Arvind Kumar Jain and Others Vs State of Madhya Pradesh and Others

Court: Madhya Pradesh High Court

Date of Decision: Aug. 9, 2007

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 2
Constitution of India, 1950 â€" Article 226, 227
Industrial Disputes Act, 1947 â€" Section 17B

Hon'ble Judges: A.K. Patnaik, C.J; K.K. Lahoti, J; Dipak Misra, J

Bench: Full Bench

Judgement

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Dipak Misra, J.
On a preliminary objection advanced by the learned Counsel for the respondents that the writ appeal preferred against the

order dated 12.1.2007 passed by the learned Single Judge in W.P. No. 17241/2006 is not maintainable being hit by the proviso to Sub-section

(1) of Section 2 of the M.P.Uchcha Nyaylaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 (for brevity "the Act") a Division Bench hearing

the appeal noticed that there are two sets of decisions pertaining to maintainability of an appeal under the Act in respect of interlocutory orders, (i)

holding that the appeals are maintainable under certain circumstances and (ii) the other that no writ appeal would lie against any interlocutory order

as the bar created by the proviso appended to Section 2 of the Act would come into play. Because of this situation the Division Bench has

recommended the following question for adjudication by a larger Bench:

Whether the proviso of Section 2(1) of the Madhya Pradesh Uchcha Nyaylaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 absolutely bars

an appeal to the Division Bench or such an order can be assailed in an appeal regard being had to the nature, tenor, effect and impact of the order

passed by the learned Single Judge?

In the aforesaid factual matrix, the matter has been placed before us.

2. In W.A. No. 69/2007 [Nav Nirman (Milan) Deria v. State of M.P. (decided on 15.1.2007)] a Division Bench has expressed the opinion as

under:

A preliminary objection has been raised by the respondents to the maintainability of the appeal saying that under the Proviso to Sub-section (1) of

Section 2 of the Madhya Pradesh Uchcha Nyaylaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005, no appeal shall lie against an interlocutory

order passed by learned Single Judge. In Shah Babulal Khimji v. Jayaben D Kania and Anr. AIR 1981 SC 1736 the Supreme Court while

considering the maintainability of appeals against judgment and interlocutory orders, considering a series of decisions of different Courts rendered

on the subject, held that every interlocutory order cannot be regarded as a judgment but only those orders would be judgments which decide

matter of moment or affect vital and valuable rights of the parties and which work serious injustice to the party concerned. After laying down the

aforesaid law, the Supreme Court held that in that case, the order of the Trial Judge was one refusing to appoint a receiver or to grant an ad interim

injunction and such an order undoubtedly was a judgment within the meaning of the Letters Patent. Applying the aforesaid law to the facts of the

present case, we hold that the refusal of an interim order for staying the order of removal u/s 41-A of the Act passed against the appellant would

cause serious injustice to the appellant, inasmuch as he would stand removed from the office of the President of the Nagar Panchayat. W are, thus,

of the view that the impugned order passed by the learned single Judge refusing to grant ad-interim prayer was not an interlocutory order and could

be challenged in a writ appeal and the objection to the maintainability of appeal has no merit and is rejected.

3. In W.A. No. 671/2007 [Shri Tejpal Singh and Anr. v. Central Bank of India and Ors. (decided on 25.4.2007)] another Division Bench

referred to certain decisions of the Apex Court and expressed the opinion as under:

In our considered opinion, the learned Single Judge has really passed an order which materially affects the final decision in the main case and has

vital impact on the case. Hence, we hold that the appeal against the said order is maintainable.

4. In W.A. No. 1318/2006 [Arvind Kumar Jain and Ors. v. State of M.P. and Ors. (decided on 02.1.2007)], the contrary view has been

expressed on following terms:

In fact, we are indeed greatly surprised at the vehemence with which learned Sr.Counsel has argued the matter knowing fully well that an appeal

such an interim order passed by the learned Single Judge would not be maintainable. In fact we had expected, in all fairness, learned Sr.Counsel

would submit that the appeal is hit by the proviso contained in Section 2(1) of Adhiniyam 2005, but instead it was argued with full force.

In this view of the matter, we have no doubt in our mind that against such an interim order Writ Appeal would not be maintainable as the bar

created by proviso appended to Section 2 of the Adhiniyam would come into play. We, accordingly, hold so. The appeal is, accordingly, hereby

dismissed.

