

Kamla Devi & Appellant vs Khushal Kanwar & Anr. & Respondents on 15 December, 2006

Equivalent citations: AIR 2007 SUPREME COURT 663, 2006 (13) SCC 295, 2007 AIR SCW 268, (2007) 1 CTC 186 (SC), (2007) 2 JCR 202 (SC), 2007 (1) CTC 186, 2006 (13) SCALE 645, 2007 (1) HRR 200, 2007 (2) SRJ 319, (2007) 50 ALLINDCAS 117 (SC), (2006) 13 SCALE 645, (2007) 1 LANDLR 16, (2007) 2 MAH LJ 721, (2007) 2 MPLJ 25, (2007) 2 RAJ LW 1636, (2007) 2 SUPREME 412, (2007) 1 RECCIVR 468, (2007) 1 ICC 790, (2007) 1 UC 397, (2007) 66 ALL LR 620, (2007) 2 ALL WC 1148, (2007) 2 CIVLJ 852, (2007) 102 REVDEC 425, (2007) 1 ALL RENTCAS 577, (2007) 1 CURCC 314, 2006 BLJR 1 664, (2006) 4 CIVLJ 869, (2007) 1 RENCER 57

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Bench: S.B. Sinha, Markandey Katju

CASE NO.:

Appeal (civil) 5838 of 2006

PETITIONER:

Kamla Devi

Appellant

RESPONDENT:

Khushal Kanwar & Anr. Respondents

DATE OF JUDGMENT: 15/12/2006

BENCH:

S.B. Sinha & Markandey Katju

JUDGMENT:

J U D G M E N T [Arising out of SLP (Civil) No. 236 of 2006] S.B. SINHA, J :

Leave granted.

Application of Section 100-A of the Code of Civil Procedure, 1908 (for short, 'the Code') is involved in this appeal which arises out of a judgment and order dated 19.09.2005 passed by a Division Bench of the High Court of Rajasthan, Jaipur Bench, Jaipur in D.B. Special Appeal No. 22 of 1992.

The father of Appellant indisputably was the owner of the property. He died on 03.07.1973 leaving behind his widow Smt. Anandi Devi and the parties hereto. He allegedly gifted a portion of the

house known as 'Anand Vihar' in favour of the appellant. On 22.02.1977, Smt. Anandi Devi died. She is said to have executed a Will on 28.01.1977 in favour of Respondent No. 1 herein. An application for grant of probate in respect of the said Will came to be filed by her in favour of Respondent No.1 herein. Appellant entered into caveat in the said proceeding. The application for grant of probate was registered as Probate Case No. 31 of 1978 which was converted into a suit. Appellant herein raised the objections, inter alia, on the following grounds :

"1. That Shrimati Anandi Devi Upadhyaya neither executued any Will and Testament dated 28th January, 1977, nor was she physically and mentally fit to execute any Will and Testament as she had been suffering from Cancer since January, 1976 and had been confined to bed in a very critical and serious condition since December, 1976 until her death. Moreover, Shrimati Anandi Devi had been mentally and physically handicapped and was not of sound disposing state of mind. Hence the execution of the alleged Will and Testament is emphatically denied and the petitioner be put to strict proof of it. Moreover Shrimati Anandi Devi had no right or title to execute any will and Testament of the proportion described in the annexed affidavit due to the reasons below :

(A) That late Shri Ganeshi Lal Upadhyaya had three daughters namely Shrimati Kamla Devi, Shrimati Nihal Kanwar and Shrimati Kushal Kanwar and a wife Shrimati Anandi Devi and Shri Ganesh Lal Upadhyaya expired on July 3, 1973, at Jhansi (UP).

(B) That Shri Ganeshi Lal Upadhyaya gifted to Shrimati Kamla Devi a portion of open plot bearing area 34 ft. x 25 < fit. of Anand Bihar now bearing AMC No. 258 / 1 on the eve of her marriage in Kanyadan and he had made a note of the abovesaid gift in his daily diary dated 6th May, 1956, which is in the possession of the petitioner and also mentioned in an application to the Municipal Council, Ajmer, dated November 11, 1970. Shrimati Kamla Devi got construction erected by her and her husband's means in December, 1963.

