GULAB BAI AND ANR. A

v.

PUNIYA

October 7, 1965

[P. B. GAJENDRAGADKAR, C.J., K. N. WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.] B

Rajasthan High Court Ordinance 1949 (*Raj.* 15 *of* 1949), *cl.* 18—*Application under Guardian & Wards Act—Appeal to Single Judge—If further appeal to Division Bench competent.*

Guardian & Wards Act, 1890 (8 *of* 1890), *ss.* 47 *and* 48—*Scope of.* C

The respondent's application under s. 25 of the Guardians and Wards Act for the custody of respondent's daughter was rejected by the Civil Judge. When the decision was reversed in appeal by a single Judge of the Rajasthan High Court, the appellants preferred an appeal to the Division Bench under cl. 18 of the Rajasthan High Court Ordinance. This was dismissed on the ground that the appeal was incompetent having regard to ss. 47 and 48 of the Guardians and Wards Act. In appeal to this Court, D

HELD : The appeal before the Division Bench of the Rajasthan High Court under cl. 18(1) of the Ordinance was competent. [106 H]

The competence of an appeal before the Division Bench will have to be judged by the provisions of cl. 18 of the Ordinance itself and s. 48 of the Act has no restrictive impact. Section 48 saves the provisions of s. 47 of the Act and s. 115 of the Code of Civil Procedure; and considered by themselves the provisions of s. 47 do not create any bar against the E competence of an appeal under cl. 18(1) of the Ordinance where the appeal permitted by s. 47 is heard by a single Judge. [106 G]

Section 48 attaches finality to the order passed by the trial Court subject to the provisions prescribed by s. 47 of the Act and s. 115 of the Code of Civil Procedure. [106 E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 729 of F 1964.

Appeal by special leave from the order dated February 1964 of the Rajasthan High Court in D.B. Civil Appeal No. 2 of 1963.

O. P. Varma, for the appellants.

G

Mohan Behari Lal, for the respondent.

The Judgment of the Court was delivered by

Gajendragadkar, C.J. This appeal by special leave arises from an application made by the respondent Puniya in the Court of the Senior Civil Judge at Jhalawar under s. 25 of the Guardians and H Wards Act, 1890 (No. 8 of 1890) (hereinafter called 'the Act'), for the custody of his daughter Mt. Chitra. To this application, the

A respondent had impleaded the two appellants, Gulab Bai and her husband Onkar Lal. The respondent is a Kumhar by caste, whereas the appellants are Jat. The respondent's case was that the minor Chitra who was about 11 years of age at the date of the application, had been living with the appellants for the last 4 or 5 years with his consent. Whilst the minor girl was living with the appellants, she B used to come to spend some time with the respondent and his wife; but for some time past, the appellants did not allow Chitra to visit her parents. That is why the respondent thought it necessary to move the Court for an order under s. 25 of the Act.

The claim thus made by the respondent was disputed by the ap- C pellants. They alleged that the respondent and his wife had lost some children in their infancy, and so, they decided to leave the minor in the custody of the appellants in the hope that their custody would save the child. Accordingly, the minor was entrusted to the appellants a few hours after her birth and in fact, she was given away by the respondent and his wife to the appellants to be looked after D as if she was their adopted child. During all these years, the appellants have looked after the minor as their own child, have taken fond care of her, and have looked after her education. The appellants and the respondent and his wife are neighbours, and the appellants denied the allegation made by the respondent that they ever obstructed the minor from visiting her parents. According to the E appellants, recently an unfortunate incident had taken place between appellant No. 1 and the wife of the respondent and that was the real cause of the present application. They pleaded that as a result of the ugly incident that took place between the two ladies, the minor was frightened and appeared to be disinclined to visit her parents any longer.