5. In view of the cleavage of opinion, the question, as indicated before, was framed.

6. We have heard Mr.R.P.Agrawal, learned senior counsel alongwith Mr.Sanjay Agrawal for the appellants, Mr.Sanjay K. Agrawal for the

respondents No. 1 and 2 and Mr.V.S.Shroti, learned senior counsel alongwith Mr.A.P.Shroti for the respondent No. 3.

7. Mr.R.P.Agrawal, learned senior counsel has raised the following submissions:

(i) The main part of Section 2 of the Act incorporates two terms, namely, ''judgment'' and ''order'' and the conception of an order under Article

226 is of wide amplitude and does not always convey that it is an order passed finally but includes an order which has the trappings and

characteristics of finality.

(ii) True it is, the proviso to Section 2(1) has used the words ''interlocutory order'', but the same cannot be read in absolute terms. The proviso in

its basic essentiality carves out an exception which gives rise to the natural presumption that the provision would have been attracted but for the

exclusion made in the proviso, however, it cannot be so interpreted in all circumstances.

(iii) Though there is manifest exclusion of an appeal against an interlocutory order but if every interlocutory order is treated as an order which is not

final the purpose of the use of the term ''order'' in the main part of the enactment would stand annihilated and destroy the normative purpose which

is never the intention of the proviso.

(iv) An interlocutory order can have many a spectrum and contour and there can be many a category of order which would have tremendous

immediate impact and effect leaving nothing to be adjudicated in the pending writ petition, for an executed order in all circumstances cannot put

things in the same situation as relegation to the original factual matrix would not always be possible by efflux of time or irretrievable damage being

done.

(v) The courts of law have never interpreted an interlocutory order in ''stricto sensu'' regard being had to the nature, character and the impact of the

order, for the basic purpose of law is ''jus civile'' ''to do justice'' and it should not be allowed to foundered.

8. Mr.V.S.Shroti, learned senior counsel appearing for the contesting respondents, per contra, advanced the following proponements:

(a) When there is a bar under the proviso qua interlocutory orders it has to be treated as a bar for all purposes as the legislative intendment is

absent for entertaining an appeal against such an order.

(b) The proviso has curtailed what has been conferred on the main part of the provision and, therefore, by interpretative process, an appeal cannot

be held to be maintainable as that would defeat and frustrate the intention of the legislature.

(c) The concept of order under Article 226 of the Constitution of India has the final base and an interlocutory order has to be treated as an order

of interim nature or ad interim one and, therefore, no appeal would lie.

(d) The writ court while exercising extraordinary jurisdiction may or may not exercise its inherent and equitable jurisdiction and such kind of orders

cannot be put into the frame work of judgment or order and hence, the decision rendered in Arvind Kumar Jain (supra) is absolutely impeccable

and does not require reconsideration.

9. To appreciate the rivalised submissions raised at the Bar it is apposite to reproduce Section 2 of the Act. It reads as under:

2. Appeal to the Division Bench of the High Court from a Judgment or order of one Judge of the High Court made in exercise of original

jurisdiction.-(1) An appeal shall lie from a Judgment or order passed by one Judge of the High Court in exercise of original jurisdiction under

Article 226 of the Constitution of India, to a Division Bench Comprising of two judges of the same High Court:

Provided that no such appeal shall lie against an interlocutory order or against an order passed in exercise of supervisory jurisdiction under Article

227 of the Constitution of India.

(2) An appeal under Sub-section (1) shall be filed within 45 days from the date of the order passed by a single Judge:

Provided that any appeal may be admitted after the prescribed period of 45 days, if the petitioner satisfies the Division Bench that he had sufficient

cause for not preferring the appeal within such period.

Explanation.-The fact that the petitioner was misled by any order, practice or judgment of the High Court in ascertaining or computing the

prescribed period may be sufficient cause within the meaning of this sub-section.

(3) An appeal under Sub-section (1) shall be filed, heard and decide in accordance with the procedure as may be prescribed by the High Court.

On a studied scrutiny of the said provision it is manifest that an ''order'' is appealable. What is curtailed by the proviso is an interlocutory order.

The basic rule of understanding a proviso as has been held by their Lordships in The Commissioner of Income Tax, Mysore, Travancore-cochin

and Coorg, Bangalore Vs. The Indo Mercantile Bank Limited, is as under:

Ordinarily the effect of an excepting or a qualifying proviso is to carve something out of the preceding enactment or to qualify something enacted

therein which but for the proviso would be in it and such a proviso cannot be construed as enlarging the scope of an enactment when it can be

fairly and properly construed without attributing to it that effect.

