
(1980) 04 MP CK 0005

Madhya Pradesh High Court

Case No: C. Revision No. 361 of 1979

Sitaram and another

APPELLANT

Vs

Chaturu and others

RESPONDENT

Date of Decision: April 4, 1980

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 2(2), 47
- General Clauses Act, 1897 - Section 6

Citation: (1981) JLJ 171

Hon'ble Judges: G.P. Singh, C.J; S.J. Surana, J

Bench: Division Bench

Advocate: V.K. Sapre, for the Appellant; R.C. Lahoti, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

G.P. Singh, C.J.

In this Civil revision the following question of law has been referred by a learned single Judge :

Whether the right of appeal against an order determining a question falling u/s 47 of the CPC 1908, made in Execution Case, pending on 1-2-77, the date of commencement of the CPC (Amendment) Act, 1976 (Act No. 104 of 1976), but passed after the aforesaid date, can be regarded to continue to vest in spite of the provisions enacted by sub section (3) of section 97 thereof?

2. This revision by the decree holders is directed against an order dated 19th January 1979 passed by the First Additional District Judge, Guna, dismissing their appeal against the order dated 7th November 1977 passed by the executing Court on the ground that the appeal was not maintainable u/s 47 of the CPC as amended by the CPC (Amendment) Act. 1976 (Act No 104 of 1976). When the revision came up for hearing before the learned single Judge it was contended by the applicants that

the appeal was maintainable before the Additional District Judge u/s 47 although the order of the executing Court was passed after the coming into force of the amending Act for the reason that the execution proceeding in which the said order was passed was pending at the time of the commencement of the amending Act. The learned counsel for the applicants relied upon a ruling of this Court in *Chuluram v. Bhagatram* (1979 111 J 730). The learned counsel for the non-applicants contested the correctness of that ruling on the ground that section 97 (3) of the amending Act was not considered in the said ruling. In view of this argument of the learned counsel for the non-applicants, the learned single Judge referred the question of law set out above to an appropriate Bench. This is how the revision has come up before us.

3. The amending Act (Act No. 104 of 1976) came into force on 1st February 1977. Section 3 of the amending Act amended section 2(2) of the CPC and omitted the words and "figure section 47 or" from it. The result of this omission it that the determination of any question under S. 47 of the Code does not now amount to a decree. The object behind this amendment is obviously not to confer any right of appeal against a determination made u/s 47. The next important section for our purpose is section 97 of the amending Act which in so far as relevant reads as follows:

97. Repeal and savings.-(1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provisions, of the Principal Act as amended by this Act, stand repealed.

(2) Notwithstanding that the provisions of this Act have come into force or the repeal under sub section (1) has taken effect, and without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897 (10 of 1897)--

(a) the amendment made to clause (2) of section 2 of the Principal Act by section 3 of this Act shall not affect any appeal against the determination of any such question as is referred to in section 47 and every such appeal shall be dealt with as if the said section 3 had not come into force;

(3) Save as otherwise provided in sub-section (2), the provisions of the principal Act, as amended by this Act, shall apply to every suit proceeding, appeal or application, pending at the commencement, notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement.

4. It is now well settled that a right of appeal against a decree or order accrues and vests in the suit or at the time of the institution of the proceeding in which the decree or order is passed. There is a very strong presumption that this vested right of appeal in pending proceedings is not taken away by a change in law relating to appeals. In view of this presumption a change in law restricting or abolishing

