Shri Jai Chand etc. Vs Smt. Bimla Devi

Court: High Court of Himachal Pradesh

Date of Decision: Nov. 2, 1973

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 41 Rule 23, Order 41 Rule 23A, Order 43 Rule 1, 104, 122
Constitution of India, 1950 â€" Article 239(1)
General Clauses Act, 1897 â€" Section 3(25), 3(58), 3(60)

Citation: (1974) 3 ILR HP 33

Hon'ble Judges: R.S. Pathak, C.J

Bench: Single Bench

Advocate: Chhabil Dass, for the Appellant; K.D. Sud, for the Respondent

Final Decision: Dismissed

Judgement

R.S. Pathak, C.J.
This is a Plaintiff''s revision petition under paragraph 35 of the Himachal Pradesh (Courts) Order, 1948.

2. The Petitioner, Jai Chand, filed a declaratory suit, and the suit was decreed by the learned Subordinate Judge, First Class, Solan. The

Respondent appealed against the decree and during the pendency of the appeal applied for amendment of her written statement. The learned

Additional District Judge, Simla, allowed the amendment application and setting aside the trial Court decree directed the trial court to try the suit

afresh. Against the order remanding the case the Petitioners have now filed this revision petition.

3. A preliminary objection has been raised by Shri K.D. Sud for the Respondent. He contends that the revision petition is not maintainable in as

much as an appeal lay against the impugned order. There is no doubt that if an appeal lies the revision petition cannot be entertained, because

paragraph 35 of the Himachal Pradesh (Courts) Order, 1948, permits the exercise of revisional jurisdiction only in a case in which no appeal lies.

The question is whether an appeal lay in the present case.

4. The suit was instituted on December 1, 1966. On that day Solan fell in the erstwhile District of Mahasu. Mahasu was one of the original districts

of Himachal Pradesh. In its application to the original districts of Himachal Pradesh, the First Schedule of the CPC was amended so that Order

XLI Rule 23-A was added, which provided:

Where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree is

reversed in appeal, and a retrial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.

And Order XLIII Rule 1(u) was amended, so that it provided:

An appeal shall lie from the following orders under the provisions of Section 104, namely:

(u) an order under Rule 23 or Rule 23-A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court.

These amendments were brought about by a notification No. J.C. 16-(76)/53, dated June 5, 1959 (published in the Himachal Pradesh Gazette

(Extraordinary) dated August 7, 1959).

5. The suit was decreed by the trial court on the merits. It was not disposed of on a preliminary point. It was a case which fell within Order XLI

Rule 23-A. The trial court decree was reversed in appeal and a retrial was directed. The Appellate court had the same powers on that appeal as it

had under Rule 23, that is to say, to remand the case and direct a fresh trial. There is also no dispute that in a case such as the one before me if the

Appellate court had passed a decree instead of remanding the case an appeal would have lain against that decree. That being so, an appeal from

the order of remand would lie under Order XLIII, Rule l(u).

6. Shri Chhabil Dass, learned Counsel for the Petitioners, contends that the notification dated June 5, 1959, is invalid, there being no legal sanction

to sustain it. The rules mentioned in the notification were made by the Judicial Commissioner''s Court, Himachal Pradesh, and Shri Chhabil Dass

urges that there was no power in the Judicial Commissioner''s Court to make rules amending the First Schedule of the Code of Civil Procedure. In

my opinion, the contention is whithout substance. Section 122 of the Code provides:

122. Power of certain High Courts to make rule-- High Courts, not being the Court of a Judicial Commissioner, may, from time to time after

previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by

such rules annul, alter or add to all or any of the rules in the First Schedule.

7. It is apparent that the power to make the impugned rules cannot be traced to Section 122. The section clearly excludes the Judicial

Commissioner''s Court. But Section 125 provides:

125. Power of other High Courts to make rules.-- High Courts, other than the courts specified in Section 122, may exercise the powers conferred

by that Section in such manner, and subject to such conditions as, the State Government may determine:

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which

have been made by any other High Court.

The section empowers ""High Courts other than the courts specified in Section 122"" to exercise the powers conferred by Section 122, that is the

powers to make rules annulling, altering or adding to the rules in the First Schedule, the exercise of these powers being effected in the manner and

subject to such conditions as the State Government may determine. It is clear that the High Courts mentioned in Section 125 cannot be the High

Courts referred to in Section 122. As Section 122 stood before its amendment by the Government of India (Adaptation of Indian Laws) Order,

1937, it applied to High Courts established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the Chief Court

of Oudh. A High Court within the meaning of the Government of India Act, 1915, was a High Court established in British India by Letters Patent.