F On these pleadings, the parties led evidence to support their respective contentions. The learned trial Judge held that the child had been entrusted to the appellants soon after she was born, and that she was looked after by the appellants as if she was their daughter. He felt satisfied that in case the child was removed from the homely atmosphere which she enjoyed in the house of the appel- G lants, that would definitely be detrimental to her welfare and would also affect her health, because she had come to look upon the appellants as her parents. The learned trial Judge examined the child in order to ascertain her own wishes, because he thought that she had attained the age of discretion and could express her wishes intelligently. He was convinced that the child definitely preferred H to stay with the appellants. Having come to the conclusion that it would be inconsistent with the interests of the child to allow the application made by the respondent, the learned Judge ordered that

appellant No. 2 should be appointed the guardian of the person of the minor under ss. 7 and 8 of the Act. He directed that the said guardian shall give an undertaking to the Court not to remove the child from the territorial jurisdiction of the Court and not to marry her without the permission of the Court. A direction was also issued that the child shall not, of course, be married outside her caste without the consent of her parents even if she so desires.

Against this order, the respondent preferred an appeal before the Rajasthan High Court. This appeal was heard by a learned single Judge of the said High Court who reversed the decision of the trial Judge. He came to the conclusion that it would be in the interests of the minor to deliver her to the custody of the respondent and his wife. He held that under s. 6(a) of the Hindu Minority and Guardianship Act, 1958, the respondent was entitled to be the guardian of his daughter in the absence of any allegation or proof that he was in any way unsuitable to be such a guardian. The learned single Judge also took into account the fact that the appellants and the respondent belonged to different castes, and he held that since the minor was then about 12 years of age, it was in her interest that she went back to be looked after by her own parents. On this view, the learned single Judge set aside the order passed by the learned trial Judge by which appellant No. 2 was appointed the guardian of the minor and directed him to deliver the minor to the custody of the respondent. The order passed by the learned Judge further provided that if the appellants did not deliver the minor Chitra to her parents on the expiry of three months, the respondent shall apply for execution of the order and that it would be executed as a decree under s. 25(2) of the Act by issue of a warrant under s. 100 of the Code of Criminal Procedure.

Against this decision, the appellants preferred an appeal under clause 18 of the Rajasthan High Court Ordinance, 1949 (No. 15 of 1949) (hereafter called 'the Ordinance'). This appeal was dismissed by a Division Bench of the High Court on the ground that the appeal was incompetent having regard to the provisions of sections 47 and 48 of the Act. The appellants then moved the High Court for certificate to prefer an appeal to this Court, but the said application was dismissed. That is how the appellants applied for and obtained special leave from this Court, and it is with the said leave that this appeal has come before us.

The short question of law which arises for our decision is whether the High Court was right in holding that the appeal under clause 18(1) of the Ordinance was incompetent; and that raises the question about the construction of sections 47 and 48 of the Act.

A Before dealing with this point, two relevant facts ought to be mentioned. The Act was extended to Rajasthan by the Part B States (Laws) Act, 1951 (Act III of 1951) on the 23rd February; 1951; but before the Act was thus extended to Rajasthan, the Ordinance had already been promulgated. Clause 18(1) of the Ordinance provides, *inter alia*, that an appeal shall lie to the High B Court from the judgment of one Judge of the High Court; it excepts from the purview of this provision certain other judgments with which we are not concerned. It is common ground that the judgment pronounced by the learned single Judge of the High Court on the appeal preferred by the respondent before the High Court, does not fall within the category of the exceptions provided C by clause 18(1) of the ordinance; so that if the question about the competence of the appeal preferred by the appellants before the Division Bench of the High Court had fallen to be considered solely by reference to clause 18(1), the answer to the point raised by the appellants before us would have to be given in their favour. The High Court has, however, held that the result of reading ss. 47 and D 48 together is to make the present appeal under clause 18(1) of the Ordinance incompetent. The question which arises before us is : is this view of the High Court right ?

Section 47 of the Act provides that an appeal shall lie to the High Court from an order made by a Court under sections specified E in clauses (a) to (j) thereof. Clause (c) of the said section refers to an appeal against an order made under s. 25, making or refusing to make an order for the return of a ward to the custody of his guardian. It is thus clear that the order passed by the learned trial Judge in the present proceedings was an order under s. 25 of the F Act, and as such, is appealable under s. 47; and when as a result of the rules framed by the Rajasthan High Court the present appeal was placed before a learned single Judge of the said High Court for hearing and was decided by him, his decision became appealable to a Division Bench of the said High Court under cl. 18(1) of the Ordinance. Thus far, there is no difficulty or doubt.

