

(2010) 11 AHC CK 0164

In the Allahabad High Court

Case No : Special Appeal Defective No. 445 of 2005

Union of India (UOI) and Others

APPELLANT

Vs

Ram Baran

RESPONDENT

Date of Decision : 02-11-2010

Acts Referred:

Allahabad High Court Rules, 1952 — Rule 5
Armed Forces Tribunals Act, 2007 — Section 3(O), 4, 14, 15, 30, 31, 33, 34, 34(1)
Constitution (Forty-Second Amendment) Act, 1976 — Article 323A, 323B
Constitution Of India, 1950 — Article 32, 225, 226, 227
Government Of India Act, 1935 — Section 107, 299
Uttar Pradesh High Court (Abolition Of Letters Patent Appeals) Act, 1962 — Section 5, 3(ii)

Citation : (2011) 1 AWC 571 : (2011) 2 UPLBEC 1036

Hon'ble Judges : Sunil Ambwani, J;Kashi Nath Pandey, J

Bench : Division Bench

Judgement

1. We have heard Shri Satish Kumar Rai, learned Counsel appearing for Union of India-appellant-respondent.

2. This Special Appeal was reported to be beyond time of 122 days. In the affidavit of Cap. Trilok Dixit, Quarter Master, 23 Medium Regiment, the delay has been explained in paragraphs 4 to 13. It is stated that the copy of the judgment dated 1st February, 2005 was applied on 2.2.2005. The judgment was received on 10.2.2005, and was forwarded along with opinion of counsel on 18.2.2005. The records were sent for legal opinion of DAJAG. On 19.5.2005 the Legal Adviser, Ministry of Defence opined that this is a fit case for filing special appeal. On 27.5.2005 the file was sent to Arty Records for filing the special appeal and on 4.6.2005 the legal cell was asked to proceed further with filing of the appeal.

3. The delay has been sufficiently explained and is accordingly condoned. The delay condonation application is allowed.

4. We have heard learned Counsel for the parties.

5. It is submitted by Shri Satish Kumar Rai that the Special Appeal is not liable to be transferred to the Armed Forces Tribunal u/s 34 of the Armed Forces Tribunal Act, 2007, (in short the Act of 2007). He submits that u/s 34 of the Act every suit, or other proceeding pending before any Court including a High Court, or other authority immediately before the date of establishment of the Tribunal under the Act, being a suit or proceeding the cause of action whereon it is based, is such that it would have been within the jurisdiction of the Tribunal, if it had arisen after such establishment within the jurisdiction of such Tribunal, is to be transferred on that date to such Tribunal. The Special Appeal arising out of Judgment of learned Single Judge is not a proceeding, which may be transferred u/s 34 of the Act to the Tribunal. Shri S.K. Rai submits that the cause of action in this case had arisen prior to the establishment of the Tribunal, and that in any case the Tribunal does not have powers to set aside the Judgment of learned Single Judge under Article 226 of the Constitution of India. He submits that the writ petition under Article 226 of the Constitution cannot be treated as a suit or other proceedings and that a special appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, preferred against a judgment of Single Judge of the High Court, as an intra court appeal, is not liable to be transferred to the Tribunal.

6. The question of transfer of the writ petitions filed under Article 226/227 and pending in the High Court to the Armed Forces Tribunal, was considered by learned Single Judge of this Court in *Devi Saran Mishra v. Union of India and Ors.* 2010 (2) ESC 1475 (All). After examining the provisions of Part XIV-A of the Constitution of India, inserted by the Constitution (42nd Amendment) Act, 1976 introducing Article 323A and 323B; the judgments in *L. Chandra Kumar v. Union of India* 1977 UPLBEC 712 and the provisions of the Armed Forces Tribunal Act of 2007, the Court observed that the Act has been enacted with a view to provide speedy justice to the members of the Armed Forces. The Tribunal is to perform special role as large number of cases relating to service matters of the members of three Armed Forces of Union of India are pending in the Courts. In para 22 of the judgment learned Single Judge recorded his opinion that the word, "other proceedings" u/s 34 of the Act of 2007, will include first appeals; appeals letters patent; second appeals; revisions; civil and criminal references; writ petitions; special appeals and all such proceedings with which the courts are burdened in the matters provided to be decided by the Armed Forces Tribunal. The Tribunal consisting of one Judicial Member and one Administrative Member has been vested with the authority to decide both the questions of law and fact, that may arise before it. The Tribunal is vested with the authority of the civil court which includes the authority to summon the documents and enforce the attendance of witnesses, examine them on oath and review its decisions. Section 3(O) of the Act defines "service matters" and Section 4 of the Act deals with the jurisdiction, powers and authority of the Tribunal in such matters.

