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October 11

DAJISAHEB MANE AND OTHERS
v.
SHANKAR RAO VITHAL RAO MANE AND ANOTHER.

[S. R. DAS, ACTING C. J., VIVIAN BOSE, JAGANNADHADAS, JAFER IMAM and CHANDRASEKHARA AIYAR JJ.]

Constitution of India—Arts. 133 and 135—Decree of lower court in respect of properties of the value of more than Rs. 10,000 but below Rs. 20,000—Reversed by the High Court on 8-11-1949—High Court granted leave to appeal on 1-10-1951—Appeal to the Supreme Court —Whether competent—Word "exercisable" in Art. 135—Construction of.

This appeal to the Supreme Court was from a reversing decree of the Bombay High Court in a suit for possession of certain immovable properties. The suit was dismissed by the trial court on 20-12-1946, the value of properties being found to be over Rs. 10,000. The decree of the High Court allowing the plaintiff's claim was passed on the 8th November 1949. The defendants applied to the High Court for leave to appeal to the Federal Court on 6-1-1950 which was granted on 1-10-1951.

One of the questions for determination was whether Art. 133 of the Constitution applied to the case and the appeal was competent to the Supreme Court.

Held, that Art. 133 did not apply as it relates expressly to appeals against any judgment, decree or final order in a civil proceeding of a High Court in the "territory of India".

Held further that on the date of the decree of the High Court, the defendants had a vested right of appeal to the Federal Court as the properties were of the requisite value and on 6-1-1950 a certificate of leave to appeal was bound to be granted.

Held also that the appeal was competent to the Supreme Court by virtue of the provisions of Art. 135 of the Constitution as the jurisdiction and powers in relation to the matter in dispute were exercisable by the Federal Court immediately before the commencement of the Constitution under an existing law inasmuch as the Federal Court had jurisdiction to entertain and hear appeals from a decree of a High Court which reversed the lower court's decree as regards properties of the value of more than Rs. 10,000.

The construction contended for by the respondent that the jurisdiction was exercisable under Art. 135 by the Federal Court only if the matter was actually pending before the Federal Court and that it could not be said to be pending until the appeal is declared admitted under Order XLV of the Civil Procedure Code is

too narrow and does not give full and proper scope to the meaning of the word 'exercisable' in the Article.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 92 of 1953.

Appeal under section 110 of the Civil Procedure Code from the Judgment and Decree dated the 8th November 1949 of the Bombay High Court in Appeal from Original Decree No. 195 of 1947 arising out of the Judgment and Decree dated 20th December 1946 of the Court of Civil Judge, Senior Division, Sholapur in Special Suit No. 78 of 1945.

C. K. Daphtary, Solicitor-General of India (*R. A. Govind,* with him) for the appellants.

J. B. Dadachanji, Sri Narain Andley and *Rajinder Narain,* for respondents.

1955. October 11. The Judgment of the Court was delivered by

CHANDRASEKHARA AIYAR J.—This appeal is from a reversing decree of the Bombay High Court in a suit for the possession of certain immovable properties which was dismissed by the Civil Judge, Senior Division, Sholapur. The value of the properties has been found to be over Rs. 10,000.

The Original decree was on 20-12-1946. The decree of the High Court allowing the plaintiff's claim was on 8-11-1949. The defendants applied for leave to appeal to the Federal Court on 6-1-1950. The High Court directed the trial court to find the value of the property which was the subject-matter of the suit at the time of the suit and on the date of the passing of the decree in appeal. On 22-1-1951 the lower court ascertained the value as stated above. The High Court thereafter granted leave to appeal on 1-10-1951, overruling the objections raised by the plaintiff to the grant of such leave.

The maintainability of this appeal has been questioned before us by Mr. Dadachanji, learned counsel for the respondents, in a somewhat lengthy argument. His main contention was that article 133 of the

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Constitution applies to the case, and as the value is below Rs. 20,000, no appeal can be entertained. It is the correctness of this argument that we have to consider.

On the date of the decree of the High Court, the defendants had a vested right of appeal to the Federal Court, as the properties were of the requisite value, and on 6-1-1950 they sought a certificate of leave to appeal, which was bound to be granted. The Constitution establishing the Supreme Court as the final appellate authority for India came into force on 26-1-1950. Did the vested right become extinguished with the abolition of the Federal Court? If the court to which an appeal lies is altogether abolished without any forum substituted in its place for the disposal of pending matters or for the lodgment of appeals, the vested right perishes no doubt. We have therefore to examine whether the Constitution which brought the Supreme Court into being makes any provision for an appeal from a reversing decree of the High Court prior to the date of the Constitution respecting properties of the value of Rs. 10,000 and more being entertained and heard by the Supreme Court.

Article 135 is in these terms:—

"Until Parliament by law otherwise provides, the Supreme Court shall also have jurisdiction and powers with respect to any matter to which the provisions of article 133 or article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of this Constitution under any existing law".

