
(1989) 07 BOM CK 0006

In the Bombay High Court

Case No : Letters Patent Appeals No's. 89. 79 and 7 of 1988

Sushilabai Laxminarayan Mudliyar and others

APPELLANT

Vs

Nihalchand Waghajibhai Shaha and others

RESPONDENT

Date of Decision : 18-07-1989

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1989) MhLj 695

Hon'ble Judges : C. Mookerjee, C.J.;V.A. Mohta, J;C.S. Dharmadhikari, J

Bench : Full Bench

Advocate : R.B. Pendharkar and J.T. Gilda in L.P.A. No. 89 of 1988, P.G. Palshikar, in L.P.A. No. 79 of 1988, C.S. Kaptan and B.A. Udhoji in L.P.A. No. 7 of 1988, for the Appellant; J.N. Chandurkar, No appearance for respondent No. 3, A.S. Bobde, Advocate-General and M.P. Badar, Government Pleader For respondent No. 4, A.S. Bobde, Advocate-General and M.P. Badar, Government Pleader in L.P.A. No. 79 of 1988 and J.N. Chandurkar in L.P.A. No. 7 of 1988, for the Respondent

Judgement

C. Mookerjee, C.J.—Mohta and Ghodeswar, JJ. have made this reference to the Full Bench for the correct interpretation of the law laid down by the Supreme Court in the case of Umaji Keshao Meshram and Others Vs. Radhikabai and Another, . The Supreme Court in the said reported decision had elaborately dealt with the point whether Letters Patent Appeals would be maintainable against judgments of learned Single Judges in Petitions under Article 227 read with Article 226 of the Constitution. According to the learned referring Judges, upon question of true interpretation of the decision in Umaji's case (supra), there was apparent conflict between the opinion expressed by a Division Benches of this Court in the case of Surekhabai Amrut Asare vs. Motilal Prabhudayal Sharma, 1987 Mh.L.J. 610 and the opinion expressed by other Division Benches in the cases of (1) Pushpabai Anandji Gala vs. Sukumar Jinnappa Bhore, 1988 Mh.L.J. 765 and (2) Jaitunbi vs. Smt. Malimabi, L. P. As. Nos. 14 of 1988 and 111 of 1988 decided on 21st December 1988.

2. In view of the Special Bench decision of this Court in the case of State of Maharashtra vs. Kusum wd/o Charudutta and ors., 1981 Mh.L.J. 93 and the Supreme Court decision in the case of Umaji Keshao Meshram and ors. vs. Radhikabai Anandrao Banapurkar and anr. (supra), it is now settled law that while an appeal under clause 15 of Letters Patent would be maintainable against a judgment of a Single Judge passed on an application under Article 226 of the Constitution, no such intra Court appeal lies against a judgment of a Single Judge made in exercise of powers of superintendence under Article 227 of the Constitution. The jurisdiction under Article 227 of the Constitution has been described as revisional or supervisory.

3. The Rule 18, Chapter XVII of the Appellate Side Rules of this Court provides inter alia that applications under Article 226 or under Article 227 of the Constitution (or applications styled as applications under Article 227 of the Constitution read with Article 226 of the Constitution) arising out of orders or decrees mentioned in clauses (1) to (14) of the Rule 18 shall be heard and finally disposed of by a Single Judge appointed by the Chief Justice. Madon, J. (as he then was) had delivered the judgment of the Special Bench in the case of State of Maharashtra vs. Kusum wd/o Charudutta and ors. (supra). The same learned Judge who in the meantime had been elevated to the Supreme Court had pronounced judgment of the Supreme Court in the case of Umaji Keshao Meshram and ors. vs. Radhikabai Anandrao Banapurkar and anr. (supra). In spite of elaborate judgments delivered in these two reported cases, with respect, in applying the ratio to facts of particular cases, scope for difference in judicial views has persisted. In a certain measure, this is due to the fact that the Rule 18 of Chapter XVII recognises right to file a combined application under two Articles of the Constitution and while an order passed by a learned Single Judge under Article 226 is appealable under clause 15, appeal under clause 15 against order passed under Article 227 by a learned Single Judge does not lie. In each individual appeal against the judgment passed upon a writ application by a learned Single Judge in the light of the law laid down in these two reported cases, the Division Bench is required to determine with reference to the facts of each case under which particular jurisdiction the learned Single Judge had entertained and disposed of the application. On pages 188 and 189 of his judgment in Special Bench case of State of Maharashtra vs. Kusum wd/o Charudatta (supra), Madon, J. had set out his conclusions on this point. In Umaji's case (supra) the same learned Judge at pages 837-38 of Supreme Court Reports had summed up the legal position as follows :