(C) That except the property of Shrimati Kamla Devi described in para No. 2 above, late Shri Ganeshi Lal had the property namely Anand Bihar bearing AMC 258 situated at Rajendrapura, Hathi Bhata, Ajmer in his own exclusive possession and ownership as the said property was got constructed by late Shri Ganeshi Lal by his own means on the land purchased by him in his own name.

(D) That the late Shri Ganeshilal was survived by three daughters namely Shrimati Kamla Devi, Shrimati Nihal Kanwar and Shrimati Kushal Kanwar and his wife Shrimati Anandi Devi.

(E) That on February 22, 1977, Shrimati Anandi Devi died at Ajmer and thus three daughters, being the only survivors, jointly inherited the property AMC 12/258 Anand Bihar, Ajmer and movable property including gold and silver ornaments, two motor cars, utensils etc. (F) That after the death of late Shri Ganeshi Lal the said

immovable and movable properties were inherited by four survivors namely his wife Shrimati Anandi Devi and his three daughters.

Consequently, Shrimati Anandi Devi, if ever wished to execute any Will although she never did, never execute the Will of her only < share in the immovable property. But as she did not execute so, the property has been inherited by her three surviving daughters."

The said suit was dismissed by a judgment and order dated 29.08.1987 passed by the learned District Judge, Ajmer, opining that although Respondent No.1 had proved that the Will had duly been executed, the map annexed thereto was changed after execution of the Will and, thus, the propounded Will was tampered. A First Appeal preferred thereagainst by Respondent No.1 was dismissed by a learned Single Judge of the High Court of Judicature at Rajasthan by a judgment and order dated 13.02.1992, holding that the execution of the Will was doubtful inasmuch as the map which was said to have been annexed therewith was not the same which was found to have been attached at the time of its registration.

An intra-court appeal was preferred thereagainst. By reason of the impugned judgment, the judgment and order passed by the learned Single Judge was set aside. An application for review filed thereagainst was also dismissed.

Parliament inserted Section 100A in the Code of Civil Procedure by Section 38 of Act No. 104 of 1976, which was substituted by Section 4 of Act No.22 of 2002, which came into force with effect from. 01.07.2002.

The core question which arises for consideration in this appeal is as to whether the Special Appeal filed by Respondent No.1 herein before a Division Bench of the Rajasthan High Court was maintainable.

Submission of the learned counsel appearing on behalf of the appellant is that Section 100A not only bars filing of an appeal, but would be attracted even in a pending appeal.

Constitutionality of Section 100A of the Code of Civil Procedure came to be questioned before this Court in Salem Advocate Bar Association, T.N. etc. v. Union of India (2003) 1 SCC 49], wherein this Court upheld the validity thereof, stating :

"14. Section 100A deals with two types of cases which are decided by a Single Judge. One is where the Single Judge hears an appeal from an appellate decree or order. The question of there being any further appeal in such a case cannot and should not be contemplated. Where, however, an appeal is filed before the High Court against the decree of a trial court, a question may arise whether any further appeal should be permitted or not. Even at present depending upon the value of the case, the appeal from the original decree is either heard by a Single Judge or by a Division Bench of the High Court. Where the regular first appeal so filed is heard by a Division Bench, the question of there being an intra-court appeal does not arise. It is only in cases

where the value is not substantial that the rules of the High Court may provide for the regular first appeal to be heard by a Single Judge.

15. In Such a case to give a further right of appeal where the amount involved is nominal to a Division Bench will really be increasing the workload unnecessarily. We do not find that any prejudice would be caused to the litigants by not providing for intra-court appeal, even where the value involved is large. In such a case, the High Court by Rules, can provide that the Division Bench will hear the regular first appeal. No fault can, thus, be found with the amended provision Section 100A."

However, it was opined that the modalities were required to be formulated in respect of the manner in which Section 89 of the Code and for that matter, the other provisions which have been introduced by way of amendments, may have to be operated. For the said purpose, a Committee headed by the Chairman, Law Commission of India, was constituted so as to ensure that the amendments become effective and result in quicker dispensation of justice. It submitted a report. We are, however, not concerned therewith herein.