7. Learned Single Judge observed in *Devi Saran Mishra's* case that Section 14, of the Act gives to the Tribunal the jurisdiction, powers and authority except the

authority of the Supreme Court and High Court under Article 32 and 226/227 of the Constitution. The proceedings pending before the High Court would, however, include the proceedings pending under Article 226/227, where the subject matter is within the jurisdiction of the Tribunal. The authority of the Tribunal is not controlled by Section 14, inasmuch as Section 14 vests authority in Tribunal to exercise jurisdiction, power and authority exercisable immediately before that day by all courts except the Supreme Court or a High Court exercising jurisdiction under Article 226 and 227 of the Constitution. The Tribunal after receiving the records will not exercise the authority of Supreme Court or High Court u/s 226/227. It will proceed to decide the matter in exercise of its authority vested u/s 14 of the Act. In paragraphs 26 to 29 of the Judgment, Hon"ble Mr. Justice V.K. Shukla, observed as follows:

26. Once Section 14 in no way encroaches upon the authority or dilutes the authority of Hon"ble Apex Court or High Court under Articles 226/227 of the Constitution and such power is always retained by the courts, as power of judicial review is integral feature of the Constitution constituting specific and basic structure, then the provisions of Section 14 has to be read as it has been mentioned and each and every provision has to be given purposive interpretation.

27. By transferring the petitions under Articles 226/227 of the Constitution, the power of judicial review is not being taken away, rather the matter is transferred to a forum of competent jurisdiction constituted for a purpose having all wide powers and once decision is taken by the said competent authority, then power of judicial review is always there as has been held in the case of L. Chandra Kumar (supra) 1997 (1) UPLBEC. 14 o f 2007 Act has to be read in the way and manner it has been framed. It merely proceeds to save the powers and authority, exercisable immediately before that day by all courts except the Supreme Court or a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to all service matters. In this way and manner the purpose of the Act would also be fulfilled without encroaching upon the authority of the High Court of judicial review, in any manner.

28. Once the question has been answered as above, judicial notice may also be taken of the fact that Hon"ble the Chief Justice of this Court in exercise of administrative authority has already passed order on administrative side to transfer all such matters, which are subject matter of Armed Forces Tribunal. Such fact is referred from the letter circulated by Joint Registrar (L) dated 13.11.2005 29. For reasons mentioned above, it is hereby directed that all the matters pending before this Court, which are subject matter of Armed Forces Tribunal in terms of Section 34 of the Armed forces Tribunal Act, 2007 be transferred to the Armed forces Tribunal at Lucknow, and immediately necessary steps be undertaken in this regard.

8. The appeal is defined in the Concise Law Dictionary-P. Ramanatha Aiyar 3rd Edition Reprint 2009, as a right of entering a superior court and invoking its aid and interposition to redress the error of the court or authority in reversing or

modifying the decision of an inferior court or authority on ground of error, a case so appealed. An appeal is a creature of statute, and is a continuation of the original proceedings. The appellate court in exercise of its appellate power of judicial review, unless expressly barred by statute, continues to exercise the same powers as are vested in the Court deciding the original proceedings. The pleadings can be amended, and additional evidence can be taken in appeal. The appellate authority can modify the decree or order as the case may be, or remand the matter to the court of which the order is under examination in appeal. The plaintiff-appellant can also withdraw or adjust the suit by a compromise with opposite party, in appeal. The appellate court for all such purposes continues to possess the same powers, as of original court.

9. The jurisdiction of the Tribunal under the Act of 2007, is not supplementary but in substitution of the Civil Courts and High Court. The Tribunal is thus expected to have the same jurisdiction as of the High Court and can decide special appeals.

10. The High Court of Judicature at Allahabad was created by Letters Patent of Her Majesty dated 17.3.1866. Class 10 of the Letters Patent provided for an intra-court appeal from the judgment of one Judge of the High Court to the Division Bench provided the judgment was not in exercise of appellate jurisdiction, by a Court subject to the superintendence of the High Court, and not being an order made in exercise of a revisional jurisdiction, and not being a sentence or order made in exercise of powers of superintendence under the provisions of Section 107 of the Government of India Act or in exercise of Criminal jurisdiction. The Letters Patent was amended by Letters Patent issued from time to time. The United Provinces High Court (Amalgamation) Order 1948, issued u/s 299 of Government of India Act, 1935, had the effect of the Letters Patent of her Majesty dated 17.3.1866, establishing the High Court for the North Western Provinces, and with that the Chapter II of the Avadh Courts Act, 1925 ceased to have effect except for certain purposes given in Clause 17 of the Amalgamation Order. The jurisdiction of the Special Appeal was continued by virtue of Clause 7 and 15 of the Amalgamation Order 1948.

11. The rules of the Allahabad High Court were framed by the Court in exercise of powers conferred under Article 225 of Constitution of India. These rules provide that the jurisdiction administered in any existing High Court, shall be the same as immediately before the commencement of the Constitution of India. Chapter VIII Rule 5 provides for special appeal against certain judgment of Single Judge.