Petitions are at times filed both under Articles 226 and 227 of the Constitution. The case of Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, , before this Court was of such a type. Rule 18 provides that where such petitions are filed against orders of the tribunals or authorities specified in Rule 18 of Chapter XVII of the Appellate Side Rules or against decrees or orders of courts specified in that Rule, they shall be heard and finally disposed of by a Single Judge. The question is whether an appeal would lie from the decision of the Single Judge in

such a case. In our opinion, where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these Articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the Court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the Court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. Such was the view taken by the Allahabad High Court in *Aidal Singh and Others Vs. Karan Singh and Others*, and by the Punjab High Court in *Raj Kishan Jain Vs. Tulsi Dass etc.*, and *Barham Dutt and others vs. Peoples' Co-operative Transport Society Ltd., New Delhi and others*, and we are in agreement with it.

These statements of law in *Umaji's case (supra)* have been reaffirmed by the Supreme Court in their recent unreported judgment in Civil Appeal No. 520 of 1989 (*The Ratnagiri District Central Co-operative Bank Ltd. vs. Dinkar Kashinath Watve and others*) delivered on January 27, 1989. After quoting the aforesaid passage from their earlier decision in *Umaji's case (supra)*, the Supreme Court held that the relief granted by a Single Judge of this Court in an application filed both under Articles 227 and 226 of the Constitution clearly indicated that he was exercising jurisdiction under Article 226 and not under Article 227 of the Constitution. In that view of the matter, the Supreme Court reversed the judgment dated 28th April 1988 of *Jahagirdar and Puranik, JJ.* dismissing as not maintainable a Letters Patent Appeal preferred against a judgment of Single Judge upon an application under Article 227 read with Article 226 of the Constitution. The said Letters Patent Appeal was directed to be heard on merits.

4. The aforesaid two Supreme Court decisions do not, however, lay down that an appeal under clause 15 would lie as a matter of course against every judgment passed by a learned Single Judge upon an application styled as one under Article 227 read with Article 226 of the Constitution. In other words, such intra Court appeals would lie only against those judgments which satisfy the tests indicated in the Supreme Court decision in *Umaji's case (supra)*.

5. According to the Supreme Court decision in *Umaji's case (supra)* which was affirmed and followed in the case of *The Ratnagiri District Central Co-operative Bank Ltd. (supra)*, for determining the question of maintainability of an appeal under clause 15 preferred against the Single Judge's judgment upon an application under Articles 227 and 226 of the Constitution, tests to be applied are :

(1) Whether facts of the case justify filing an application either under Article 226 or Article 227 of the Constitution?

(2) Whether "the substantial part of the order" of the learned Single Judge was passed under Article 226 of the Constitution?

(3) Ancillary reliefs granted were not relevant for the purpose of deciding the question of maintainability of an appeal under Clause 15 of Letters Patent?