10. In Madhu Gopal Vs. VI Additional District Judge and Others, a two Judge Bench of the Apex Court has held that it is a well settled principle

of construction that unless clearly indicated, a proviso would not take away substantive rights given by the Section or the subsection.

11. In J.K. Industries Ltd. and Others Vs. Chief Inspector of Factories and Boilers and Others, their Lordships have held as under:

33. A proviso to a provision in a statute has several functions and while interpreting a provision of the statute, the court is required to carefully

scrutinise and find out the real object of the proviso appended to that provision. It is not a proper rule of interpretation of a proviso that the

enacting part of the main part of the section be construed first without reference to the proviso and if the same is found to be ambigous only then

recourse may be had to examine the proviso as has been canvassed before us. On the other hand an accepted rule of interpretation is that a

section and the proviso thereto must be construed as a whole, each portion throwing light, if need be, on the rest. A proviso is normally used to

remove special cases from the general enactment and provide for them specially.

34. A proviso qualifies the generality of the main eactment by providing an exception and taking out from the main provision, a portion, which, but

for the proviso would be a part of the main provision. A proviso must, therefore, be considered in relation to the principal matter to which it stands

as a proviso. A proviso should not be read as if providing something by way of addition to the main provision which is foreign to the main provision

itself.

35. Indeed, in some cases, a proviso, may be an exception to the main provision though it cannot be inconsistent with what is expressed in the

main provision and if it is so, it would be ultra vires of the main provision and struck down. As a general rule in construing an enactment containing

a proviso, it is proper to construe the provisions together without making either of them redundant or otiose. Even where the enacting part is clear,

it is desirable to make an effort to give meaning to the proviso with a view to justify its necessity.

12. In the case of Director of Education (Secondary) and Another Vs. Pushpendra Kumar and Others, the Apex Court has ruled thus:

8... An exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely

the right conferred by the main provision....

13. We have referred to the aforesaid decisions only to highlight that in the main part of Sub-section (1) the word ''order'' has been used. Article

226(1) of the Constitution confers power on the High Court to issue "orders" or writs including writs in the nature of habeas corpus, mandamus,

prohibition, quo warranto and certiorari or any one of them. In the case of K. Venkatachalam Vs. A Swamickan and Another, it has been held that

Article 226 is couched in widest possible term and unless there is a clear bar to the jurisdiction of the High Court, its powers under Art. 226 of the

Constitution can be exercised when any act is committed which is against any provision of law or violative of constitutional provisions.

14. It is worth noting that in the case of Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another, it has been held that

powers of the High Court under Article 226 are not confined to the prerogative writs and the High Court can issue directions, orders or writs

under Article 226 and can mould the reliefs to meet the peculiar requirements.

15. In Life Insurance Corporation of India and Others Vs. Smt. Asha Goel and Another, the Apex Court has held that power under Article 226 of

the Constitution of India is wide and expansive. The constitution does not place any fetter on exercise of the extraordinary jurisdiction. It is left to

the discretion of the High Court and, therefore, it cannot be laid down as a general proposition of law that in no case the High Court can entertain

writ petition under Article 226 of the Constitution to enforce a claim under life insurance policy.

16. In Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another, while explaining the meaning of the expression for

any other purpose it has been ruled as under:- It appears that the Constitution empowers the High Court to issue writs, directions or orders in the

nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the rights conferred by Part III and for

any other purpose under Article 226 of the Constitution of India. It is, therefore, essentially a power upon the High Court for issuance of high

prerogative writs for enforcement of fundamental rights as well as non-fundamental or ordinary legal rights, which may come within the expression

for any other purpose. The powers of the High Courts under Article 226 though are discretionary and no limits can be placed upon their discretion,

they must be exercised along the recognized lines and subject to certain self- imposed restrictions. The expression for any other purpose in Article

226 makes the jurisdiction of the High Courts more extensive but yet the courts must exercise the same with certain restraints and within some

parameters.

17. In Roshan Deen Vs. Preeti Lal, their Lordships have observed thus:

...Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to

advance justice and not to thwart it. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be

subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an

academic angle but see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an

erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law.