A right of appeal under the Code is statutory. Such right of appeal is also conferred under the Letters Patent of the High Court or the statutes creating the High Court.

An appeal, as is well known, is the right of entering a superior court invoking its aid and interposition to redress an error of the Court below. The central idea behind filing of an appeal revolves round the right as contra- distinguished from the procedure laid down therefor.

This Court in Messrs. Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh and Others [AIR 1953 SC 221], opined :

"11. The above decisions quite firmly establish and our decisions in Janardan Reddy v. The State and in Ganpat Rai v. Agarwal Chamber of Commerce Ltd., uphold the principle that a right of appeal is not merely a matter of procedure. It is matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated in, and before a decision is given by, the inferior court. In the language of Jenkins C.J. in Nana v. Shaikh (supra) to disturb an existing right of appeal is not a mere alteration in procedure. Such a vested right cannot be taken away except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication."

Whether Section 100A takes away such a right is the question. In our opinion, it does not. An appeal, as is well known, is a continuation of the original proceedings.

In Shiv Shakti Co-op. Housing Societdy, Nagpur v. M/s Swaraj Developers and Others [AIR 2003 SC 2434], this Court held :

"17. Right of appeal is statutory. Right of appeal inherits in no one. When conferred by statute it becomes a vested right. In this regard there is essential distinction between right of appeal and right of suit. Where there is inherent right in every person to file a suit and for its maintainability it requires no authority of law, appeal requires so. As was observed in *The State of Kerala v. K.M. Charia Abdulla and Co.*, the distinction between right appeal and revision is based on differences implicit in the two expressions. An appeal is continuation of the proceedings; in effect the entire proceedings are before the appellate authority and it has power to review the evidence subject to statutory limitations prescribed. But in the case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power. It was noted by the four-Judges Bench in *Hari Shankar and Ors. v. Rao Girdhari Lal Chowdhury* that the distinction between the appeal and a revision is a real one. A right of appeal carries with it a right of re- hearing on law as well as fact, unless the statute conferring the right of appeal limits the re-hearing in some way, as has been done in second appeals arising under the Code. The power of hearing revision is generally given to a superior Court so that it may satisfy itself that a particular case has been decided according to law. Reference was made to Section 115 of the Code to hold that the High Court's powers under the said provision are limited to certain particular categories of cases. The right there is confined to jurisdiction and jurisdiction alone."

A question in relation to maintainability of a Letters Patent Appeal under the Indian Succession Act came up for consideration before this Court in *Subal Paul v. Malina Paul and Another* [(2003) 10 SCC 361], wherein this Court opined :

"17. It is not disputed that Section 299 of the Act expressly provides for an appeal to the High Court. The right of appeal, therefore, is not conferred under Section 104 of the Code of Civil Procedure. The words "save as expressly provided by any other Act" were inserted in the said provisions in 1908 having regard to difference of opinions rendered in the judgments of various High Courts as regards the applicability of letters patent. The High Courts of Calcutta, Madras and Bombay following the decisions of the Privy Council in *Hurrish Chunder Chowdhry v. Kalisunderi Devi* [(1883) 9 Cal. 482 : 10 I.A. 4] held that Section 588 of the Code of Civil Procedure, as it then stood, did not take away the jurisdiction of Clause 15 of the Letters Patent whereas the Allahabad High Court in *Bannu Bibi v. Mehdi Husain* [(1889) 11 All. 375] held to the contrary. The said words were, therefore, added in the 1908 Act to give effect to the Calcutta, Madras and Bombay High Courts' decisions."

It was further held :

"21. If a right of appeal is provided for under the Act, the limitation thereof must also be provided therein. A right of appeal which is provided under the Letters Patent cannot be said to be restricted. Limitation of a right of appeal in absence of any

provision in a statute cannot be readily inferred. It is now well-settled that the appellate jurisdiction of a superior court is not taken as excluded simply because subordinate court exercises its special jurisdiction. In G.P. Singh's 'Principles of Statutory Interpretation', it is stated:

"The appellate and revisional jurisdiction of superior courts is not taken as excluded simply because the subordinate court exercises a special jurisdiction. The reason is that when a special Act on matters governed by that Act confers a jurisdiction to an established court, as distinguished from a persona designata, without any words of limitation then, the ordinary incident of procedure of that court including any general right of appeal or revision against its decision is attracted."

