

(1991) 09 CAL CK 0025
In the Calcutta High Court
Case No : F.M.A.T. No. 2510 of 1991

Tarai Tea Co. (P) Ltd.

APPELLANT

Vs

New Red Bank Tea Co. (P) Ltd.

RESPONDENT

Date of Decision : 10-09-1991

Acts Referred:

Bengal, North- Western Provinces, Agra and Assam Civil Courts Act, 1887 — Section 20, 21
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 100
Suits Valuation Act, 1887 — Section 11

Citation : AIR 1992 Cal 61 : 96 CWN 396

Hon'ble Judges : Bhagabati Prosad Banerjee, J; Amal Kanti Bhattacharji, J

Bench : Division Bench

Advocate : Sidhartha Sankar Roy, Mukul Prokash Banerjee, S.P. Roy Chowdhury, Girija Saha and Tapan Chakraborty, for the Appellant; S.B. Mukherjee, Mintu Sen, Saktinath Mukherjee, Amiya Mukherjee and C.N. Mukherjee, for the Respondent

Judgement

Bhagabati Prosad Banerjee, J.—In this appeal an interesting point had arisen. This appeal against the order dated 6th August, 1991 passed by the learned Assistant District Judge, Jalpaiguri in O.C. Suit No. 81/91 had been presented before this Court on 8th August, 1991 and was registered as F.M.A.T. No. 2510 of 1991. The appeal was presented before this Court without disclosing the value of such an appeal and office had reported with regard to the maintainability of this appeal that "the instant appeal has been directed against an order passed by Assistant District Judge and the appeal has not been valued. In view of the amended provision of S. 2 of the Bengal Agra and Assam Civil Courts Act, an appeal does not lie to the High Court against an order of Assistant District Judge unless the value of the suit exceeds Rs. 60,000/-. In this appeal the value has not been mentioned whether or not the present appeal lies, is however, a matter for consideration of the Court."

2. This report was given by the Stamp Reporter on 12th August, 1991 and this

appeal came up for hearing before this Court for admission on 22nd August, 1991. When the attention of learned counsel appearing on behalf of the appellant was drawn with regard to the maintainability of the appeal in terms of the report of the Stamp Reporter, this Court was informed that the O.S. Suit No. 81/91 was initially valued at Rs. 15,500/- only and that on 10th August, 1991 the plaintiff/appellant filed a petition under O. 6, R. 17 of the CPC praying for amendment of plaint valuation and on the basis of such a petition, the petition was allowed to be amended and the value of the suit was allowed to be enhanced at Rupees 1,00,000/- only.

3. The question is whether on 8th August, 1991 this appeal against the order of Assistant District Judge could be presented before this Court when the value of the suit was Rs. 15,500/- and that the value was amended and was enhanced to Rs. 1,00,000/- only on 10th August, 1991. It is not in dispute that on the basis of the valuation as on 8th August, 1991, the appeal could not be presented before this Court and it could only be presented before the District Judge concerned. The learned Advocates appearing on behalf of the respondent filed caveat and were present in the Court and the appeal was taken up for hearing on the question of admission and the Counsel for both sides were heard on the question of maintainability of the appeal.

4. Mr. Sidhartha Sankar Roy appearing with Mukul Prokash Banerjee submitted that this appeal is maintainable in view of the fact that the valuation of the suit was amended on the basis of the petition under O.6, R. 17 of the CPC on 10th August, 1991 and such an amendment would be effective or would relate back from the date of the institution of the suit and accordingly, it must be held that even though on 8th August, 1991, the suit was valued at Rs. 15,500/- because of such amendment made on 10th August, 1991, the suit should be deemed to have been valued at Rs. 1,00,000/- at the date of institution of the suit as well as at the date when the appeal was presented. It was submitted by Mr. Roy that true, on the date when the appeal was presented, this Court had no jurisdiction to entertain the appeal, but because of the amendment of the valuation which should refer back to the date of the situation of the suit. This appeal which was invalid at the time when it was filed, had become valid and it was maintainable because of subsequent event which is validated the filing of the appeal. It was submitted that the right to prefer an appeal is substantive right and this substantive right cannot be allowed to be defeated on technical grounds inasmuch as, it was submitted that at this stage, if this Court holds that this appeal is not maintainable, inasmuch as on 8th August, 1991 this Court had no jurisdiction because of the valuation of the appeal and the appeal cannot also be filed now before the District Judge in view of the fact that the valuation of the suit now stands at Rs. 1,00,000/- and the District Judge had no jurisdiction to entertain an appeal, the value of which, is Rupees 1,00,000/-, inasmuch as, in view of the provisions of S. 21 of the Bengal Agra and Assam Civil Courts Act, 1887, this appeal is maintainable before this Court and this Court is only competent to deal and dispose of such an appeal.