12. The U.P. High Court (Abolition of Letters Patent Appeals) Act, 1962 (UP Act No. 14 of 1962) came into effect from 13.11.1962 abolishing Letters Patent appeals. Section 3(ii) saves the appeals which were pending on that date to be decided by the Court. Consequently the Rules of the High Court, 1952, were also amended vide notification dated 6.11.1963, substituting Rule 5 of Chapter VIII. Rule 5 was further amended in 1972 and 1975. The State Government enacted

UP High Court (Abolition of Letters Patent Appeals) (Amendment) Act, 1981, substituting Section 5 of UP Act No. 14 of 1962, amending Rule 5 of Chapter VIII. The effect of these amendments was considered by a Division Bench of the High Court in *Vajara Yojna Seed Farm and Others Vs. Presiding Officer, Labour Court II and Another*, The Division Bench, after exhaustively considering the provisions of the Rules of the Court providing for intra court special appeals, held as follows:

4. From the above discussions and looking into the provisions of U.P. Act No. 14 of 1962 as amended by Amendment Act of 1981 and Chapter VIII, Rule 5 of the Rules of the Court, 1952, special appeal is excluded from a judgment of one Judge of this Court in following categories:

(i) Judgment of one Judge passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court.

(ii) Judgment of one Judge in the exercise of revisional jurisdiction.

(iii) Judgment of one Judge made in the exercise of its power of Superintendence.

(iv) Judgment of one Judge made in the exercise of criminal jurisdiction.

(v) Judgment or order of one Judge made in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award of a Tribunal, Court or Statutory Arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in State List or Concurrent List.

(vi) Judgment or order of one Judge made in exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award by the Court or any officer or authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any Uttar Pradesh Act or under any Central Act.

13. In *P.D. Jaiswal Vs. Sri Dwarikadhish Temple Trust and Spinick India Pvt. Ltd.*, a Division Bench of this Court modified Category-V, to include an order of one Judge also to be subject to appeal.

14. From the aforesaid discussion, we find that the intra court appeal provided by Letters Patent has been substituted by the appeal provided under the Rules of the Court, limited to judgments and orders of which the exceptions are enumerated and explained by the court in *Vajara Yojna Seed Farm's* case (*supra*). The intra-court appeal in respect of other judgments and orders are not maintainable. The special appeals in the matters where learned Single Judge has decided the writ petitions under Article 226 of the Constitution in the matters covered by Section 14 of the Armed Forces Tribunal Act, 2007, are maintainable, and are pending in the High Court, including the present appeal.

15. We do not find much substance in the contention of Shri S.K. Rai that the transfer of intra court special appeals to the Tribunal will amount to giving a power to the Armed Forces Tribunal, to set aside the decision of a learned Single Judge of the High Court and that such power is excluded u/s 14, of the Act inasmuch as the Tribunal has not been given powers vested in the High Court under Article 226 of the Constitution. If the Tribunal, with a judicial member, who has been a Judge of the High Court, can decide a transferred writ petition filed under Article 226 of the Constitution of India, it can certainly decide an appeal arising thereof, to be considered and decided with the same powers vested in Court under Article 226 of the Constitution of India. In deciding special appeals the High Court exercises the same powers to judicially review the judgments of one Judge of the Court. The Judgment in special appeal is and remains the Judgment of the High Court in exercise of its extraordinary powers vested in it under Article 226 of the Constitution of India.

16. The Armed Forces Tribunal under the Armed Forces Tribunal Act, 2007, has been constituted as independent adjudicatory forum for the defence personnel for which the recommendations were made by the Supreme court in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, The new legislation contemplates adjudication of complaints and disputes regarding service matters and appeals arising out of the verdict of the Court Martial, of the members of the three services, and to provide for quicker and less expensive justice to the members of the Armed Forces of the Union. The legislature wanted to establish independent Armed Forces Tribunal to fortify the trust and confidence amongst the members of the three services in the system of dispensation of justice, in relation to their service matters. The bill provided for a judicial appeal on points of law and facts against the verdict of the Court Martial. Section 14 not only provides for jurisdiction, powers and authority in service matters exercisable immediately before the appointed day by courts except the Supreme Court or the High Court exercising jurisdiction under Article 226 and 227 of the Constitution of India in relation to all service matters. Section 15 provided for jurisdiction, powers and authority in the matters of appeal against Court Martial. The Tribunal has also been given powers available to the courts established by law to punish for contempt. These powers provide for a stricter punishment of three years as compared to the powers under the Contempt of Courts Act, 1971, providing for a maximum period of only two months. The appeal against the order of the Tribunal lies to Supreme Court u/s 30 of the Act, subject to provisions of Section 31, which provides for leave by the Tribunal. Section 33 excludes the jurisdiction of the Civil Court in relation to the service matters covered under the Act.

17. In the aforesaid context, we are of the opinion that the words "other proceeding" in Section 34(1), will include intra court special appeals provided under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, in respect of the matters, which fall within the jurisdiction of the Tribunal u/s 14 of the Act. If the Tribunal can decide the pending writ petitions, which are transferred to it, the

powers to decide the special appeal arising out of the judgments of one Judge of the High Court, has to be included in it.

18. The office is directed to transfer the records of this special appeal to the Armed Forces Tribunal, Lucknow, to be decided by it in accordance with the jurisdiction and powers conferred upon it by the Act of 2007.