18. Regard being had to the aforesaid the fundamental concept of the term ''order'' has to be understood. The statute permits an order to be

appealed against. The proviso stipulates that no appeal would lie against an interlocutory order. But an eloquent and pregnant one, when an

interlocutory order has the semblance of final order or affect the rights of the parties, it can be treated as an order for all practical purposes. The

said exception cannot be treated in absolute terms to nullify the enactment. Therefore, the order has to be a final order by way of final disposal. It

cannot be regarded as the correct interpretation of the proviso in entirety, for a writ court can issue directions or pass orders in its inherent

jurisdiction which can assume the colour and contour of finality and, at an interim stage, can vitally affect the rights of the parties or destroy the

rights or create a situation by which the relegation to the original stage would become impossible.

19. At this juncture, we would like to address ourselves how the Apex Court dealt has with the concept of interlocutory order while dealing with

the appeals preferred under the Letters Patent. We are conscious that the appeals under the Letters Patent are different than the appeals provided

under this statute, but the decisions rendered by the Apex Court are instructive to understand the nature and character of an interlocutory order.

20. In Shah Babulal Khimji Vs. Jayaben D. Kania and Another, the Apex Court while dealing with Clause 15 of the Letters Patent of the Bombay

High Court dealt with the scope, meaning and the purport of the judgment and the test to determine as to when the order passed by the leaned trial

Judge can be said to be a judgment. Their Lordships expressed the opinion that every interlocutory order cannot be regarded as a Judgment but

only those orders which decide the matter of moment or affect the vital and valuable rights of the parties and which cause serious injustice to the

party concerned. Their Lordships further held that when an interlocutory order causes injustice who is deprived of valuable right till such

interlocutory order continues has the attributes or character of finality and must be treated as a judgment within the meaning of Letters Patent. It is

worth noting here that the Apex Court gave certain instances and held that the instances would constitute sufficient guidelines to determine whether

or not the order passed by the learned trial Judge is judgment within the meaning of Letters Patent. Their Lordships further opined that the

instances given are illustrative and not exhaustive.

21. In Employer in Relation to Managment of Central Mine Planning and Design Institute Ltd. Vs. Union of India and Another, while dwelling upon

Clause 10 of the Letters Patent of Patna High Court their Lordships referred to case of Shah Babulal Khimji (supra) and in the ultimate eventuate

opined that to determine the question whether an interlocutory order passed by one Judge of the High Court falls within the meaning of judgment

for purposes of Letters Patent, the test is whether the order is a final determination affecting the vital and valuable rights and obligations of the

parties concerned and the same has to be ascertained on the facts of each case. Be it noted that in the said case the learned Single Judge had

allowed the application u/s 17B of the Industrial Disputes Act, 1947 and directed management to pay the workman full wages last drawn by them

on the date of termination of their services. The Division Bench of the High Court had held that the Letters Patent Appeal was not maintainable.

The Apex Court came to the conclusion that the appeal was maintainable and remitted the matter to the High Court for fresh adjudication on

merits.

22. In Deoraj Vs. State of Maharashtra and Others, it was held that there may be few cases which would not call for the court"s leaning not in

favour of maintaining the status quo and still lesser in percentage are the cases when an order tantamounting to a mandamus is required to be issued

even at an interim stage. It was observed that there are matters of significance and of moment posing themselves as moment of truth and such cases

do cause dilemma and put the wits of any judge to test. It was also laid down therein that in certain situations grant of interim relief would

tantamount to granting of final relief itself and there may be converse cases where withholding of an interim relief would tantamount to dismissal of

main petition itself, for by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though

all the findings may be in his favour.

23. In Liverpool and London S.P. and I Asson. Ltd. Vs. M.V. Sea Success I and Another, it was held as under:

124. Clause 15 of the Letters Patent is not a special statute. Only in a case where there exists an express prohibition in the matter of maintainability

of an intra- court appeal, the same may not be held to be maintainable. But in the event there does not exist any such prohibition and if the order

will otherwise be a judgment within the meaning of Clause 15 of the Letters Patent, an appeal shall be maintainable.

24. In Subal Paul Vs. Malina Paul and Another, it has been held as under:

32. While determining the question as regards Clause 15 of the Letters Patent, the court is required to see as to whether the order sought to be

appealed against is a judgment within the meaning thereof or not. Once it is held that irrespective of the nature of the order, meaning thereby

whether interlocutory or final, a judgment has been rendered, Clause 15 of the Letters Patent would be attracted.

