(1928) 12 BOM CK 0027

Bombay High Court

Case No: Appeals Under Letters Patent No. 45 of 1926

Pandharinath Kikalal		APPELLANT
	Vs	
Thakoredas Shankardas Vani		RESPONDENT

Date of Decision: Dec. 5, 1928

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- Limitation Act, 1908 - Section 5

Citation: (1929) 31 BOMLR 484 : (1929) ILR (Bom) 453

Hon'ble Judges: Patkar, J; Murphy, J

Bench: Division Bench

Judgement

Patkar, J.

This is an appeal against the order of the Joint First Class Subordinate Judge of Dhulia ragcting an Application to restore the suit to the file. The plaintiffs filed suit No. 197 of 1918 to recover possession of the properties in suit. It is alleged that their pleader, Mr. Dev, compromised the suit without their consent and a decree was passed in terms of the compromise. The plaintiffs filed suit No. 25 of 1922 to set aside the compromise decree on the ground the authority to compromise the suit, and, the therefore, the decree was not binding on thim. This suit was not binding on them. This suit was dismissed on January 15, 1923, as their pleader Mr. Shidore was absent, and on the advice of their pleader they filed an appeal agai missal. The appeal was dismissed on June 3C that the order was not appealable. The made an application on June 15, 1925, to vt file, under Order IX, Rule 9, of the Civil P: learned Subordinate Judge held that the a time under Article 164 of the Indian Limitati 8. 5 of the Indian Limitation Act the dela An appeal is filed against the order rejeci restore the suit to the file.

2. The provisions of Section 5 of the Indian were made applicable to applications unde [VOL. XXXI. e order of the Joint rejecting an appli- t the pleader had no efore,

the decree was ist the order of dis-1925, on the ground plaintiffs, therefore, store the suit to the ocedure Code. The a rule made by this High Court u/s 122 of the CPC and published in the Bombay, (iovernment Gazette on December 21, 1927.

3. It is urged, on behalf of the respondents the High Court u/s 122 of the Civil ultra vires, that the High Court had no power to frame a rule modifying expressly or by necessary impl: tion prescribed by the Indian Limitation 1 "rule" in "by any enactment or rule" Limitation Act has been dropped by the amending Act X of 1922. The present rule does not alter expressly period of limitation. The rule frarnec applies a section of the Indian Limitation vides for such an application. The exist of Order XXII shows that the provision Indian Limitation Act was deliberatel schedule of the Civil Procedure Code, The u/s 122 of the CPC dure of the civil Courts subject to their s power by such rules to annul, alter or a plication was beyond n Act, and that under could not be excused. ng the application to limitation Act, 1908, Order IX, Rule 9, by that the rule made by Procedure Code was cation a rule of limita-3t, and that the word in Section 5 of the Indian or by implication the by the High Court Act which itself pro-nee of Clause (8) in Rule 9 f extending Section 5 of the placed in the first High Court has power ;o regulate the proce-perintendence, and has Id to all or any of the rules in the first schedule. "Enactment", u/s 3, Clause (17), of the General Clauses Act, would include any provision contained in any Act. The words "by any enactment or rule" have been changed into "by or under any enactment," The words "by or under" are more extensive than the mere word "by". The words "under any enactment would mean under any provision contain-ed in any Act; and would not be covered by the words "by any enactment," and would cover the rule making power under any provisions of the Act, e. g., Section 122 of the CPC : see Manibhai Govindbhai Patel Vs. The Nadiad City Municipality, . Such rules are to be as effectual as if they were part of the statute itself. See Institute of Patent Agents v. Loekwood [1894] A.C. 347 and Shankarlal v. Dakor Temple Committee (1925) 28 Bom. L.R. 309 Similar contentions were considered and overruled by the Madras High Court in the Full Bench decision in the case of Krishnamachariar v. Srirangammal ILR (1924) Mad. 824 where it was held that the rule framed by the High Court applying Section 5 of the Indian Limitation Act to applications under Order IX, Rule 13, of the Civil Procedure Code, is intra vires.

4. It is further urged on behalf of the respondents that suit No. 197 of 1918 having been dismissed, the change effected by the rule should not be given retrospective effect as it affected the rights of the defendants under the decree, and reliance is placed on the decisions in Ramahrishna Chetty v. Subbaraya Iyer ILR (1912) Mad. 101. and Girish Chundra Basu v. Apurba Krishna Dass ILR (1894) Cal. 940 In In re Joseph Suche & Co., Limited ILR (1894) Cal. 940 it was held by Jessel M.E. (p. 50):-

It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of actions, its enactments, unless in express terms they apply o pending actions, do not affect them. [But] there is an exception to that rule,

namely,... where enactments merely affect procedure and do not extend to rights of action,...,

