

(2020) 08 GUJ CK 0318

In the Gujarat High Court

Case No : R/Letters Patent Appeal No. 242 Of 2020 In R/Criminal Revision
Application No. 1711 Of 2019

Rakesh Josephbhai Macwan Thro Ravikant Josephbhai Macwan **APPELLANT**
Vs

State Of Gujarat **RESPONDENT**

Date of Decision : 31-08-2020

Acts Referred:

Constitution Of India, 1950 — Article 225, 226, 227, 228
Gujarat High Court Rules, 1993 — Rule 1, 2
Code Of Civil Procedure, 1908 — Section 104, 115, 144, Order 43 Rule 1
Code Of Criminal Procedure, 1973 — Section 125(4), 341(i), 360, 397, 401, 482
Government Of India Act, 1935 — Section 107, 108
Bombay Prohibition Act, 1949 — Section 93
Bombay Children Act, 1948 — Section 94
Provisional Small Causes Courts Act, 1887 — Section 25

Citation : (2020) 08 GUJ CK 0318

Hon'ble Judges : Vikram Nath CJ; J.B.Pardiwala, J

Bench : Division Bench

Advocate : Girish M Das, Dharmesh Devnani

Final Decision : Dismissed

Judgement

J.B.Pardiwala, J

1 This appeal seeking to invoke Clause 15 of the Letters Patent Act is at the instance of the original applicant before the learned Single Judge in a Criminal Revision Application and is directed against an interim order dated 28th February 2020 passed by a learned Single Judge in the Criminal Revision Application No.1711 of 2019.

2 We need not delve much into the facts of this litigation as this appeal on the face of it is not maintainable in law. The order impugned passed by the learned Single Judge, is in exercise of his revisional jurisdiction under Section 401 read with Section 397 of the Code of Criminal Procedure, 1973. The same reads thus:

"Present applicant has challenged the impugned judgment and order dated 6th July 2018 passed by learned Principal Judge, Family Court, Vadodara in Criminal Misc. Application No. 559 of 2016 as well as consequential order dated 26.11.2019 passed by the Judge, Family Court, Court No. 3, Vadodara in Criminal Misc. Application No. 972 of 2018.

Heard learned advocate for the applicant.

It was submitted by learned advocate for the applicant that the respondent-wife is not entitled to claim maintenance amount from the applicant. Learned Family Court has erroneously overlooked the provisions of Section 125(4) of the Code of Criminal Procedure and granted maintenance of Rs. 4,000/- per month. It is further submitted that without any reason, the respondent-wife is not ready and willing to return back to her matrimonial home, as per her cross examination made before the Family Court. That, she voluntarily left the matrimonial home and therefore, she is not entitled to claim any maintenance. That, the applicant has deposited Rs. 75,000/- before the Family Court at Vadodara.

Issue requires consideration.

Rule returnable on 13th March 2020. Learned APP waives service of notice of rule for and on behalf of the respondent-State."

3 The plain reading of the aforesaid order passed by the learned Single Judge would indicate that the dispute is matrimonial in nature and something to do with maintenance.

4 Be that as it may, any order passed by a learned Single Judge of the High Court, in exercise of criminal jurisdiction, cannot be challenged by way of an appeal under Clause 15 of the Letters Patent Act. Clause 15 of the Letters Patent Act reads thus:

"15. Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction -- And we do further ordain that an appeal shall lie to the said High Court of Judicature at (Madras) (Bombay), Fort William in Bengal from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, on or after the first day of February 1929 in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate

jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to us. Our heirs or successors in Our or Their Privy Council, as hereinafter provided."

5 The issue otherwise also is no longer res integra in view of the Full Bench decision of this High Court in the case of Nitin Shantilal Bhagat and other vs. State of Gujarat [Letters Patent Appeal No.335 of 2011 decided on 10th May 2011], wherein the Full Bench held as under:

"29. Clause 15, if broken up into its component parts, its operative form reads as follows :

An appeal shall lie to the High Court of Judicature at Bombay - (1) from a judgment (2) of one Judge of the High Court (3) pursuant to S. 108 of the Government of India Act of 1915 (4) not being - (a) a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court, (b) an order made in the exercise of revisional jurisdiction, (c) a sentence or order passed or made in the exercise of the power of superintendence under the provisions of S. 107 of the Government of India Act of 1915, or (d) a sentence or order passed or made in the exercise of criminal jurisdiction.

30. 1985 Letters Patent constituting Bombay High Court has been broken into two different and distinct jurisdictions, viz. 'civil jurisdiction' and 'criminal jurisdiction'.