22. But an exception to the aforementioned rule is on matters where the special Act sets out it a self-contained Code the applicability of the general law procedure would be impliedly excluded. [See Upadhyaya Hargovind Devshanker v. Dhirendrasinh Virbhadrasinghji Solanki and Ors.]

In *Municipal Corporation of Brihanmumbai and Another v. State Bank of India* [(1999) 1 SCC 123], this Court held:

"This section has been introduced to minimize the delay in the finality of a decision. Prior to the enactment of the above provision, under the letters patent, an appeal against the decision of a Single Judge in a second appeal was in certain cases, held competent, though under Section 100 of the Code of Civil Procedure, there was some inhibition against interference with the findings of fact. The right of taking recourse to such an appeal has now been taken away by Section 100-A of the Code of Civil Procedure "

In *P.S. Sathappan (Dead) by L.Rs. v. Andhra Bank Ltd. and Others* [(2004) 11 SCC 672], a Constitution Bench of this Court, albeit in reference to Section 104 of the Code, held :

"It is thus to be seen that when the Legislature wanted to exclude a Letters Patent Appeal it specifically did so. The words used in Section 100A are not by way of abundant caution. By the Amendment Acts of 1976 and 2002 a specific exclusion is provided as the Legislature knew that in the absence of such words a Letters Patent Appeal would not be barred. The Legislature was aware that it had incorporated the saving clause in Section 104(1) and incorporated Section 4 C.P.C. Thus now a specific exclusion was provided. After 2002, Section 100A reads as follows:

"100A. No further appeal in certain cases.- Notwithstanding anything contained in any Letters Patent for any High Court or in any instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge."

To be noted that here again the Legislature has provided for a specific exclusion. It must be stated that now by virtue of Section 100A no Letters Patent Appeal would be maintainable. However, it is an admitted position that the law which would prevail would be the law at the relevant time. At the relevant time neither Section 100A nor Section 104(2) barred a Letters Patent Appeal."

It was furthermore observed :

" We may notice that when a first appeal or second appeal was disposed of by a Single Judge, a Letters Patent Appeal had been held to be maintainable therefrom only because there existed no bar in relation thereto. Such a bar has now been created by reason of Section 100-A of the Code. No appeal would, therefore, be maintainable when there exists a statutory bar. When the Parliament enacts a law it is presumed to know the existence of other statutes. Thus, in a given case, bar created for preferring an appeal expressly cannot be circumscribed by making a claim by finding out a source thereof in another statute."

In Kamal Kumar Dutta and Another v. Ruby General Hospital Ltd. & Ors., [2006 (7) SCALE 668], it was observed :

"So far as the general proposition of law is concerned that the appeal is a vested right there is no quarrel with the proposition but it is clarified that such right can be taken away by a subsequent enactment either expressly or by necessary intendment. The Parliament while amending Section 100A of the Code of Civil Procedure, by amending Act 22 of 2002 with effect from 1.7.2002, took away the Letters Patent power of the High Court in the matter of appeal against an order of learned single Judge to the Division Bench..."

[Emphasis supplied] Keeping in view the principles of law as enunciated in the aforementioned decisions of this Court, it is evident that a letters patent appeal, which was filed prior to coming into force of the 2002 Act would be maintainable.

Our attention has, furthermore, been drawn to the two decisions of this Court in Bento De Souza Egipsy (Dead) by LRs. v. Yvette Alvares Colaco and Others [(2004) 13 SCC 438] and Sanjay Z. Rane and Others v. Saibai S. Dubaxi (Dead) Through LRs. [(2004) 13 SCC 439], wherein this Court opined that Section 100A of the Code has no retrospective effect. We, therefore, are unable to accept the contentions of the learned counsel for the appellant that Section 100A of the Code will have retrospective effect so as to bring within its fold even the appeals preferred prior to coming into force of the said Act. The appeal is dismissed. No costs.