5. Reference was made to a decision of the Supreme Court in the case of Jai Jai Ram Manohar Lal Vs. National Building Material Supply Gurgaon, wherein it was held at page 1270 "The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations and that in a suit an application for amendment could not be refused on the ground that there was no averment therein that the misdescription was on account of a bona fide mistake and on that account the suit must fail. There is no rule that unless in an application for amendment of the plaint it is expressly averred that the error, omission or misdescription is due to a bona fide mistake, the Court has no power to grant leave to amend the plaint. The power to grant amendment of the pleadings intended to serve the ends of justice and is not governed by any such narrow or technical limitations."

6. Relying upon this decision it was submitted that when the Court below allowed the valuation to be amended. The illegalities which were there at the time of filing of the appeal, had since been removed and the Court should dispose of the appeal and should not deny the right of appeal to the appellant against the order under challenge.

7. On behalf of the respondent Mr. S. B. Mukherjee followed up by Mr. Sakti Nath Mukherjee contended that this appeal is not maintainable before this Court, inasmuch as, at the time when the appeal was presented, this Court had no jurisdiction to entertain this appeal and by subsequent amendment, as invalid appeal cannot be validated and in this connection, reference was made to the decision of Madras High Court in the case of The Public Prosecutor Vs. Bhasker Kamath, and submitted that appeal was filed where no right of appeal and that subsequent change in law cannot validate to an invalid appeal. Reference was also made to the decision of this Court in the case of Renuka Pachal Vs. Sm. Chapa Guha Neogi and Others, wherein the Special Bench of this Court had the occasion to consider the effect of amendment made in Bengal Agra and Assam Civil Courts Act, 1887 by West Bengal Amendment Act (26 of 1969) by Ss. 4 and 5. In this case, in 1957 by the West Bengal Act No. XVI of 1957, S. 21(I)(a) was amended and for the words "five thousand rupees" in S.21(I)(a) the words "ten thousand rupees" were substituted. The Act came into force on 4th January, 1958. The effect of the amendment was that an appeal from a decree or order of a subordinate Judge lay to the District Judge where the value of the original suit in which or in any proceeding arising out of which the decree or order was made did not exceed ten thousand rupees.

8. "When this Amendment Act was in force one Sudhinda Mohan Guha Neogy since deceased, filed in the subordinate Judge's Court at Alipore on the 14th September, 1964 a title suit being T.S. No. 89 of 1964 for, inter alia, declaration of title, possession and mesne profits against Renuka Pachal, and the suit was valued at Rs. 10,635/-."

9. "When the suit was pending the Bengal Agra and Assam Civil Courts Act, 1887 was again amended by the West Bengal Act, XXVI of 1969. S. 21(I)(a) as

amended by the 1957 Act was changed. In the new amendment for the words "ten thousand rupees" the words "fifteen thousand rupees" were substituted. In other words, the District Judges' jurisdiction to entertain appeals was raised from ten thousand rupees to fifteen thousand rupees. The West Bengal Act, XXVI of 1969 came into force on the 21st November, 1969." "On May 27, 1973 a decree was passed in Title Suit No. 89 of 1964. The appeal was preferred not to the High Court but to the District Judge and the question was before whom such an appeal would lay."

10. In this connection, reference was made to S. 4 of the West Bengal Act, XVI of 1957 which was as follows:

"Section 4. Savings: Nothing in this Act shall apply to or affect any appeal from any decree or order passed before the commencement of this Act."

11. This S.4 was construed by the Division Bench of this Court in *Lokenath v. Subasona Sadhukhan*, reported in (1959) 63 CWN 812 wherein the Division Bench held that S. 4 purports to save from the operation of the amending Act, appeals from decrees or orders passed before the date of commencement of the Act. By doing so S. 4 makes, the amending Act applicable to appeals from decrees or orders passed on or after the date of the commencement of the amending Act, makes by necessary implications or intendment, the amending Act applicable retrospectively to pending suits or proceedings, although there are no express words to that effect in the section itself. The reasonable construction of S. 4 is that it was enacted with a view to give the amending Act a limited retrospective effect to the extent indicated above."

