madras case relied upon by Mr. Bhabha in *Venugopal Mudali* v. *Venkatasubbiah Chetty.*[13] In that case, after holding that the final order was the order passed in appeal, the learned Judges discuss the position with regard to review application and revision, and at page 1202 the learned Judge says :

"I need not say that where the order on a review petition as distinguished from an appeal petition merely refuses to interfere with the judgment or order sought to be reviewed or where an appeal is not entertained at all though filed, the original decree or order is and continues to be the subsisting and final decree or order. In this respect an order rejecting a review petition stands on a different footing from

11. [1954] A. I. R. All. 433.

12. (1952) 54 Bom. L. R. 28.

13. (1916) 39 Mad. 1196.

a decision passed on appeal confirming the lower Court's judgment and dismissing the appeal. If the decision on review or revision does interfere with the original decision, the former decision becomes the only subsisting order and stands on the same footing as the decision passed in a competent appeal."

In *Sawaldas Madhavdas* v. *Arati Cotton Mills*,[14] we pointed out the vital distinction between an application for review and an appeal and we stated that an appeal is a vested right and that right is a substantive right. There is no vested right in a litigant to prefer an application for review. Hence, when an application for review is filed, it is an independent proceeding which is initiated by the litigant. The same observations would apply to an application in revision. Clearly, the litigant has no vested right to prefer an application in revision and in that sense the application for revision is an independent proceeding. It is true that the revision application arises out of the suit in respect of which the appeal is preferred, but it is independent in the sense that it is no longer a continuation of the suit or a rehearing of the suit.

Therefore, in our opinion, what the petitioner is challenging and rightly challenging is the order of the Custodian which is the effective and subsisting order, and not the order of the Custodian General which merely in revision refuses to interfere with the order passed by the Custodian.

The Advocate General suggested that there might be serious difficulties if we were to quash the order of the Custodian while the order of the Custodian General stands. The fallacy underlying this argument is that there is no effective order of the Custodian General. The only effective order is that of the Custodian and if that order is quashed nothing remains which would affect the petitioner prejudicially.

On the merits there is very little to be said in favour of the Custodian's order. The facts bearing on the question are that prior to the July 15, 1948, the evacuee Kassam Abba carried on the business in the name of Haji Jusab & Co. On July 15, 1948, the petitioner and one Kurbanhussein joined the partnership and the partnership deed was executed on the August 12, 1948. This partnership was dissolved on October 21, 1948, and the evacuee went out. On December 18, 1948, the landlord gave a notice to quit to Haji Jusab & Co. and another notice was given on August 3, 1950. The ground for giving these notices was that the tenant was in arrears of rent. On November 14, 1951, Kurbanhussein went out of the partnership and thereafter the sole proprietor of the partnership was the petitioner. The initial tenant was undoubtedly the evacuee, but the salient fact of this case is that the notice to quit was given by the landlord to the tenant on December 18,

14. (1955) 57 Bom. L. R. 394.

1955

K. B. SIPAHIMALANI v. FIDAHUSSEIN VALLIBHOY

Chagla C. J.

1948, and the tenancy of the evacuee terminated on the expiry of the notice and the position in law was that the evacuee became the statutory tenant. We have already held that a statutory tenancy is a personal right which does not vest in the Custodian, and, therefore, on the expiry of this notice there was nothing left in the evacuee which could vest in the Custodian. What was really argued before the learned Judge below as appears from his judgment was that by reason of s. 18 (*1*) of the Administration of Evacuee Property Act the personal right was the occupancy right and that occupancy right vested in the Custodian. We agree with the learned Judge that a statutory tenancy or a personal right to occupy premises could not be construed to mean an occupancy right within the meaning of s. 18 (*1*). Therefore, if s. 18 (*1*) has no application and s. 18 (*1*) does not cover the case of a statutory tenancy or a personal right to occupy certain premises, it is clear that on the termination of the tenancy of the evacuee the tenant continued to be a statutory tenant and that right could not vest in the Custodian. The learned Judge has also accepted the contention of the petitioner, and in our opinion rightly, that in any view of the case the petitioner was in occupation under a colour of title and if he was there under a colour of title he could not be evicted as a trespaser by the summary procedure permissible to the Custodian under the Act. What has been pointed out to us is that there was inconsistency in the petitioner's case as put forward in his reply to the show cause notice and in the petition before us. At one time, it is pointed out, the petitioner contended that the lease was surrendered to him. At another time he contended that lease was transferred by the partnership deed. In this case the facts are not in dispute and if the petitioner drew one or the other inference as to his status it cannot be said that he was guilty of *mala fides* which would disentitle him to any relief at the hands of this Court. In our opinion, the learned Judge has taken the right view as to the merits of the matter and it is a clear case for interference with the order passed by the Custodian. It may be pointed out again that the Custodian has made the order on an erroneous conception of the law and he has taken the view that the tenancy rights vested in the Custodian although in law there could be no such vesting.

The result is that the appeal fails and must be dismissed with costs.

Attorneys for Appellant: *Little & Co.*

Attorneys for Respondent: *Mehervaid & Co.*

Appeal dismissed.

P. M. P