G But the High Court has held that s. 48 of the Act, in substance, amounts to a prohibition against an appeal to a Division Bench under cl. 18(1) of the Ordinance; and that makes it necessary to examine the provisions of s. 48 carefully. Section 48 reads thus :—

> H "Save as provided by the last foregoing section and by s. 622 of the Code of Civil Procedure, an order made under this Act shall be final, and shall not be liable to be contested by suit or otherwise."

It is clear that what is made final by s. 48 is an order made under this Act; and the context shows that it is an order made by the trial Court under one or the other provision of the Act. This position is made perfectly clear if the first part of s. 48 is examined. The finality prescribed for the order made under this Act is subject to the provisions of s. 47 and s. 622 of the earlier Code which corresponds to s. 115 of the present Code. In other words, the saving clause unambiguously means that an order passed by the trial Court shall be final, except in cases where an appeal is taken against the said order under s. 47 of the Act, or the propriety, validity, or legality of the said order is challenged by a revision application preferred under s. 115 of the Code. It is, therefore, essential to bear in mind that the scope and purpose of s. 48 is to make the orders passed by the trial Court under the relevant provisions of the Act final, subject to the result of the appeals which may be preferred against them, or subject to the result of the revision applications which may be filed against them. In other words, an order passed on appeal under s. 47 of the Act, or an order passed in revision under s. 115 of the Code, are, strictly speaking, outside the purview of the finality prescribed for the orders passed under the Act, plainly because they would be final by themselves without any such provision, subject, of course, to any appeal provided by law or by a constitutional provision, as for instance, Art. 136. The construction of s. 48, therefore, is that it attaches finality to the orders passed by the trial Court subject to the provisions prescribed by s. 47 of the Act, and s. 115 of the Code. That is one aspect of the matter which is material.

A B C D E

The other aspect of the matter which is equally material is that the provisions of s. 47 are expressly saved by s. 48, and that means that s. 47 will work out in an ordinary way without any restriction imposed by s. 48. In considering the question as to whether a judgment pronounced by a single Judge in an appeal preferred before the High Court against one or the other of the orders which are made appealable by s. 47 will be subject to an appeal under clause 18(1) of the Ordinance, s. 48 will have no restrictive impact. The competence of an appeal before the Division Bench will have to be judged by the provisions of cl. 18 itself. Section 48 saves the provisions of s. 47, and as we have already indicated, considered by themselves the provisions of s. 47 undoubtedly do not create any bar against the competence of an appeal under cl. 18(1) of the Ordinance where the appeal permitted by s. 47 is heard by a learned single Judge of the High Court. Therefore, we are satisfied that the High Court was in error in coming to the conclusion that an appeal before a Division Bench of the said High Court under clause 18(1) of the Ordinance was incompetent.

F G H

A It is true that in upholding the respondent's plea that the appeal preferred by the appellants under clause 18(1) of the Ordinance was incompetent, the High Court has no doubt purported to rely upon and apply its earlier decision in the case of *Temple of Shri Bankteshwar Balaji Through Rampal* v. *The Collector, Ajmer*(1). The said decision, however, was concerned with the effect of the B provisions prescribed by s. 66(3) of the Ajmer Abolition of Intermediaries and Land Reforms Act (No. III of 1955) in relation to clause 18 of the Ordinance, and since we are not called upon to consider the correctness of the conclusion reached in that behalf, it is unnecessary for us to examine whether the High Court was right in holding that the provisions of the said s. 66(3) created a C bar against the competence of the appeal under cl. 18(1) of the Ordinance. All that we are concerned to deal with in the present appeal is the effect of s. 48 of the Act, and in our opinion, the High Court was in error in holding that s. 48 excluded the application of clause 18(1) of the Ordinance to the decision of the learned single Judge in the present proceedings. D