12. The Special Bench of this Court observed that at page 459 "When the State Legislature enacted the West Bengal Act, XXVI of 1969 raising the District Judges' jurisdiction from ten thousand rupees to fifteen thousand rupees, it must be presumed to have known how S. 4 of the West Bengal Act, XVI of 1957 was interpreted by the Division Bench of this Court in the case of *Lokenath v. Subasona Sadhukhan*, reported in (1959) 63 CWN 812 and *Mukunda Das Nandy and Others Vs. Bidhan Chandra Roy and Others*, " and in spite of the said decision, the same savings clause was introduced by S. 5 of the 1969 Act. In S. 5 of the said Act it was stated "Nothing in this Act shall apply to or affect any appeal from any decree or order passed before the commencement of the Act." This was, therefore, a conscious adoption or approval by the legislature to this Court's decision referred to above.

13. The Special Bench considered the effect of adopting the same savings provisions over and over again the State Legislature made both the 1969 Act and 1977 Act retrospective in operation to a limited extent. Reference was also made by the Special Bench to a passage from *Craies on Statute Law* 6th Edition at page 167, wherein it was stated-- "There is a well known principle of construction that where the legislature used in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the

sense in which it has been judicially interpreted unless a contrary intention appears."

14. Accordingly, the Special Bench of this Court held that because of the retrospective effect given by two decisions of this Court and in view of the provisions of S. 5 of the said Act, the said amendment with regard to the valuation conferring jurisdiction, regarding right of appeal could be retrospective operation. An appeal to the District Judge was competent and maintainable. This was not position before us. Here, there is no question of amending law prospectively or retrospectively. Admittedly, the suit was maintainable before the Court below and when the suit was filed, the valuation was Us. 15,500/- and at a point of time, when the appeal was presented before this Court, the valuation was also Rs. 15,500/-. But two days later the valuation was amended and it was made on Rupees 1,00,000,"-. At the time when the appeal was presented, this Court had no jurisdiction. But because of amendment in the valuation made on 10th August, 1991, an appeal could be entertained if presented on or after 10th August, 1991. It is firmly established principle that the right of appeals is a statutory right. It is not in itself a necessary part of procedure in an action but it is the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below and the appeal strictly so-called is one in which the question is whether order of the Court from which the appeal is brought was right on the materials which that Court had before it. A right of appeal where it exists, is a matter of substance and not of procedure. (See Colonial Sugar Refining Co. v. Irving (1905) AC 369, Newman v. Klausner (1#22) 1 KB 228.

The right of appeal is a creature of a statute and it is not a mere matter of procedure. It is the substantive right. Here, under the Act, the appeal would lie if the valuation of the suit is below Rs. 50,000/- before the District Judge and before the High Court when the valuation of the suit exceeds Rs. 60,000/"-.

15. Supreme Court in the case of Kiran Singh and Others Vs. Chaman Paswan and Others, held that-- "It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties."

16. In this case, Supreme Court had also observed that "The principle that under S. 11 of Suits Valuation Act, 1887, is that a decree passed by a Court, which would have had no jurisdiction to hear a suit or appeal but for over-valuation or under-valuation, is not to be treated as what it would be but for the section null and void and that an objection to jurisdiction based on over-valuation or under-valuation, should be dealt with under that section and not otherwise." "The words "unless the over-valuation or undervaluation thereof has prejudicially

affected the disposal of the suit or appeal on its merits" in S. 11 clearly shows that the decrees passed in such cases are liable to be interfered with in an Appellate Court, not in all cases and as a matter of course, but only if prejudice such as is mentioned in the section results and that the prejudice contemplated by the section is something different from the fact of the appeal having been heard in a forum which would not have been competent to hear it on a correct valuation of the suit as ultimately determined."