Article 133 runs as follows:—

"(1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(c) that the case is a fit one for appeal to the Superme Court;

and, where the judgment, decree or final order appealed from affirms the decision of the court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law....."

It is reasonably clear that article 133 does not apply to this "matter". The language is prospective, and the judgment, decree or final order from which the appeal is to be taken is that of a High Court in the territory of India—that is a High Court established under the Constitution. The territory of India comprises the territory of the States. Aricle 214 says that there shall be a High Court for each State, and clause (2) thereof provides that "the High Court exercising jurisdiction in relation to any Province immediately before the commencement of this Constitution shall be deemed to be the High Court for the corresponding State". We can compendiously speak of the High Court prior to the Constitution and the High Court after the Constitution as the Provincial High Court and the State High Court. A High Court in the territory of India means a State High Court, and article 133 provides for appeals against any judgment, decree or final order in a civil proceeding of such High Court.

Though article 133 does not apply, we have still to see whether it is a matter as regards which jurisdiction and powers were exercisable by the Federal Court immediately before the commencement of the Constitution. It is unnecessary to refer in detail to the earlier enactments defining the jurisdiction of the Privy Council, and the Government of India Act, 1935 establishing the Federal Court and conferring a limited jurisdiction on the same. It is sufficient to point out that as the law then stood, the Federal Court had jurisdiction to entertain and hear appeals

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from a decree of a High Court which reversed the lower court's decree as regards properties of the value of more than Rs. 10,000. The aggrieved party had a right to go before it, without any special leave being granted. It was a matter over which jurisdiction was "exercisable" by the Federal Court. The construction that it was "exercisable" only if the matter was actually pending before the Federal Court and that it could not be said to be pending until the appeal is declared admitted under Order XLV of the Civil Procedure Code is too narrow, and does not give full and proper scope to the meaning of the word "exercisable" in the article. Pending matters are dealt with under article 374(2), and we must give some meaning to the provisions of article 135. As soon as the decree of the High Court came into existence, the jurisdiction of the Federal Court to hear an appeal from that decree became exercisable. provided certain conditions as to security and deposit were complied with, which are not material for our present purpose.

Reference may be made here to paragraph 20 of the Adaptation of Laws Order, 1950, as amended in 1951, which provides:

"Nothing in this Order shall affect the previous operation of, or anything duly done or suffered under, any existing law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law.....

By this Order section 110, Civil Procedure Code was adapted to the new situation but the requirement as to value was raised from 10,000 to 20,000. What is provided is that this adaptation will not affect the right of appeal already accrued.

If we accede to the argument urged by the respondents, we shall be shutting out altogether a large number of appeals, where the parties had an automatic right to go before the Federal Court before the Constitution and which we must hold was taken away from them for no fault of their own, merely because the Supreme Court came into existence in place of the Federal Court. An interpretation or

construction of the provisions of the Constitution which would lead to such a result should be avoided, unless inevitable. The Full Bench decision of the Madras High Court in *Gundapuneedi Veeranna and three others* v. *Gundapuneedi China Venkanna and seven others*(1) was a case where the decree of the High Court and the application for leave to appeal were both after the Constitution came into force. Whether in all matters where there was a right of appeal under section 110 of the Civil Procedure Code it continues in respect of all suits filed prior to the Constitution is a question that does not arise for decision now.

On the merits, the appeal is unassailable. The family whose genealogical tree is given in the opening portion of the judgment of the trial Judge owned what may be compendiously described as Sangam properties and Peta Velapur Mahal properties, and all of them were of the nature of watan. The Sangam lands were held by the eldest branch represented by Yeshwant Rao (son of Panduranga Rao) by right of lineal primogeniture. When Yeshwant Rao and his widow Tarabai died in November 1924, these properties went to the plaintiff Shankar Rao's branch as the next senior in line. The Peta Velapur Mahal properties were held in three shares by Narsinga Rao, Vithal Rao and Krishna Rao, the fourth brother Shyama Rao having no right as he was insane. Defendants 1, 2 and 3 represent Krishna Rao's branch. After Yeshwant Rao's death, Lakshman Rao, the grandfather of defendants 1 and 2, filed a suit No. 1064 of 1925 for a declaration that he was the nearest heir to the Sangam properties, the Peta Velapur Mahal properties and the cash income appertaining to the inamdar's right in Sangam. He got a declaratory decree that he was the nearest heir of the deceased Yeshwant Rao, and had a right in such capacity to take possession of all the properties, excluding the inam income and the Sangam lands specified in Schedule B of the decree and a small item of property situated in the same village and specified in Schedule G. As regards the excluded items, Shankar

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Rao, the first defendant, (plaintiff in the present suit) was held to be the heir. On appeal to the High Court, the decree of the Subordinate Judge was confirmed, except as regards the cash allowance of three villages Nevare, Tambure and Limbagaon, which was also declared to belong to Shankar Rao.

