

(1986) 07 SHI CK 0013

In the High Court Of Himachal Pradesh

Case No : Civil Miscellaneous Petition (Main) No. 140 of 1986

Municipal Corporation Shimla

APPELLANT

Vs

B.K. Chawla and Another

RESPONDENT

Date of Decision : 04-07-1986

Acts Referred:

Constitution of India, 1950 — Article 227

Excise Tariff Act, 1902 — Section 38, 39

Himachal Pradesh Municipal Corporation (Amendment) Ordinance, 1985 — Section 40

Himachal Pradesh Municipal Corporation Act, 1979 — Section 259, 262, 262(1), 268, 268(2)

Citation : (1986) 15 ILR HP 771

Hon'ble Judges : P.D. Desai, C.J

Bench : Single Bench

Advocate : Kedar Ishwer, for the Appellant;

Final Decision : Dismissed

Judgement

P.D. Desai, C.J.—This is a petition under Article 227 of the Constitution of India praying that the decision rendered on April 2, 1986, by the Additional District Judge (II), Shimla , in Civil Misc. Appeal No. 133-S/14 of 1985 be quashed and set-aside. In order to appreciate points arising for determination in the case, a few facts, which are not in dispute, may be stated at the outset.

2. On April 14, 1982, the Respondent gave a notice in writing of his intention to construct a brick wall on the front side of his house to the petitioner (Municipal Commissioner, Shimla) u/s 259 of the Himachal Pradesh Municipal Corporation Act, 1979 (hereinafter referred to as 'the Act') and seeking sanction for the same. The notice was accompanied by a plan. The Respondent was informed for the first time by a letter dated October 25, 1982 that his application could be entertained only if and when the permission for the said construction is granted by the Town and Country Planning Department. Since the Respondent did not receive any intimation regarding the refusal of sanction within the period prescribed therefore in Section 262 of the Act, he proceeded with the

construction of the wall and completed the same in accordance with the plan under the legitimate belief that the sanction must be deemed to have been accorded to commence and proceed with such construction.

3. On March 28, 1983 the petitioner served a notice upon the Respondent u/s 268 of the Act with regard to the construction of the said wall by treating the same as unauthorised and called upon him to show-cause why, within three days, orders for demolition of the unauthorised construction should not be passed against him. The Respondent sent a reply to the said notice on April 2, 1983 which was received in the office of the petitioner and diarised on April 4, 1983. On May 27, 1983 Anr. notice was issued by the petitioner to the Respondent in which a reference was made to the previous show-cause notice and in which it was further stated that since no reply thereto had been received, the Respondent should attend the office of the petitioner on May 30, 1983 at 11 a.m. to discuss the matter. According to the petitioner, the Respondent appeared, as directed, on May 30, 1983 before him and admitted that the construction in question was unauthorised. The petitioner thereupon ordered that the unauthorised construction be removed and that a notice in that regard be issued to the Respondent. This order is stated to have been passed by the petitioner on the same day by way of an endorsement made at the foot of the second show cause notice. On June 4, 1983 a communication was issued to the Respondent incorporating the substance of the order of the petitioner and directing him to remove the unauthorised construction within three days and advising him that he may prefer an appeal against the said order to the District Judge, Shimla, u/s 268(2) of the Act if he was aggrieved thereby. The Respondent instituted the appeal on June 15, 1983 and the appeal succeeded vide the decision which is under challenge herein.

4. The main challenge levelled against the decision is that the Additional District Judge (II), Shimla, had no jurisdiction to entertain and decide the appeal since the jurisdiction in that regard stood statutorily transferred to and conferred on the Divisional Commissioner, Shimla on the day on which the decision was rendered. In order to appreciate this contention, it is necessary to refer to the relevant statutory provisions.

5. Section 268, sub-section (2) of the Act, which confers the right of appeal, read as follows prior to its amendment:

(2) Any person aggrieved by an order of the Commissioner made under sub-section (1) may prefer an appeal against the order to the Court of the District Judge of the city within the period specified in the order for the demolition of the erection or work to which it relates.