appeals it not interpreted to apply to pending proceedings unless the legislature expressly or by necessary intendment provides to the contrary and the mere fact that if the change in law is not applied to appeals arising from pending proceedings, the object of curtailing the appeals would not be immediately achieved, is by itself insufficient to show a contrary intention. The leading Indian case laying down these principles is [Garikapatti Veeraya Vs. N. Subbiah Choudhury](#), In Garikapatti's case it was held that in suits filed in British India before the date of the coming into force of the Constitution an appeal lay to the Supreme Court against a decision of the High Court rendered after that date, if the suit satisfied the requirement of valuation of appealing to the prevy Council or the Federal Court according to the law in force on the date of institution of the suit, although it did not satisfy the requirement of valuation as laid in Article 133 of the Constitution. It was argued in that case that such a construction would make Article 133 virtually a dead letter for many years to come. In repelling the argument it was observed by the Supreme Court that such a consideration should not deter the Court in giving effect to the vested rights of appeal (p 561 para 40) The principle laid down and the rule of construction applied in Garikapatti's case were reaffirmed in subsequent cases. [State of Bombay Vs. Supreme General Films Exchange Ltd.](#), and [Mukund Deo \(Dead\) represented by his legal representatives Kasibai and Others Vs. Mahadu and Others](#), It is in the background of these principles that one has to consider whether the amending Act has taken away the right of appeal which vested in a party in pending executions.

5. The amendment introduced in section 2(2) of the Code by section 3 of the amending Act which omits the words and figure "section 47 or"" from it cannot by itself be construed to take away any vested right of appeal in pending executions, for, the presumption is that the Legislature does not intend to take away such a vested right. We now pass on to section 97 (2) of the amending Act. Section 97 (2) preserves the generality of the provisions of section 6 of the General Clauses Act, 1897 which is also an indication that any vested right is not taken away Clause (a) of section 97 (2) then specifically provides that the amendment made to section 2(2) of the Code by section 3 of the amending Act "shall not affect any appeal against the determination of any such question as is referred to in section 47 and every such appeal shall be dealt with as if the said section 3 had not come into force." The words used here are not in terms restricted to any pending appeal or to appeals arising from determinations made before the coming into force of the amending Act. The words "any appeal" are wide enough to cover appeals from orders passed in pending execution proceedings in which the right of appeal had vested in a party in accordance, with sections 2 and 47 of the Code as they stood before the amending Act had come into force. Clause (a) of section 97 (2) of the amending Act, in our opinion, must be given this natural meaning as that is consistent with the normal presumption that the Legislature does not intend to affect vested rights and in case vested rights are to be affected, it uses clear words to indicate its intention. This conclusion is further strengthened by a look at the various clauses (b) to (zb) of

section 97 (2) which discloses that when it was intended to make a limited saving embracing only a pending suit for a pending appeal or any other pending proceeding" that intention has been clearly evinced by the use of the word "pending or similar other word or words. Omission to use the word "pending"" in clause (a) of section 97 (2) clearly indicates that this clause cannot be restricted in application to appeals pending against determinations u/s 47 at the time when the amending Act came into force. Further, the words "any appeal" cannot also be restricted to appeals against determinations u/s 47 made before the commencement of the amending Act because vested rights of appeal are not confined to determinations already made before the amending Act came into force but also cover determinations made subsequent to the coming into force of the amending Act in pending executions. Clause (a) of section 97 (2) of the amending Act thus on a proper construction preserves all vested rights of appeal and any appeal in prosecution of such a right against a determination u/s 47 has to be dealt with as if the amendment made by section 3 of the amending Act had not come into force. This construction is also strengthened by the words "without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897" which, as already seen, occur in the opening clause of section 97 (2).

6. We then come to section 97 (3) which makes the Code as amended apply to every suit, proceeding appeal or application pending at the commencement of the Act or instituted or filed after such commencement notwithstanding the fact that the right or cause of action in pursuance of which such suit, proceeding appeal or application is instituted or filed had been acquired or had accrued before such commencement section 97 (3) opens with the words "Save as otherwise provided in sub-section (2) "The implication of these words is that section 97 (3) is subordinate to section 97 (2) and if a right is saved u/s 97 (2) it cannot be taken away by section 97 (3) It has also to be noticed that section 97 (2) is not limited to clauses (a) to (zb) but it also includes the Opening words which preserve the generality of the provisions of section 6 of the General Clauses Act. In our opinion, if a particular vested right of appeal or suit can be said to be preserved u/s 97 (2) it cannot be taken away (sic) taken away by section 97 (3). We have already shown that vested rights of appeal in pending executions are preserved by section 97 (2) (a) and an appeal filed in exercise of such a right is to be dealt with as if section 3 of the amending Act had not come into force. This saving, in our opinion, is not affected by section 97 (3) of the amending Act. In *Chuluram v. Bhagatram* (supra) a Division Bench of this Court, on a proper construction of section 97 (2) (a) held that it preserves vested rights of appeal in pending executions It is true that in that case section 97 (3) was not referred to but as pointed out by us above, section 97 (3) is subordinate to section 97 (2) and rights preserved by section 97 (2) are not taken away by section 97 (3) This is also the view of another Division Bench in *Shesh Kumar Pradhan Keshbo and others* (Civil Revision No 253 of 1979, decided on 28th January 1980). It was held in this case that a vested right of suit under the old rule 103 of Order 21 which was preserved by