Clause 11 to 18 have been grouped together under the caption 'civil jurisdiction', as sub-divided into different civil jurisdictions and shown hereunder:-

- i) ordinary original civil jurisdiction (clause 11),
- ii) original civil jurisdiction as to suit (clause 12),
- iii) extraordinary original civil jurisdiction (clause 13),
- iv) civil appellate jurisdiction (clause 15),
- v) jurisdiction as to infants and lunatics (civil) (clause 17).

31. Similarly, clause 22 to 29 have been grouped together under the caption 'criminal jurisdiction', which is subdivided as follows:-

- i) ordinary original criminal jurisdiction (clause 22),
- ii) extraordinary original criminal jurisdiction (clause 24),
- iii) appellate jurisdiction in an appeal from criminal courts (clause 27), iv) reference and revisional jurisdiction of criminal trials (clause 28).

32. From the aforesaid fact, it would be evident that while Letters Patent was issued constituting the Bombay High Court, the civil jurisdictions and criminal jurisdictions were mentioned thereunder.

33. When the Government of India Act, 1915 was enacted, as amended in 1916, the jurisdiction of the High Courts was shown under Sec.106 as under:

"106. (1) The several high courts are courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction, in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the court, and power to make rules for regulating the practice of the court, as are vested in them by letters patent, and, subject to the provisions of any such letters patent, all such jurisdictions, powers and authority as are vested in those courts respectively at the commencement of this Act. (1a)

The letters patent establishing or vesting jurisdiction, powers or authority in a high court may be amended from time to time by His Majesty by further letters patent. (2) The high courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

34. Thereunder, the exercise of jurisdiction by Single Judge and Division Courts was separated u/Sec.108 as quoted hereunder:-

"108. (1) Each high court may by its own rules provide, as it thinks fit, for the exercise, by one or more judges, or by division courts constituted by two or more judges, of the high court, of the original and appellate jurisdiction vested in the court. (2) The chief justice of each high court shall determine what judge in each case is to sit alone, and what judges of the court, whether with or without the chief justice, are to constitute the several division courts."

35. The aforesaid provisions stand continued by virtue of provision under Article 225 of the Constitution of India with amendments, which reads as follows:-

225. Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply

to the exercise of such jurisdiction."

In exercise of power conferred under the aforesaid provisions, in supersession of Bombay High Court Appellate Side Rules, 1960, the Gujarat High Court Rules, 1993 were enacted by the Gujarat High Court, whereunder the jurisdiction ordinarily required to be exercised by Division court of two Judges, as evident from Rule 1 and quoted hereunder:

"1. Jurisdiction ordinarily exercised by Division Court of two Judges. - The Civil and Criminal Jurisdiction of the Court shall, except in cases where it is otherwise provided for by any law in force or by these rules, be exercised by a Division Court consisting of two or more Judges."

36. From the aforesaid Rule 1, it will be evident that Gujarat High Court also separated civil and criminal jurisdiction for the purpose of hearing by Division Courts consisting of two or more Judges.

37. The matters to be disposed of by a Single Judge are prescribed under Rule 2, wherein Single Judges have been empowered to dispose of certain nature of cases of civil nature and certain nature of cases of criminal jurisdiction, relevant portion of which is quoted hereunder:

"2. Matters to be disposed of by a Single Judge.- Save as otherwise expressly provided by any law in force or by these rules, a Single Judge may dispose of the following matters: I. Civil (1) xx xx (2) Appeals under Special or Local Acts where the value of the subject matter before the trial Court or Tribunal or other authority does not exceed Rs.10,00,000/- or is incapable of valuation.

(3) Appeals in proceedings under the Guardians and Wards Act, 1890 and the Hindu Minority and Guardianship Act, 1956.

(4) Appeals under Section 144, Civil Procedure Code, 1908.

(5) Appeals under the Hindu Marriage Act and other Matrimonial enactments.

(6) Appeals from Appellate Decrees.

(7) Appeals from orders under Section 104 and Order XLIII, Rule 1 of the Civil Procedure Code, 1908.

(8) Appeals relating exclusively to costs or instalments.

(9) Appeals arising out of the Land Acquisition References, the value of the subject matter of which does not exceed Rs.10,00,000/- except where the valuation in an allied matter to be heard with the former exceeds Rs.10,00,000/-.

(10) Applications under Articles 226 of the Constitution of India except:- (1) those where vires of any provision of a statute are challenged. (2) those for issue of writs of Habeas Corpus and also those for issue of appropriate directions order or writs in respect of orders of deportation.

(3) those where awards under the Industrial Disputes Act (India Act XIV) of 1947) concerning revision of wages or wage structure of a class or classes of an employees in an industry are challenged. (4) those arising under the Acts specified below:- (a) The Customs Act (India Act L II of 1962). (b) The Central Excises & Salt Act (Act I of 1944). (c) Taxing statutes such as the Income Tax Act (India Act No. XLIII of 1961) The Wealth Tax Act, 1957 (India Act No. 27 of 1957) the Gift Tax Act, 1958 (India Act No. 18 of 1958). The Gujarat Sales Tax Act, 1969 (Act No.1 of 1970) etc. (d) The Land Acquisition Act (Act 1 of 1894). (e) The Import and Export Control Act (Act XVIII of 1947).