25. In Midnapore Peoples'' Co-op. Bank Ltd. and Others Vs. Chunilal Nanda and Others, it has been held as under:

15. Interim orders/interlocutory orders passed during the pendency of a case, fall under one or the other of the following categories:

(i) Orders which finally decide a question or issue in controversy in the main case.

(ii) Orders which finally decide an issue which materially and directly affects the final decision in the main case.

(iii) Orders which finally decide a collateral issue or question which is not the subject-matter of the main case.

(iv) Routine orders which are passed to facilitate the progress of the case till its culmination in the final judgment.

(v) Orders which may cause some inconvenience or some prejudice to a party, but which do not finally determine the rights and obligations of the

parties.

16. The term judgment occurring in Clause 15 of the Letters Patent will take into its fold not only the judgments as defined in Section 2(9) CPC

and orders enumerated in Order 43 Rule 1 CPC, but also other orders which though may not finally and conclusively determine the rights of

parties with regard to all or any matters in controversy, may have finality in regard to to some collateral matter, which will affect the vital and

valuable rights and obligations of the parties. Interlocutory orders which fall under categories (i) to (iii) above, are, therefore, judgment for the

purpose of filing appeals under the Letters Patent. On the other hand, orders falling under categories (iv) and (v) are not judgments for the purpose

of filing appeals provided under the Letters Patent.

26. From the aforesaid enunciation of law there remains no scintilla of doubt that interlocutory orders on certain circumstances, could be appealed

against under the Letters Patent. Despite the fact they are interlocutory in nature they can be put into the compartment of judgment if it affects the

merits of the case between the parties by determining some rights or liabilities. There can be three categories of judgments, final judgment,

preliminary judgment and intermediary judgment or interlocutory judgment. If the order finally decides the question and directly affects the decision

in the main case or an order which decides the collateral issue or the question which is not the subject matter of the main case or which determines

the rights and obligation of the parties in a final way indubitably they are appealable.

27. In the case of W.A. No. 69/2007 (Nav Nirman (Milan) Deria v. State of M.P. and ors.) the Division Bench had taken note of the decision

rendered in the case of Shah Babulal Khimji (supra) and expressed the opinion that the refusal of the interim order had caused serious injustice to

the appellants and hence, the appeal was maintainable.

28. In Tejpal Singh (supra) the Division Bench has scanned the order and concluded that the Single Judge has really passed an order which

materially affects the final decision in the main case and has vital impact on the case and hence, the appeal against the said order was maintainable.

29. In our considered opinion, the said decisions are in consonance with the law laid down by the Apex Court in various cases and also in accord

with the proper interpretation placed on the proviso.

30. In Arvind Kumar Jain (supra) the Division Bench has held that against an interim order no writ appeal would be maintainable as bar has been

created by the proviso appended to Section 2(1) of the Act. The said decision is not in concordance with the decisions of the Apex Court. That

apart, in the said decisions erroneous interpretation has been placed on the proviso to Sub-section (1) of Section 2 of the Act and, therefore, we

conclude and hold that the said decision does not lay down the law correctly.

31. In view of the aforesaid premised reasons we proceed to record our answer to the reference on following terms:

(a) The decision rendered in the case of Arvind Kumar Jain (supra) does not lay down the law correctly and any decision treading on the same

path has to be deemed to have been overruled.

(b) The decisions rendered in Nav Nirman (Milan) Deria (supra) and Tejpal Singh (supra) enunciate the law correctly.

(c) The proviso to Section 2(1) of M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 does not create an absolute bar to

prefer an appeal to the Division Bench.

(d) An appeal can be preferred against an order regard being had to the nature, tenor, effect and impact of the order passed by the learned single

Judge

(e) The guidelines given in the cases of Shah Babulal Khimji (supra), Central Mine Planning and Design Institute Ltd.(supra), Deoraj (supra),

Liverpool & London S.P. & I Association Ltd (supra), Subal Paul (supra) and Mindnapore Peoples'' Cooperative Bank Ltd. (supra) are to be

kept in view while deciding the maintainability of an appeal.

(f) It should be borne in mind that instances given in the aforesaid decisions are not exhaustive but illustrative in nature, because various

kinds/categories of orders may be passed in exercise of jurisdiction under Article 226 of the Constitution of India.

(g) The facts in each case, the nature and the character of the order are to be scrutinised to appreciate the trappings of the same.

32. Let the matter be placed before the Division Bench for adjudication.