In this connection, we may incidentally refer to the decision of this Court in *Union of India* v. *Mohindra Supply Company*(2). In that case, this Court has held that an appeal against the appellate order of the single Judge was barred under s. 39(2) of the Indian Arbitration Act, 1940, because the expression "second appeal" in E s. 39(2) means a further appeal from an order passed in appeal under s. 39(1) and not an appeal under s. 100 of the Code, and as such, the said expression "second appeal" includes an appeal under the Letters Patent. In substance, the effect of the decision of this Court in the case of *Mohindra Supply Co.*(2) is that by enacting s. 39(2) the Arbitration Act has prohibited an appeal under the F Letters Patent against an order passed under s. 39(1). This decision again turned upon the specific words used in s. 39(1) & (2) of the Arbitration Act and is not of any assistance in interpreting the provisions of s. 48 of the Act with which we are concerned in the present proceedings.

G The question as to whether an appeal permitted by the relevant clause of the Letters Patent of a High Court can be taken away by implication, had been considered in relation to the provisions of s. 588 of the Codes of Civil Procedure of 1877 and 1882. The first part of the said section had provided for an appeal from the orders specified by clauses (1) to (29) thereof, and the latter H part of the said section had laid down that the orders passed in appeals under this section shall be final. Before the enactment of

(1) I.L.R. 14 Raj. 1. (2) [1962] 3 S.C.R. 497

the present Code, High Courts in India had occasion to consider whether the provision as to the finality of the appellate orders prescribed by s. 588 precluded an appeal under the relevant clauses of the Letters Patent of different High Courts. There was a conflict of decisions on this point. When the matter was raised before the Privy Council in *Hurrish Chunder Chowdhry* v. *Kali Sundari Debia*(1), the Privy Council thus tersely expressed its conclusion:

> "It only remains to observe that their Lordships do not think that section 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the Full Court".

Basing themselves on these observations, the High Courts of Calcutta, Madras, and Bombay had held that s. 588 did not take away the right of appeal given by clause 15 of the Letters Patent, vide *Toolsee Monev Dassee & Others* v. *Sudevi Dassee & Others*(2), *Sabhapathi Chetti & Others* v. *Narayanasami Chetti*(3), and *The Secretary of State for India in Council* v. *Jehangir Maneckji Cursetji*(4) respectively. On the other hand, the Allahabad High Court took a different view, vide *Banno Bibi* and *others* v. *Mehdi Husain and Others*(5), and *Muhammad Naim-ul-Lah Khan* v. *Ihsan-Ullah Khan*(6). Ultimately, when the present Code was enacted, s. 104 took the place of s. 588 of the earlier Code. Section 104(1) provides that an appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders. It will be noticed that the saving clause which refers to the provisions of the Code, or to the provisions of any law for the time being in force, gives effect to the view taken by the Calcutta, Madras and Bombay High Courts. In fact, later, the Allahabad High Court itself has accepted the same view in *L. Ram Sarup* v. *Mt. Kaniz Ummehani*(7).

We have referred to these decisions to emphasise the fact that even where the relevant provision of s. 588 of the earlier Code made certain appellate orders final, the consensus of judicial opinion was that the said provision did not preclude an appeal being filed under the relevant clause of the Letters Patent of the High Court. In the present case, as we have already indicated, s. 48 in terms saves the provisions of s. 47 of the Act as well as those of s. 115 of the

(1) 10 I.A. 4 at p. 17.
(2) (1899) 26 Cal. 361.
(3) (1902) 25 Mad. 555.
(4) (1902) 4 Bom. L.R. 342.
(5) (1889) 11 Alld. 375.
(6) (1892) 14 Alld. 226 (F.B.)
(7) A.I.R. 1937 Alld. 165.

A Code, and that gives full scope to an appeal under clause 18 of the Ordinance which would be competent when we deal with the question about appeals under s. 47 of the Act considered by itself.

The result is, the appeal is allowed, the order passed by the Division Bench of the High Court dismissing the appeal preferred by the appellants under cl. 18(1) of the Ordinance on the ground B that it is incompetent, is set aside, and the said appeal is remitted to the High Court for disposal in accordance with law. In view of the unusual circumstances of this case, we direct that parties should bear their own costs incurred so far.

Appeal allowed