(11) Matters Pertaining to Preventive Detention Laws.

(12) Applications under Article 227 of the Constitution of India except those arising from the decisions under the Industrial Disputes Act (India Act XLV of 1947), concerning revision of wages or wage structure of a class or classes of the employees in an Industry. The Customs Act (India Act LII of 1962). The Central Excise and Salt Act (Act I of 1944) and Taxing Statutes.

(13) Applications for the exercise of the Court's revisional jurisdiction under section 115 of the Civil Procedure Code, 1908, or under Section 25 of the Provisional Small Causes Courts Act, 1887 or under any Special or Local Law.

(14) to (25) xx xx

II. Criminal

(1) Appeals against conviction in which only a sentence of fine or imprisonment for a period not exceeding seven years with or without fine has been imposed except (i) where a notice of enhancement of sentence has been issued where the accused has been sentenced for a term of 2 years or more and (ii) where a notice has been issued to show cause why his conviction should not be altered to one of any offence punishable with death or imprisonment for life.

(2) appeals or applications against the order of acquittal by Metropolitan Magistrate or Chief Judicial Magistrate or Judicial Magistrate or by a Sessions Court in exercise of its appellate powers.

(3) Appeals against orders relating to disposal of property and orders directing payments of compensation expenses and/or fees.

(4) Appeals against order under Section 360, Criminal Procedure Code, 1973, Section 93 of the Bombay Prohibition Act, 1949, Bombay Probation of Offenders Act, 1938, or any other enactment or provision relating to probation of offenders.

(5) Appeals under Section 94 of the Bombay Children Act, 1948 and under Section 93 of the Saurashtra Act, 1954.

(6) Appeals under Section 341(i) of the Criminal Procedure Code, 1973.

(7) Appeals or Revision Applications against orders passed under Chapter VIII Code of Criminal Procedure, 1973.

(8) Applications for the exercise of the Court's Revisional Jurisdiction under section 401 of the Criminal Procedure Code, 1973 and the disposal of cases of which record is called for an examination of Criminal Returns or otherwise.

(9) Applications for the exercise of the Court's revisional jurisdiction under any other statute.

(10) Applications under Section 482 of the Criminal Procedure Code, 1973.

(11) All applications (except applications under Article 228 of the Constitution of India) for transfer of cases, Appeals or other proceedings pending for trial or disposal in any Criminal Court subordinate to the High Court or over which the High Court has power of superintendence, to the High Court Superintendence of the High Court.

(11-A) Applications under Article 227 of the Constitution of India.

(11-B) Applications under Article 226 of the Constitution of India except those specified in sub-rule (10) of part 1 Civil or rule 2.

(12) Applications for bail or stay not arising out of or relating to any appeal, except appeals referred to in clause (i).

(13) Applications for excuse of delay in or extension of time for making deposit for transcript record in Criminal Appeals to the Supreme Court.

(14) All miscellaneous applications including applications for bail or stay arising in or out of or relating to matters falling under this rule.

(15) All Criminal proceedings transferred or withdrawn to this High Court from subordinate Courts except proceedings withdrawn under Article 228 of the Constitution.

(16) All applications or proceedings incidental to or arising out of or relating to applications for leave to appeal to the Supreme Court or of appeals to the Supreme Court after the grant of leave to appeal by the High Court or of Special Leave by the Supreme Court except cancellation of certificate of fitness granted by the High Court.

(17) Parol, Furlough, Jail Petitions and Exterment Matters."

38. Thus, from Gujarat High Court Rules, it will be evident that when Single Judge exercises power under Article 226, i.e. extraordinary jurisdiction, such power is exercised either under civil jurisdiction or criminal jurisdiction.

39. The writ petition under civil jurisdiction in the Gujarat High Court are registered as Special Civil Application whereas writ petition under criminal jurisdiction is registered as Special Criminal Application. In the case of State of Uttar Pradesh vs. Mukhtar Singh reported in AIR 1957 All 505 while considering the nature of proceedings under Article 226, one of the Hon'ble Judges, Beg J. held that whether a proceeding civil or not depends on the nature of the subject-