section 97 (2) in view of the words "without prejudice to the generality of the provisions of section 6 of the General Clauses Act" as used therein was not taken away by section 97 (3) on the reasoning that the preservation of rights and remedies u/s 6 of the General Clauses Act is also an otherwise provision made by section 97 (2) which is saved by the opening words of section 97 (3). The view taken by us that rights of appeal in pending executions against determinations made u/s 47 are not affected by the amending Act was also taken by the Orissa High Court in [Nanda Kishore Moharana Vs. Mahabir Prasad Lath,](#) with which we respectfully agree.

7. We will now refer to cases which have taken a contrary view. In [Pratap Narain Agarwal Vs. Ram Narain Agarwal and Others,](#) a Full Bench of the Allahabad High Court took the view that section 97 (2) (a) does not preserve the right of appeal in pending executions and that it only preserves the right in pending appeals and in appeals to be filed against determinations u/s 47 made before the commencement of the amending Act. In our opinion, there is no sound reason to limit the words "any appeal" to pending appeals and to appeals against determinations already made. There are no words of limitation in section 97 (2) (a) which should be construed consistent with the presumption that vested rights of appeal are saved and construed that way, it clearly embraces appeals arising from determinations u/s 47 in pending executions. Such a construction as noticed earlier would also be consistent with the words "without prejudice to the generality of the provisions of section 6 of the General Clauses Act" as finding place in the opening clause of section 97 (2). The application of section 6 of the General Clauses Act is ruled out by the Allahabad High Court on the reasoning that section 97 (2) (a) indicates a contrary intention. In our opinion, whatever view may be taken about other clauses of section 97 (2) clause (a) does not show any contrary intention. The words "any appeal" as used therein are of wide amplitude and with great respect we are unable to agree that a contrary intention is indicated by clause (a). We, however, agree with the Allahabad High Court that section 97 (3) is subordinate to section 97(2) and that rights preserved by section 97 (2) are not taken away by section 97 (3). The Punjab and Haryana High Court in [Ram Niwas Vs. Mithan Lal and Others,](#) has taken the view that the words "any appeal" in section 97 (2) (a) refer only to pending appeals. According to this decision, even an appeal filed after the coming into force of the amending Act against a determination u/s 47 made before that date will also not be tenable. In our opinion, there is no justification for reading the word "pending" in clause(a) when it has not been used there and when this word is used in other clauses of section 97 (2). The reasoning of the Punjab and Haryana High Court that unless such a word is read the amendment made in section 2(2) of the Code by the amending Act would become wholly ineffective is also not correct. The words "any appeal" properly construed embrace all appeals filed in the exercise of the rights which had vested before the commencement of the amending Act. By so construing, the amendment made in section 2 of the Code will apply to those cases where no such vested right had arisen, i.e., to the determinations made in execution cases

