

(2011) 09 GUJ CK 0147

In the Gujarat High Court

Case No : Letters Patent Appeal No. 885 of 2011 in Special Civil Application No. 11391 of 2010

Atulbhai Jagdishchandra Dave

APPELLANT

Vs

Deepaliben Atulbhai Dave and Another

RESPONDENT

Date of Decision : 20-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 226, 227

Citation : (2011) 09 GUJ CK 0147

Hon'ble Judges : A.L. Dave, Acting C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : G.M. Joshi, for the Appellant;

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J.—In this appeal the Appellant - original Petitioner seeks to challenge judgment and order passed by the learned Single Judge dated 22.4.2011 in SCA No. 11391 of 2010, whereby the learned Single Judge rejected the petition confirming order passed by Second Additional Senior Civil Judge and Judicial Magistrate First Class, Bhavnagar, dated 3.8.2010 below Exh.60 in HMP No. 80 of 2005.

2. It is evident that the challenge before the learned Single Judge was to the order passed by a Civil Court in a Hindu Marriage Petition. Learned Single Judge, in exercise of his jurisdiction under Article 227 of the Constitution, refused to grant any relief and rejected the petition. This being the position, present appeal would not be maintainable under Clause 15 of the Letters Patent.

3. We may state that this issue as regards maintainability of appeal in the orders of the present nature is no longer res-integra. In the case of Gustad ji D. Buhariwala v. Nevil B. Buhariwala reported in 2011 (2) GLH 147, the Division Bench of this High Court in paragraphs 56 and 57 have summarised its findings as under:

56. The sum and substance of our discussion and findings recorded in the judgment can be now summarized as under:

(1) When the Parliament has thought fit to restrict powers u/s 115 of the Code with a definite object, then, under such circumstances an order which is not revisable u/s 115 of the Code cannot be challenged by way of filing writ petition under Article-226 of the Constitution invoking the extra-ordinary jurisdiction of the High courts and that too an interlocutory order passed by Civil Courts in a regular suit proceeding.

(2) When remedy for filing the Revision u/s 115 of the CPC has been expressly barred then in such case the petition under Article 227 of the Constitution would lie and not a writ petition under Article 226 of the Constitution of India. If a petition under Article-227 of the Constitution would lie and if the same has been dismissed, then, no appeal under Clause-15 of the Letters Patent would be maintainable. A petition under Article-227 is not a writ petition. No Writ can be issued under Article-227.

(3) Where the statute bans exercise of revisional powers it would require very exceptional circumstances to warrant interference under Article-227 of the Constitution of India since power of superintendence was not made to circumvent statutory law. Jurisdiction under Article-227 cannot be exercised as a cloak of appeal in disguise.

(4) There cannot be any distinction with regard to a proceeding under Article-226/227 and Section 115 of the CPC when it relates to a proceeding arising out of an order of the Civil courts passed in suit proceeding.

(5) Where law provides the provision of Appeal and the same is decided by the judicial authority or where there is a scope for judicial scrutiny by the subordinate at the top, the petition challenging such order would be covered under Article-227 of the Constitution.

(6) Where a petition is filed, both under Articles-226 and 227 of the Constitution, it will have to be considered whether the point raised in the petition arose for adjudication for the first time before the High court. If the challenge in the petition is with respect to the point already adjudicated upon by the subordinate court, then, it will have to be held that the supervisory jurisdiction of the High court was invoked and not the original.

(7) The cause title, averments and the prayers in the petition can be taken into account while deciding whether the petition is one under Article-226 and 227 of the Constitution. This has to be determined on the facts of each case having regard to-

- i) nature and the jurisdiction invoked;
- ii) the averments contained in the petition;
- iii) the reliefs sought; and

iv) most importantly, the true nature of the principal order passed by the learned Single Judge. The true nature of the order passed by the learned Single Judge has to be determined on the basis of true character of the relief granted. By merely labeling the petition under Article-226 and by praying for Writ of Certiorari it cannot be said that the facts justify the party to invoke the extraordinary jurisdiction of the High court under Article-226 of the Constitution of India.

(8) As held by the Supreme Court in the case of Radhey Shyam and Another Vs. Chhabi Nath and Others, orders and proceeding of the Judicial Courts subordinate to the High Court are not amenable to the writ jurisdiction of the High Court under Article-226 of the Constitution, more particularly, when the orders are passed in Suit proceeding in a contest between two private parties.

(9) Writ Petition is a remedy in public law which may be filed by any person but the main Respondent should be either Government, Governmental agency or a State or instrumentalities of the State within the meaning of Article-12. Private individuals cannot be equated with State or instrumentality of the State. All the Respondents in a writ petition cannot be private parties. High Court can issue Writ to any person, but the person against whom writ will be issued must have some statutory or public duty to perform.

(10) In a petition for relief under Article-226 of the Constitution, the Court/Tribunal whose order is impugned in the petition must be made a party to the petition so that the writ sought from the Court can go against the Court/Tribunals, but if the petition is for relief under Article-227 of the Constitution, it is well settled that the Courts/Tribunals whose order impugned in a petition, need not be a party in the writ petition. By entertaining the petition under Article-227 of the Constitution, the High Court exercise its power of superintendence, which is analogous to the revisional jurisdiction.

57. Having considered the entire issue threadbare and also having considered the position of law, we hold that the appeal is not maintainable under Clause 15 of the Letters Patent and on the ground of maintainability the appeal fails and deserves to be dismissed. The appeal is accordingly dismissed with no order as to costs.

4. In this view of the matter, we hold that the present appeal is not maintainable and the same is hereby dismissed with no order as to costs.