The Himachal Pradesh Municipal Corporation (Amendment) Ordinance, 1985 (hereinafter referred to as 'the Ordinance'), which was promulgated on August 30, 1985 and was published in the Official Gazette on August 31, 1985 amended the aforesaid statutory provision by Section 40 thereof by providing that for the

words the 'Court of the District Judge of the city' occurring in sub-section (2) and for the words 'Court of the District Judge', wherever those words occurred in Section 268, the words 'Divisional Commissioner' should be substituted. The Himachal Pradesh Municipal Corporation (Amendment) Act, 1985 (hereinafter referred to as 'the Amendment Act'), which received the assent of the Governor on January 23, 1986 and was published in the Official Gazette on January 27, 1986, repealed the Ordinance. An identical amendment in Section 268, sub-section (2), was introduced by Section 41 of the Amendment Act. Section 1, sub-section (2), of the Amendment Act provides that the said Act shall come and be always deemed to have come into force on August 31, 1985. The question which arises against the aforesaid background is whether the Additional District Judge (II), Shimla, before whom the appeal had been instituted and who was validly seized of the appeal prior to the amendment of sub-Section (2) of Section 268 of the Act, lost jurisdiction to decide the appeal upon the enactment of the Amendment Act and whether the impugned decision, therefore, suffers from the vice of lack of jurisdiction.

6. The legal position in this regard is well-settled. The leading case on the subject is *Colonial Sugar Refining Company Ltd v. Irving* 1905 A.C. 369 (A). In that case the Collector of Customs, acting under the statute called the Excise Tariff Act, 1902, required the appellants to pay a certain sum by way of excise duty on a specified quantity of sugar. The appellants disputed the demand. However, they deposited the money with the Collector and then brought an action in the Supreme Court of Queensland against the Collector for recovering the sum so deposited. The writ in the said action was issued on October 25, 1902. At the date of the institution of the action, the Order in Council of June 30, 1860 gave a right of appeal to His Majesty in Council from the judgment of the Supreme Court. A special case having been stated for the opinion of the Full Court, that Court on September 4, 1903 gave judgment for the Collector. In the meantime, the Judiciary Act, 1903 had been passed and it received the royal assent on August 25, 1903, that is to say, about 10 days before the judgment was delivered by the Supreme Court. By Section 38 of the said Act, the jurisdiction of the High Court of Australia in certain specified matters was made exclusive of the jurisdiction of the several Courts of the States whereas by Section 39 it was made exclusive in all other matters except as therein provided. Subsection (2) of Section 39 provided that the several Courts of the States would be invested with Federal jurisdiction in all matters above mentioned except those specified in Section 38, subject to certain conditions and restrictions, one of which was that every decision of a Court of a State from which, at the establishment of the Commonwealth, an appeal lay to the Queen in Council, should be final and conclusive except so far as an appeal might be brought to the High Court. The consequence of the enactment of that Act was that Her Majesty in Council ceased to be a Court of Appeal from the decision of the Supreme Court and the only appeal from the Supreme Court under that Act lay to the High Court of Australia. The Supreme Court of Queensland having granted leave to the appellants under

the Order in Council of 1860 the appellants filed the appeal in the Privy Council. The Respondent filed a petition before the Privy Council praying that the appeal might be dismissed with costs on the ground that the right of appeal to His Majesty in Council given by the Order in Council of June 30, 1860, under which the leave had been granted, had been taken away by the Judiciary Act, 1903 and that the only appeal from a decision of the Supreme Court of Queensland lay to the High Court of Australia. On behalf of the appellants it was contended that the provisions of the Judiciary Act, 1903, on which the Respondent relied, were not retrospective so as to defeat a right in existence at the time when the Act received the royal assent. Their Lordships of the Privy Council dismissed the Respondent's petition and observed as follows:

As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And, therefore, the only question is: Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suit or in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

(Underlining supplied)

7. The proposition of law so succinctly stated is firmly established in English jurisprudence. The decision has been accepted as sound and cited with approval in leading text books. It has been followed and applied in numerous decisions not only in England but also in India [See for example *Delhi Cloth and General Mills Co. Ltd. v. Income Tax Commissioner, Delhi*, 54 Ind. App. 421, *Nana Aba v. Sheku Andu* ILR 32 Bom. 337, *Daivanayaga Reddiyar v. Renukambal Ammal* AIR 1927 Mad 977 (Full Bench), *Bala Prasad and Others Vs. Shyam Behari Lal and Others*, *Sadar Ali and Others Vs. Doliluddin Ostagar*, and *Radhakishan Laxminarayan v. Shridhar Ramchandra* AIR 1950 Nag 177 (Full Bench). The correctness or authority of the decision has not been questioned anywhere.