As the decree was only a declaratory decree, a fresh suit had to be filed by Narayana Rao, son of Lakshman Rao, to recover possession of the Peta Velapur Mahal properties at Mahalung, Lavang and Wafegaon. This was Civil Suit No. 2148 of 1936. Recovery was also sought of some cash and the value of some ornaments and clothes, etc. The claim was resisted by Shankar Rao, and his main plea was that in lieu of the properties claimed, a large number of lands at Sangam had originally been given to the plaintiff's branch, and that unless those properties were given back, the plaintiff could not claim to recover the Velapur Mahal properties. The suit ended in a compromise decree. Shankar Rao was to deliver actual possession of the lands to the plaintiff as owner together with costs and mesne profits and the plaintiff was to abandon the rest of the claim. The decree states, "The defendant has given up all the contentions in his written statement".

After possession was taken of the Velapur Mahal properties under the decree, the plaintiff, Shankar Rao, brought this suit to recover from defendants 1 and 2 the Sangam lands to which he referred in his earlier written statement alleging that they were given to their grandfather in lieu of maintenance. The defendants have made the answer that the items of Sangam lands claimed by the plaintiff were given to their ancestor, Krishna Rao absolutely under the deed of 1867, and that since then they had been in the enjoyment as owners thereof. The Civil Judge dismissed the plaintiff's suit finding that the case of the plaintiff to the effect that the lands were given to Krishna Rao for maintenance under the deed of 1867 was unfounded. But on appeal by Shankar Rao (the plaintiff), the High Court reversed this decree construing the deed of 1867 as a deed under which absolute owner-

ship was not transferred to Krishna Rao and that the specified items of Sangam lands were given to him provisionally and conditionally till Krishna Rao obtained possession of the Peta Velapur Mahal lands which were then under a mortgage.

We have examined the deed closely and do not find any warrant for the view taken by the learned Judges on appeal. The deed is Exhibit No. 35, and it is printed at page 63 of the Paper Book. The correctness of the translation is admitted. It was executed by Narsinga Rao of the first branch in favour of Krishna Rao of the last branch, predecessor-in-title of defendants 1 to 3. After reciting that Krishna Rao was entitled to a one-third share in the income appertaining to the Deshmuki rent of the family at Peta Velapur Mahal, it proceeds to say,

".....In lieu of the land of that Mahal and in respect of the cash allowance of the Haqdari rights we have given to you for a 1/3 share of land of this Mahal the following lands from the village of Sangam which is continued with us by Vadilki right (the right of Primogeniture)".

The deed proceeds to set out the items by areas, assessment, and boundaries, and then goes on:

"In all 6 numbers have been given by us to you in lieu of your entire income from the said Mahal. Now, five and half Pavs out of the said land are in your 'Vahiwat' at present and the remaining land was to have been given over to your vahiwat, but we having formerly mortgaged the said village to Ramchandra Pandurang Deshpande, 5 'Pavs' of land is not in your Vahiwat this day. Hence on the expiry of 6 years, the period of the mortgage, you may carry on the entire Vahiwat of the land passed in your favour in writing as aforesaid without any hindrance. We have no claim of inheritance left on the aforesaid land".

The deed concludes with a provision made for the residence of the donee in an open space in the same village. It further states:

".....There are four shops and a wada at the Kasba of Velapur, and a one-third share thereof has been allotted to your share over which we have no

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claim of inheritance left".

It is obvious from this document that the one-third share of Krishna Rao's branch in the Peta Velapur Mahal properties was retained by Narasinga Rao and that in lieu thereof Krishna Rao was given six items of the Sangam properties, the whole of which could not then and there be given over into his possession and management as there was a usufructuary mortgage over a portion of the lands which was to expire after the lapse of six years from that date. The lands referred to as mortgaged are the Sangam lands and not the Peta Velapur Mahal lands as wrongly assumed by the High Court. There is absolutely nothing said about the properties being given for maintenance to Krishna Rao. On the other hand, in two places we find that any right to inheritance was given up. In fact, this case of the plaintiff was given up before the trial Judge. It is true that there was an exchange of properties, but there is nothing to warrant the view of the learned Judges that it was provisional or conditional, and that the Sangam lands were to be returned when the Velapur Mahal properties went into the possession and management of Krishna Rao's branch. To say such an arrangement was implied is to ignore the plain terms of the deed.

The properties now in dispute are the items covered by the deed. They did not form the subject-matter of the two previous litigations. Since 1867, the date of Exhibit No. 35 they have always been in the possession of the defendants' branch as owners. It must also be remembered that the earlier suits of 1925 and 1936 proceeded on the basis that the defendants' branch was the heir to the properties left by the deceased, Yeshwant Rao.

There is no other question which arises for discussion or decision. It follows that the trial Judge was right in holding that the plaintiff's claim to recover possession of the suit properties covered by the deed of 1867 was entirely baseless. The decree of the High Court is reversed and that of the trial Judge is restored with costs throughout payable by the plaintiff to the defendants.