filed subsequent to the coming into force of the amending Act. We also do not agree that the words "without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897" are words which have been used by way of abundant caution and that they do not add to the rights saved by clauses (a) to (zb) of section 97 (2). In our opinion, if clauses (a) to (zb) clearly show any contrary intention in respect of any particular matter, the application of section 6 of the General Clauses Act would be ruled out but if no such contrary intention is shown, section. 6 of the General Clauses Act would have its application. An illustration of this nature is furnished by the decision of our Court in *Shah Kumar Pradhan v. Keshbo and others* (supra). We also do not agree that section 97 (3) would be rendered nugatory by applying section 6 of the General Clauses Act. As already indicated by us, if the specific matters enumerated in clauses (a) to (zb) of section 97 (2) in 4 given case clearly evince an intention to take away vested rights. Section 6 of the General Clauses Act would be excluded and section 97 (3) would have its full play, for example, clause (a) of section 97 (2) clearly shows that the right to file a Letters, Patent Appeal against the decision, of a single Judge, of a High Court is taken away in all cases except in those cases where such an, appeal was admitted, before the commencement of the amending, Act. Section 6 of the General Clauses, Act will not have any application here because clause (n) gives out a clear, intention to the contrary. In such cases, section 97 (3) would have full operation. But in cases where such a clear intention is not evinced and in our opinion it is not so evinced in respect of appeals arising u/s 47, the vested rights of appeal cannot be taken away, by section 97 (3). The Rajasthan High Court in [Mohan Das and Others Vs. Kamla Devi](#), also took the view that only pending appeals are, saved by section 97 (2) (a). As shown above, this is too narrow a view of that provision. For these reasons, we are respectfully unable to agree with the aforesaid decisions of the Allahabad, Punjab and Haryana, and Rajasthan High Courts.

8. We were also referred to the decision of the Patna High Court in *Parshava Properties Ltd. v. A.K. Bose* (AIR 1979 Pat 388) which holds the view that in spite of the amendment made in section 2(2) of the Code by section 3, of the amending Act an order u/s 47 determining conclusively the rights of the parties would be appealable as a decree. This decision proceeds upon the reasoning that an execution proceeding is a continuation of the suit and an adjudication determining rights of the parties in execution will fall within the definition of decree without the aid of any fiction and that unless such a construction is adopted, the amendment introduced by section 3 of the amending Act would violate Article 14 of the Constitution. The serious objections to this, view is that it makes the; amendment in section 2 wholly nugatory. Even before the amending Act all orders or determination u/s 47 were not appealable as a decree and the fiction contained in the definition of decree on a proper construction was limited to such determinations which conclusively or finally determined rights or liabilities of the parties relating to the execution, discharge or satisfaction of the decree. In [Ramchandra Sng. and Wvg.](#)

[Mills Vs. Bijli Cotton Mills and Others](#), the Supreme Court observed:

Under section 2(2) of the Code a decree is deemed to include the determination of any question falling within section 47. An execution proceeding no doubt is not a suit but the combined effect of section 2(2) and section 47 is that an order passed in execution proceeding is tantamount to a decree in so far as regards the Court passing it if inclusively determines the question arising between the parties to the suit (which expression now includes an auction purchaser) and relating to the execution of the decree. Therefore, if an order decides a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree it would fall u/s 47 and would be a decree within the meaning of section 2(2). If such an order is a decree it is appealable u/s 96 of the Code.

These observations make it clear that it was only because of the fiction contained in the definition of decree that an order conclusively determining rights of the parties in execution though not made in a suit amounted to a decree and was appealable as such. The fiction has been removed by section 3 of the amending Act and, therefore, orders or determinations u/s 47 do not now amount to decree subject to the protection of vested rights of appeal u/s 97 (2) of the amending Act. The discrimination pointed out by the Patna High Court in the matter of appeal between an exonerated defendant and a third party in the context of Order 21 rule 38 (4) can be avoided, if necessary, by holding that an exonerated defendant's objection to the attachment of any property also falls under Order 21 rule 58. With great respect we are unable to agree with the Patna High Court that in spite of the amendment made in section 2(2) of the Code which omits the fiction, a determination u/s 47 can still amount to decree. It can now amount to decree only where a vested right to appeal had arisen before the commencement of the amending Act,

9. As a result of the aforesaid discussion, we answer the question referred in the affirmative. There shall be no order as to costs of this reference.