But there is no vested right in procedure or costs. See Craies on Statute Law, p. 332. In Gajanan Vinayak Vs. Waman Sham Rao, , Beaman J. expressed a doubt (p. 883) "whether it is strictly accurate to say that the law of limitation is always a law of procedure that is to say, a purely adjective law, for amongst its other consequences, it certainly has the creation of rights by prescription and if those rights have vested in individuals under one law of limitation", it cannot be "seriously argued that they can be devested by the introduction of a new law of limitation". It was, however, held in Gajanan Vinayak Vs. Waman Sham Rao, , that the law of limitation applicable to proceedings in execution is not the law under which the suit was instituted but the law in force at the date of the application for execut on, and that Acts of Limitation like other laws relating to procedure apply immediately to all steps taken after they have come into force except when some provision is made to the contrary. The same view was taken in Shib Shanlcar Lal v. Soni Ram ILR (1909) All. 33. which went up to the Privy Council in Soni Ram v. Kanhaiya Lal ILR (1913) All. 227 where it was held that the law of limitation applicable to a suit or proceeding is the law in force at the date when the suit or proceeding is instituted unless there is a distinct provision to the contrary. The extension of the provisions of Section 5 of the Indian Limitation Act to an application under Order IX, Rule 9, is not an enactment of a new period of limitation. If there has been an alteration in the law of limitation, different considerations would have prevailed The change effected by the rule u/s 122 of the CPC related to the procedure governing applications to restore suits, dismissed for default, to the file. The application was governed by Article 164 of the Indian Limitation Act, and it continued to be governed by the same Article. The application filed beyond thirty days, as required by Article 164, was beyond time. The new rule relaxes the rigour of the law by extending the provisions of Section 5 to applications under Order IX, Rule 9. The application was beyond time, but the procedure of the Court was amended by enabling the Court to > excuse the delay in such an application. Section 5 of the Indian Limitation Act was not in any way amended or repealed. It was extended by the rule u/s 122 of the CPC to an application under Order IX, Rule 9.

5. In Republio of Costa Rica v. Erlanger (1876) 3 Ch. D. 62. Mellish L.J. held that (p. 69) "no suitor has any vested interest in the coarse of procedure." In Warner v. Murdoch (1877) 4 Ch D 750 it was held by James L.J. that (p. 752) "no one has a vested form of procedure," and in Wright v. Pollock 0. B. that (p. 231) "when an Act right in any particular from of procedure,&#65533; and in wright v. Hale (1860) 6 H.&.N. 227 it was held by alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending,... it does apply to such actions ". The general principle seems to be that alterations in the procedure are always retrospective unless there be some good reason against it: see Maxwell''s Interpretation of Statutes, p 401. Acts which take away vested rights ought not to be

construed as having retrospective operation, but the case is different with regard to Acts regulating practice and procedure. The cases relied on of behalf of the respondents affected vested rights. The case would be different where an amendment of the law takes away any vested rights or affects a right of appeal. A right of appeal is not a mere matter of procedure. See Colonial Sugar Refining Co. v. Irving1 [1906] A.C. 369. and Delhi Cotton Co. v. Income Tax Commissioner (1927) 30 Bom. L.R. 60

6. In Hajrat Akramnissa Begam v. Valiv.lninsa Begam ILR (1893) 18 Bom. 429. where, in considering the question whether Section 4 of Act VI of 1892, which declared Section 647 of the old CPC corresponding to Section 141 of the present Code inapplicable.to applications in execution, deprived a party of the remedy u/s 103 of the old Civil Procedure Code, corresponding to Order IX, Rule 9, for restoring to file an application for execution which has been dismissed for default, it was held that alterations in forms of procedure are retrospective in effect and apply to pending proceedings, A similar view was taken in Fatah Chand v. Muhammad Bakhsh ILR [1894) All. 259. Further, u/s 122 of the CPC the rule was framed for regulating the procedure of the Civil Courts subordinate to the superintendence of the High Court. Having regard to the object for which the rule was enacted, namely, to relieve the rigour of the law without affecting any period of limitation or interfering with vested rights, we think that the rule made by the High Court effected a change in procedure and should be given retrospective effect so as to apply to pending proceedings.

7. It follows, therefore, that the rule is intra vires and would apply to pending proceedings. The rule was made applicable during the pendency of an appeal. A suit and all appeals made therein are to be regarded as one legal proceeding. See Baton-chand Shrichand v. Hanmantrav Shivbakas (1869) 6 B.H.C.R. 166. and Deb Nara- in Dutt v. Narendra Krishna ILR (1889) Cal. 267 In Chinto Joahi v. Krishnuji Narayana ILR (1879) 3 Bom. 214. West J. observes that (p. 216) "the legal pursuit of a remedy, suit, appeal, and second appeal, are really but steps in a series of proceedings connected by an intrinsic unity". The rule, therefore, framed by the High Court would apply to the application made by the plaintiffs to set aside the decree under Order IX, Rule 9.

8. We would, therefore, reverse the order of the lower Court and remand the case for disposal on the merits. Costs costs in the application.

Murphy, J.

9. The applicants in this proceeding had sued to have set aside the decree in Special Regular Suit No. 197 of 1918 of the Dhulia Court, on the ground that that suit had unauthorizedly been compromised by the pleader re] resenting them. This, applicants'' second suit, was dismissed for default on January 15, 1923. They next appealed against the order of dismissal, but their appeal was rejected by the District

Court as mistakenly undertaken, Their nest step was to apply to have their suit restored to file.