17. In the instant case, the order against the appeal was passed by the competent Court and the only question is before whom the appeal would lie. Admittedly, when on the date appeal was presented before this Court, this Court had no jurisdiction to entertain the appeal. But on 10th August, 1991 two days after the presentation of the appeal, the valuation was amended and on the basis of the amended valuation, this Court had jurisdiction at least from 10th August, 1991. The question is whether such an amendment would be held to be retrospective and would take effect from the date of filing of the suit, ordinarily the amendment takes effect from the date of filing of the suit. But at the same time as has been rightly held by the Division Bench of this Court in the case of Mst. Zohra Khatoon Vs. Janab Mohammad Jane Alam and Others, wherein the Division Bench of this Court held at page 135 "the granting an amendment postulates an authority of the Court to entertain the suit and make an order for amendment therein but where the Court inherently lacks jurisdiction to entertain the suit it cannot make any order for amendment to bring the suit within its jurisdiction. In that case, the Court will be exercising jurisdiction which it has not."

18. If the appeal was incompetent at the time when it was filed, in that event, the decrees in the appeal as to the maintainability cannot be cured by subsequent amendment in the valuation of the suit."

19. There is no another aspect of the matter, that this appeal was presented on 8th August, 1991 when this Court had no jurisdiction. If the appeal had been taken into consideration on 8th or on 9th August, 1991, this Court had no option but to hold that this appeal was not maintainable. The valuation was changed on 10th August and from 10th August, 1991 this Court could entertain appeal. The question is whether this Court would take such a view which would take away the right of appeal of the appellant which has been expressly conferred by the statute. If the appeal was presented before the Court below on 8th August, 1991, there was no difficulty. But at this stage, it is not possible on the part of this Court to hold that even after the valuation had been amended and in view of such amended valuation, appeal would lie before a District Judge. If it is held by this Court that on 8th August, 1991, this appeal cannot be entertained by this Court and because of subsequent event, the appellant would have no right of appeal before the District Judge or before this Court, that would result in anomalous, illogical and absurd position. When the statute has conferred right of appeal, it should be endeavour of the Court not to take away or defeat that right.

True, this difficulty has been created voluntarily by the appellant and if for that reason, this Court takes a view which had taken away the right of appeal against the impugned order, that would result in disproportionate counter-mischief and that in such a case, the Court will not take a stand which would result in unworkable or impracticable result. The substantive right of appeal conferred by the statute, could not be defeated merely on the ground of irregularity committed by the appellant in the matter of valuation. Now we cannot simply reject the appeal as not maintainable without indicating what would be the forum before whom the appeal would lie. Admittedly, because of valuation as amended, the appeal could no longer lay before the learned District Judge, inasmuch as, the appeal could only lie when the valuation of which is below Rs. 60,000/-. True, the appellate jurisdiction is always subject to the provisions of law. It is a statutory remedy and the Court cannot take a stand which would in substance take away the statutory right of appeal, merely on the change of valuation or change of forum. It is the duty of the Court not to set aside an order or quash a proceeding only but to give a positive direction and/ or order for the ends of justice. In this case there had been no change in the law but there had been a change in the valuation during the pendency of a proceeding. Because of change in the valuation an anomalous situation had arisen with regard to the forum before whom appeal would lie. After the valuation exceeded Rs. 60,000/-the learned District Judge could not deal with the order under appeal and in this case if the appeal is directed to be filed before that authority in that event it would be hit by the principle laid down by the Supreme Court in Kiran Singh's case (supra) that an order passed by a Court without jurisdiction is a nullity and a defect of jurisdiction may arise (arise) for want of pecuniary jurisdiction.

20. We are of the view that on 8th August, 1991 this Court had no jurisdiction to entertain this appeal and by subsequent amendment of the valuation, an appeal which was invalid, could not be validated. But at the same time, the right of appeal of the appellant which has been expressly conferred by the statute, could not be made nugatory in the facts and circumstances of the case. At this stage, in view of the amendment of valuation, the appeal could not lie before the District Judge and appeal could only lie before this Court alone. Accordingly, we are constrained to take this view in view of the fact that we cannot deny the appellant's right of appeal which has been conferred by the statute in the facts and circumstances of the case.

21. Accordingly, we hold that as on the date when this appeal was presented before this Court, this Court had no jurisdiction but in view of the amendment of the valuation, this Court had only jurisdiction with effect from 10th August, 1991 and the appeal which has been filed on 8th August, 1991, should be held to be not maintainable. The appellant is directed to take back the appeal for representing before this Court in accordance with law if they are so advised.

Amal Kanti bhattacharji, J.

22. I agree.

23. Order accordingly.