matter of the proceeding and its object, and not on the mode adopted or the forum provided for the enforcement of the right. A proceeding deals with right of a civil nature and is otherwise civil, ceases to be so just because a party chooses to resort to Article 226 of the Constitution. The fact that a right has been created by the Constitution or the forum for its enforcement prescribed by it should not make any difference, if the subject-matter of the right sought to be agitated in the proceedings is itself of a civil nature. On the other hand, a proceeding under Article 227 of a writ is not a civil proceeding. There are other kinds of jurisdictions and there is no foundation for the view that the civil and criminal jurisdiction exhaust the list of jurisdiction that can be conferred upon a High Court. According to Desai J., Article 225 retains the civil, criminal, testamentary, intestate and matrimonial jurisdictions conferred upon the High Courts under the Letters Patent and Article 226 confers additional jurisdiction. In the case of *S.A.L. Narayan Row vs. Ishwarlal Bhagwandas* reported in AIR 1965 SC 1818, the Supreme Court observed that a proceeding does not cease to be a civil when relief is claimed for enforcement of a civil right, merely because the proceeding has been tried as civil suit. Therefore, 'civil proceeding' cannot be restricted to those proceedings which arose out of civil suits or proceedings which are tried as civil suits.

40. Taking queue from the aforesaid decision of Supreme Court in *Narayan Row* (supra), Bombay High Court in *M/s. Nagpur Cable Operators' Association* (supra) held that if a writ petition under Article 226 of the Constitution arise out of or relates to proceeding in which, if carried to its conclusion, ultimately it may result in sentence of death or by way of imprisonment, fine or forfeiture of property, then such writ application under Article 226 of the Constitution of India should be treated as a criminal writ petition and styled as such.

41. Similarly, petition under Article 226 of the Constitution of India for issuance of a writ of Habeas Corpus in case of detention and for issue of appropriate directions, orders or writs in respect of orders of deportation, in their very nature, such petitions should be styled as a criminal writ petitions.

42. The aforesaid fact has been noticed by the Gujarat High Court while framing the Gujarat High Court Rules, 1993, as evident from Rule 1 and 2 quoted above.

43. In view of the provisions of law as cited above and the decisions of Supreme Court and other High Courts, we hold that the question 'whether an order passed by learned Single Judge in a writ petition under Article 226 of the Constitution of India is a proceeding under civil jurisdiction or criminal jurisdiction' can be determined by taking into consideration the nature of proceeding and keeping in mind the following principles:-

(i) If the relief asked for is against exercise of power under criminal law or the proceeding would be a criminal proceeding, or the proceeding if carried to its conclusion ultimately may result in sentence of death or by way of imprisonment or fine or forfeiture of property and those which have been specifically provided

as a writ petition under criminal jurisdiction under clause (2) of Part II of Gujarat High Court Rules 1993, such writ petitions should be treated a proceeding under criminal jurisdiction. In such case, the appeal under clause 15 of Letters Patent against an order passed by learned Single Judge in a writ petition under Article 226 is not maintainable.

(ii) on the other hand, if the nature of relief as sought for under Article 226 is that of a civil proceeding, and a person seeks to enforce by appropriate relief which alleged to have infringed his civil rights against any person or State and which if proved would result in declaration, express or implied, of right, claim and relief, such as payment of debt, damage, compensation, delivery of specific property, enforcement of personal right, determination of status, etc., such proceedings and those which have been shown in Part I of Rule 2 of the Gujarat High Court Rules, 1993, are to be treated as civil proceedings under civil jurisdiction and an appeal under clause 15 of the Letters Patent preferred against an order of learned Single Judge is maintainable.

44. In the present cases in hand, we have seen that in one case the appellants have been convicted by learned Chief Metropolitan Magistrate, Ahmedabad, by judgment dated 12th May 2008 passed in Criminal Case No. 368 of 1996 pertaining to offence punishable under the provisions of Drugs and Cosmetics Act, 1940. In the other case, the appellants have been punished by the learned Chief Metropolitan Magistrate, Ahmedabad, in Criminal Case No. 126 of 1997. The offences punishable under the provisions of the Drugs and Cosmetics Act, 1940, having been proved against the appellants, learned Single Judge has affirmed the guilt as proved, and merely remitted the matter for determination of quantum of punishment after giving an opportunity of hearing of the case. Those being criminal proceedings, as per High Court Rules, the appellants rightly preferred the writ petitions under Article 226 of the Constitution of India under criminal jurisdiction and both the cases were registered as Special Criminal Applications. Thus, in both the cases, the proceedings having been finally culminated into punishment in criminal proceedings, we hold that the appeals under clause 15 against both the orders passed by the learned Single Judge are not maintainable. They are accordingly dismissed."

6 In view of the aforesaid, this appeal fails and is hereby dismissed as not maintainable in law. It goes without saying that it shall be open for the learned counsel appearing for the appellant to request the learned Single Judge to take up the Criminal Revision Application No.1711 of 2019 for hearing as the applicant (husband) is in jail on account of failure to deposit the amount towards maintenance.