10. The learned First Class Subordinate Judge decided that their application was not in time, and that the delay could not, in the circumstances, be excused. Their appeal this order was dismissed summarily, and hence the present appeal under the Letters Patent.

11. The learned Subordinate Judge held that Section 5 of the Indian Limitation Act did not apply to an application made under Order IX, Rule 9, and that the delay could therefore not be excused, under that section. The real point oi the appeal under the Letters Patent on of this Court which heard it held that in to this Court, against is that at the hearing admission, the Bench view of the ruling in Mahadeo Govind Wadkar Vs. Lakshminarayan Ramnath Marwadi, . Section 5 of the Indian Limitation Act could not be held to apply to an application made under Order IX, Rule 9, but suggested that a rule applying it should be made, and meanwhile admitted the appeal.

12. The rule has since been made by this Court on December 21, 1927, under the powers conferred on it by Section 122 of the Civil Procedure Code. It has been objected at the hearing, that:

(1) The new rule is ultra vires of the powers of this Court; and,

(2) that it cannot in any case operate retrospectivele.

13. On the first point, I think Mr. Pradhan''s objection is not arguable. u/s 122 of the Civil Procedure Code, this Court has power to annul, alter or add to any of the Rules in Schedule I of the Code; and the amendment has been made after previous publication in accordance with that power. A similar amendment to Order IX, Rule 13, made by the by the High Court at Madras, was challenged in the case of Krishnaitiaohariar v. Sriranyammal ILR (1924) Mad 824 and it was held not to be ultra vires of the power given by Section 122 of the Code of Civil Procedure. The additional proviso to the rule does not, in itself, purport to give retrospective effect to the change it makes, and the next question consequently arises, whether as a mere alteration in a rule of procedure, it should be deemed to have retrospective effect; or if, as a substantial alteration of the law affecting existing rights, it should be confined in its operation to matters arising since it was made.

14. The general rule touching the point in question is, that every statute which takes away or impairs vested rights, acquired under the previously existing law, must be presumed to be intended not to have retrospective operation. But this presumption is not applicable to enactments affecting procedure, or practice; for no one has a vested right in procedure and practice. Alterations in procedure, therefore, are held to be retrospective, unless a good reason to the contrary is forthcoming, But the right of appeal is a vested right, and it is on this ground that Section 154 of the Code

has been enacted.

15. Now, the present applicants had no vested right in any appeal, When their second suit was dismissed for default, they could either have applied in time to have the order set aside; or have prayed for a review. They adopted neither of these courses, but appealed to the District Court. No appeal lay to that tribunal, and the appeal necessarily failed; and since by then the time within which the remedies open to them could be prosecuted was past, the decree in their suit became final, and they are precluded from bringing a fresh suit on the same cause of action. The consequence is, that the decree in suit No. 197 of 1918, and the compromise it effected, will stand, unless the new rule has a retrospective effect.

16. But from the point of view of the decree-holder in Suit No. 197 of 1918, the result is different. His decree was not appealed against and was final, subject to being set aside in a suit framed for the purpose. Such a suit was framed, and ended as already stated, and in a way it may be said that the effect of the new rule, if it is given retrospective effect to, will be to deprive his decree of the finality it would have had as not being susceptible of again being challenged in another suit.

17. This Is more or leas the situation envisaged in the remarks of Beaman J. in Gajanan Vinayak Vs. Waman Sham Rao, , though it has been held in some reported cases that the law of limitation is adjective law.

18. The real test appears to me to be, me to be whether the new rule is essentially an alteration of the procedure of the Court or one of a rule of limitation, or affecting a right of appeal.

19. This alteration, though it may possibly have the effect of granting the applicants'' prayer to have the aside, if they can show sufficient ground, d to affect any vested right in the decree-holder on the other side. It does not alter the law of limitation, or I does is to invoke the general exception con falling within Order IX, Rule 4, enabling a be set aside on sufficient cause being shown.

20. Even if looked at in its aspect of affecting the low of limita-tion, there is some authority for the view that alterations in it are matters of procedure I refer to the cases reported in Shib Shankar Lal v. Soni Ram ILR 1909 All 33. Again strictly speaking the new rule is not an alteration in the low of limitation itself, but in the application of one of the general exceptions to be found in that law to it.

21. I think, looking at all the circumstances the change really amounts to one of procedure, and if so, there can be no vested right in it.

22. I agree with my learned brother Patkar J. that in the first place, the rule made by this Court, applying Section 5 of the Indian Limitation Act to proceedings under 0rder IX Rule 9 is not ultra vires; and also in his view that, since these proceedings are still pending end that the new rule is one affecting practing and procedure only, it applies retrospects which to the application which this appeal is about, and to the

order proposed by him that the lower Court''s order be reversed and that the matter be remanded to the original Court for a decision on the merits, and that the costs should be costs in the application.