After the amendment of Section 122 by the Government of India (Adaptation of Indian Laws) Order, 1937, the Section applied to all High Courts

constituted by Letters Patent and the Chief Court of Oudh. In 1948, by another Adaptation Order, the section was re-phrased so as to apply to all

Courts which are High Courts for the purposes of the Government of India Act, 1935"". The Chief Court of Oudh was in that year amalgamated

with the Allahabad High Court. Thereafter in 1950, Section 122 was altered by another Adaptation Order so that it read now as applicable to

High Courts for Part A States. In 1951 it was made applicable also to Part B States. Upon the reorganisation of the States in 1956, and the

disappearance of the classification of States as Part A and Part B States, the Adaptation of Laws Order, 1956, was passed and Section 122 took

its present form. It is clear that at no time did Judicial Commissioner''s Courts fall within Section 122.

8. Section 125 speaks of High Courts, and the expression ''High Court'' has been defined by Section 3(25) of the General Clauses Act, 1897,

with reference to civil proceedings as ""the highest civil court of appeal (not including the Supreme Court) in the part of India in which the Act or

Regulation containing the expression operates"". The Judicial Commissioner''s Court was the highest civil court of appeal in Himachal Pradesh and,

with reference to civil proceedings it would be a ""High Court"" within the meaning of Section 3(25) of the General Clauses Act. Therefore when

Section 125 refers to High Courts specified in Section 122, it would include Judicial Commissioner''s Courts.

9. The courts mentioned in Section 125 were placed on a lower footing than the High Courts mentioned in Section 122. According to Section

125, they could exercise the powers conferred by Section 122 only in accordance with the manner and subject to the conditions determined by the

State Government. The expression ''State'' has been defined by Section 3(60) of the General Clauses Act to mean ""as respects anything done after

the commencement of the Constitution (Seventh Amendment) Act, 1956...in a Union Territory the Central Government"". Therefore as regards the

Judicial Commissioner''s Court in Himachal Pradesh, since Himachal Pradesh was a Union Territory after 1956, the powers conferred upon the

court by Section 125 could be exercised only in the manner and subject to the conditions determined by the Central Government. It is not

contended by the Petitioners that the rules framed by the Notification dated June 5, 1959, contravened that requirement.

10. Shri Chhabil Dass has drawn my attention to Section 126 of the Code, which provides that rules made under the preceding provisions would

be subject to the previous approval of the Government of the State in which a court whose procedure the rules regulate is situate, or if that Court is

not situate in any State to the previous approval of the Central Government. The expression ''State'' has been defined by Section 3(58) of the

General Clauses Act in respect of any period after the commencement of the Constitution (Seventh Amendment) Act, 1956 as ""a State specified in

the First Schedule to the Constitution and shall include in a Union Territory"". It is clear then that the rules made by the Judicial Commissioner''s

Court in Section 125 had to be made with the previous approval of the Government of the Union Territory. A notification No. S.R.O. 3610, dated

November 12, 1957 published in the Gazette of India, 1957, Part II, S.E.C. 3, p. 2679 declared that in pursuance of Article 239(1) of the

Constitution the President directed, that subject to his control, the Lieutenant Governor of the Union Territory of Himachal Pradesh, would in

relation to the said territory, exercise the powers of a State Government u/s 126 of the Code of Civil Procedure. Consequently, it was the

Lieutenant Governor of Himachal Pradesh whose previous approval was necessary u/s 126 to the rules made by the Judicial Commissioner''s

Court u/s 125 of the Code. The notification dated June 5, 1959, setting out the rules made by the Judicial Commissioner''s Court recites that the

rules were made with the previous sanction of the Lieutenant Governor, Himachal Pradesh, u/s 125 of the Code of Civil Procedure, annulling,

altering or adding to the rules in the First Schedule of the Code...

11. In my opinion, the rules set out in that notification including Order XLI, Rule 23-A and the amendment in Order XLIII, Rule 1(u) of the First

Schedule of the Code were made by valid authority. The challenge to their validity fails.

12. The result is that an appeal lies against the order of the lower Appellate court remanding the case to the trial court, and, therefore, the revision

petition is not maintainable. The preliminary objection is upheld.

13. The revision petition is rejected with costs.