The expression "facts justify" appearing in the above quoted passage of the judgment in Umaji's case (supra) connotes that the facts of the particular case are such that application either under Article 226 or under Article 227 can be legitimately filed. In other words, upon the facts alleged, application either under Article 226 or under Article 227 of the Constitution could be entertained by the learned Single Judge. In case a tribunal or a Court situated within the territorial jurisdiction of the High Court commits a jurisdictional error, the High Court may interfere either by exercising its supervisory powers under Article 227 or by issuing writs in the nature of certiorari or prohibition as might be appropriate. When a combined application under Article 227 read with Article 226 of the Constitution is filed, complaining of a jurisdictional error by a Court or a tribunal, which is subject to the High Court's superintendence, ordinarily it would be more appropriate to deal with the matter by exercising this Court's powers under Article 227 and not by invoking its extraordinary and discretionary original jurisdiction under Article 226 of the Constitution. Because in case adequate remedy is available under the general law of the land, this Court in its discretion may not invoke its jurisdiction under Article 226 of the Constitution. Thus in case a tribunal or Court acts (1) without jurisdiction, (2) in excess of jurisdiction, (3) fails to exercise a jurisdiction vested in it, (4) violates principles of natural justice, (5) commits any error apparent on the face of the record, etc., the learned Single Judge has undoubtedly a discretion whether he would exercise powers under Article 226 or under Article 227 of the Constitution or whether he would act under both the Articles. In order to decide whether the judgment passed by the learned Single Judge upon an application under Article 226 or 227 would be appealable under Clause 15, the Appellate Bench may look into the substance of the order and ascertain what particular jurisdiction the learned Single Judge has in fact exercised. When a writ petition challenges vires of the statute under which the subordinate Court or tribunal in question had been set up, Article 226 and not Article 227 is the appropriate provision to be applied. When a writ application is filed for enforcement of a right guaranteed by Part III of the Constitution, the Single Judge may deal with the matter under his jurisdiction under Article 226 of the Constitution.

6. Even when in the cause title of an application both Article 226 and Article 227 of the Constitution have been mentioned, the learned Single Judge is at liberty to decide, according to facts of each particular case, whether the said application ought to be dealt with only under Article 226 or under Article 227 read with Article 226 of the Constitution. For determining the question of maintainability of an appeal against such a judgment of the Single Judge the Division Bench has to find out whether in substance the judgment has been passed by the learned Single Judge in exercise of the jurisdiction under Article 226 of the Constitution. In the event in passing his judgment on an application which had mentioned in its cause title both Articles 226 and 227, the Single Judge has in fact invoked

only his supervisory powers under Article 227, the appeal under Clause 15 would not lie. The clause 15 of the Letters Patent expressly bars appeals against orders of Single Judges passed under revisional or supervisory powers. Even when the learned Single Judge's order has been passed under both the Articles, for deciding the maintainability against such an order what would be relevant is the principal or main relief granted by the judgment passed by the learned Single Judge and not the ancillary directions given by him. The expression "ancillary" means, in the context, incidental or consequential to the main part of the order.

7. Thus, the determining factor is the real nature of the principal order passed by the Single Judge which is appealed against and neither mentioning in the cause title of the application of both the Articles nor the granting of ancillary orders thereupon made by a learned Single Judge would be relevant. Thus, in each case, the Division Bench may consider the substance of the judgment under appeal to ascertain whether the Single Judge has mainly or principally exercised in the matter his jurisdiction under Article 226 or under Article 227. In the event in his judgment the learned Single Judge himself had mentioned the particular Article of the Constitution under which he was passing his judgment, in an appeal under Clause 15 against such a judgment it may not be necessary for the Appellate Bench to elaborately examine the question of its maintainability. When without mentioning the particular Article the learned Single Judge decides on merits the application, in order to decide the question of maintainability of an appeal against such a judgment, the Division Bench might examine the relief granted by the learned Single Judge. When more than one relief are granted by the learned Single Judge, for maintainability of an appeal, the determination would be the main and not the ancillary relief. When a combined application under Articles 226 and 227 of the Constitution is summarily dismissed without reasons, the Appeal Court may consider whether the facts alleged warranted filing of the application under Article 226 or under Article 227 of the Constitution.