8. The decision was cited with approval also in *Ganpat Rai Hiralal and Another Vs. Aggarwal Chamber of Commerce Ltd.*, . and in *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, . In the latter case, after considering several decisions, the following principles were culled out as applicable in such or similar cases:

(1) The legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(2) The right of appeal is not a mere matter of procedure but is a substantive right.

(3) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(4) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(5) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

9. In *Jose Da Costa and Another Vs. Bascora Sadasiva Sinai Narcornim and Others*, the same principle was reiterated in the following words:

Before ascertaining the effect of the enactments aforesaid passed by the Central Legislature on pending suits or appeals, it would be appropriate to bear in mind two well-established principles. The first is that ?while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, 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? (See: AIR 1927 242 (Privy Council) . The second is that a right of appeal being a substantive right the institution of a suit carries with it the implication that all successive appeals available under the law then in force would be preserved to the parties to the suit throughout the rest of the career of the suit. There are two exceptions to the application of this rule, viz. (1) when by competent enactment such right of appeal is taken away expressly or impliedly with retrospective effect and (2) when the Court to which appeal lay at the commencement of the suit stands abolished (See: *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, .

10. Now, in the present case, the lis or quasi-lis between the parties arose upon the issue of a notice u/s 268 of the Act on March 28, 1983. An appeal under sub-Section (2) of Section 268 to the Court of the District Judge against the order which may be ultimately made in pursuance of the said notice was a step intrinsically connected with the issue of such notice and it was a vested right which had accrued under the law prevailing at the date of the commencement of

the proceeding. Unless it is shown that the said vested right of appeal to the forum or tribunal prescribed by the law then applicable is taken away by the Amendment Act, expressly or by necessary intendment, it must be regarded as having been preserved till the rest of the career of the proceeding although it may be actually exercised when the adverse decision is arrived at. In the present case, the right of the Respondent to prefer an appeal to the Court of the District Judge was not only vested in him at the commencement of the proceeding but it was also actually exercised by him by the institution of the appeal on June 15, 1983. The Amendment Act came into force thereafter, on and with effect from August 31, 1985, when the Additional District Judge (II), Shimla, was already seized of the appeal. It is not the case of the petitioner and, in my opinion, rightly, that the Amendment Act took away the said vested right retrospectively by express enactment or necessary intendment. Under the circumstances, the Additional District Judge (II), Shimla, was not deprived of the jurisdiction to decide the appeal and his decision is not open to challenge on the ground that it suffers from the vice of lack of jurisdiction.

11. On merits there is very little that can be said in favour of the petitioner. As earlier pointed out, the application for sanction for the construction of the wall was made by the Respondent u/s 259 of the Act on April 14, 1982 annexing thereto the plan of the proposed construction. The petitioner did not refuse sanction for the construction within the statutory time limit prescribed in Section 262, sub-Section (1), and, therefore, the Respondent was entitled to proceed on the assumption that the sanction applied for was duly accorded and he was free to commence and proceed with the construction of the wall in accordance with the plan submitted by him. It is not in dispute that the construction of the wall, which was subsequently found by the petitioner to be unauthorised, is in accord and conformity with the plan. Under such circumstances, there was hardly any justification for the initiation of proceedings u/s 268 and the exercise of the power under the said Section by the petitioner is wholly without power, authority and jurisdiction.

12. The Additional District Judge (II), Shimla, has made certain observations in the course of his decision against the conduct of the petitioner in the course of the proceeding giving rise to this petition. The Court has not gone into that aspect of the matter and does not propose to express any opinion on the justification or otherwise of those observations.

13. For the foregoing reasons, the petition is summarily rejected.