8. Now that in their recent decision in Civil Appeal No. 520 of 1989 (The Ratnagiri District Central Co-operative Bank Limited vs. Dinkar Kashinath Waive and others) (supra) the Supreme Court has clarified the law on the subject laid down by their earlier decision in Umaji Keshao Meshram and ors. vs. Radhikabai wd/o Anandrao Banapurkar and anr. (supra), it is no longer necessary for us to elaborately deal with the different decisions of this Court regarding the scope and effect of the Supreme Court decision in Umaji's case (supra). We need not also decide whether upon the particular facts of any of these decisions, a different view could have been taken about the real nature of the orders appealed against and consequently regarding maintainability of the said appeals. We note that at least in some of these cases the contents of the writ petitions and reliefs prayed were examined in order to decide the question of maintainability of the Letters Patent Appeal vide Surekhabai Amrut Asare vs. Motilal (supra). In our view, the correct approach would be to consider not only the contents of the petition and the nature of the reliefs prayed for but also to examine the substance of the judgment passed by the learned Single Judge and the relief, if any, granted by

him, in order to determine whether the appeal under clause 15 of the Letters Patent lies. Undoubtedly the contents of the writ petition and the joinder of parties may be considered for deciding whether the facts justified filing of an application under Article 226 read with Article 227. The more relevant point is what particular jurisdiction was exercised by the learned Single Judge. In *Pushpabai Anandji Gala vs. Sukumar Jinnappa Bhore* (supra) it was correctly pointed out not the nomenclature adopted in the petition but the nature of the power exercised was the real determinant. In *Modern Paper Converters*" case (Letters Patent Appeal No. 17 of 1982) *Chandurkar and Kania, JJ.*, inter alia held that mere filing a combined application under Articles 226 and 227 before the Single Judge was not the determinative on the question of the appeal under Letters Patent. In *Modern Paper Converters*" case (supra) the Division Bench, however, had put greater emphasis on the point whether the tribunal which passed the impugned order was subject to power of superintendence of this Court. In view of the decisions of the Supreme Court in *Umaji's* case (supra) and in the case of *The Ratnagiri District Central Co-operative Bank Ltd.* (supra), in deciding the maintainability of a Letters Patent Appeal, greater emphasis ought to be placed upon the substance of the judgment passed by the Single Judge - whether in fact the learned Single Judge had dealt with the matter under Article 226 and whether he had granted the main reliefs under Article 226 or whether he had dealt with the petition in the exercise of his power of superintendence under Article 227 of the Constitution.

9. *Qazi and A. A. Desai, JJ.* in the case of *Jaitunbi vs. Smt. Halimabi* (L. P. As. Nos. 14 of 1988 and 111 of 1988 decided on 21st December 1988) had also examined the question of maintainability of appeal against the judgment of a learned Single Judge upon an application under Article 227 read with Article 226 of the Constitution. Upon the facts of the case before them, the Division Bench had come to the conclusion that neither the facts nor the law afforded any justification for invoking the jurisdiction under Article 226 of the Constitution. According to the Division Bench in *Jaitunbi's* case (supra), the Single Judge had passed his judgment in the exercise of his powers under Article 227 of the Constitution and hence the Letters Patent Appeal was not maintainable.

10. We are alive to the difficulties which may still arise in applying the tests indicated above to the facts of individual cases. This difficulty is heightened when without mentioning the particular Article of the Constitution a learned Single Judge has summarily dismissed an application filed under Article 227 read with Article 226 of the Constitution. Undoubtedly, in case of a doubt whether an appeal lies, the benefit ought to go in favour of the appellant. Thus, at present, all judgments passed by a learned Single Judge sitting on the Appellate Side upon combined applications under Article 226 read with Article 227 of the Constitution are not uniformly appealable under Clause 15 of the Letters Patent. Appeals under Clause 15 of the Letters Patent would lie against those judgments of the learned Single Judge which satisfy the tests mentioned hereinbefore.

11. We are also not unmindful that there is a lack of uniformity in the procedures of the Appellate and the Original Sides of this Court relating to filing of applications under Article 226 of the Constitution of India. But the question whether the rules of procedure relating to filing of writ petitions on the Appellate and the Original Sides of this Court ought to be made uniform is not within the scope of this Reference and it is for the Full House of the learned Judges to decide it.

12. With these observations we dispose of the Reference. Letters Patent Appeal No. 89 of 1988 with Letters Patent Appeal No. 79 of 1988 and Letters Patent Appeal No. 7 of 1988 will now be placed before the Division Bench for deciding the question of their maintainability and, if necessary, for deciding the remaining points involved in the said Appeals in accordance with law.