

(1987) 10 CAL CK 0002
In the Calcutta High Court
Case No : Civil Order No. 2675 of 1983

Bholanath Karmakar and Others

APPELLANT

Vs

Madanmohan Karmakar and Others

RESPONDENT

Date of Decision : 30-10-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 6A, Order 20 Rule 7
Constitution of India, 1950 — Article 141
Limitation Act, 1963 — Article 136 , 182
Stamp Act, 1899 — Section 2(15), 35

Citation : AIR 1988 Cal 1 : (1988) 1 CALLT 1 : 92 CWN 428

Hon'ble Judges : Nirendra Krishna Mitra, J;Ajit Kumar Nayak, J;A.M. Bhattacharjee, J

Bench : Full Bench

Advocate : S.P. Roy Chowdhury, Kamal Krishna Chakraborty, Amit Kumar Rakshit and P.B. Das, for the Appellant;Ashok Kumar Chakraborty, Swapan Kumar Nandi and Soumendra Nath Ghosh, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Hameed Joharan (d) and Others Vs. Abdul Salam (d) by L.rs. and Others, AIR 2001 SC 3404 : (2001) 6 JT 311 : (2001) 5 SCALE 163 : (2001) 7 SCC 573 : (2001) 2 UJ 1430 : (2001) AIRSCW 3261 : (2001) 6 Supreme 55

A.M. Bhattacharjee, J.—The question involved in this revisional application referred to this Special Bench is when a final decree for partition becomes enforceable within the meaning of Article 136 of the Limitation Act, 1963 so that the period of limitation prescribed therefore would begin to run thereunder. Shorn of details not necessary for our present purpose, Article 136 of the Limitation Act provides that "for the execution of any decree (other than a decree granting a mandatory injunction)", the period of limitation is 12 years and that the time from which that period would begin to run is "when the decree becomes enforceable". If a final decree for partition of immovable properties becomes

enforceable on the date of its being made or pronounced by the Court, as contended by the opposite parties, the execution in this case was rightly held to be barred by time and the revision must fail. If on the other hand such a decree does not become enforceable until the same is engrossed on requisite stamp papers, as urged by the petitioners, the impugned order holding the execution to be time barred was wrong and the revision must succeed.

2. We have heard for days together learned arguments advanced by Mr. S. P. Roy Choudhury for the petitioners and by Mr. Ashok Chakraborty for the opposite parties and we are satisfied that whatever might have been the position under Article 182 of the preceding Limitation Act of 1908, the question should not, in view of the expression used in Article 136 of the present Act of 1963, present any difficulty any more.

3. As already noted, the terminus a quo for the period of limitation under Article 136 of the Limitation Act "is when the decree becomes enforceable." A decree for partition is also an "instrument of partition" as defined in Section 2(15) of the Stamp Act, 1899 and is chargeable with stamp duty thereunder. u/s 35 of the Stamp Act, such a decree for partition cannot be admitted in evidence and cannot in any way be acted upon by or in any Court unless the same is duly stamped and, therefore, does not become enforceable until engrossed on stamp papers. No citation should be necessary for such an obvious proposition, but yet reference, if need be, may be made to a Division Bench decision of this Court in *Gour Chandra v. Prasanna Das* 65 CWN 743 . The question as to when a decree for partition becomes enforceable within the meaning of Article 136 of the Limitation Act, 1963, cannot in our view, be decided without reference to the relevant provisions of the Stamp Act, 1899, referred to hereinabove.

4. It is true, as pointed out by the Law Commission of India in its Third Report on the Limitation Act, 1908, on the basis of which the Law of Limitation was revised, recast and re-enacted in the shape of the present Act of 1963 (Section 170, pages 64-65), that the date when a decree becomes enforceable "is usually the date of the decree" and under the provisions of Order 20, Rule 7 of the Civil P.C., "the decree shall bear the date on which the judgment is pronounced". But, as already indicated, in the case of partition decree, the decree, even though already passed or made, cannot, in view of the provisions of the Stamp Act, become enforceable unless drawn up and engrossed on stamp papers. Because of such decrees, which do not become enforceable on the dates of their being passed or made, the present Article 136 has used the expression "when the decree becomes enforceable" and has made the same the starting point of limitation, departing from the expression used in Article 182 of the preceding Limitation Act, 1908, whereunder the starting point was "the date of the decree". Therefore, under Article 136 of the present Limitation Act, the terminus a quo being the date "when the decree becomes enforceable", the period of limitation in respect of a partition decree cannot begin to run until it acquires immediate enforceability and it acquires such enforceability only when it is engrossed on

requisite stamp papers, whatever might be the date of its being made or passed by the Court.

5. Mr. Chakraborty has, however, drawn our attention to the provisions of Rule 6A of Order 20 of the Civil P.C., as inserted by the Amendment Act of 1976, and has very seriously urged that now that under that Rule a decree-holder can apply for execution of the decree on the basis of the last paragraph of the judgment indicating the reliefs granted, even before any decree has been drawn up all decrees, including a decree for partition, become executable, and thus enforceable, even before they are formally drawn up and, therefore, the holders of all decrees, including a decree for partition, being thus entitled to apply for execution even before the decrees are formally drawn up, the period of limitation shall run from the date of such executability or enforceability. It is true that Rule 6A provides that "the last paragraph of the judgment shall state in precise terms the relief which has been granted by such judgment" and that "so long as the decree is not drawn up, the last paragraph of the judgment shall be deemed to be the decree for the purpose of execution and the party interested shall be entitled to apply for a copy of that paragraph only...". Ordinarily, a decree is made or passed immediately a judgment is pronounced even though a decree in proper form is formally drawn up later and that is why Order 20 Rule 7 of the Civil P.C. provides that the decree, whenever drawn up, shall bear the date on which the judgment is pronounced. The provisions of Rule 6A of Order 20 have been enacted only to ensure, as has been stated in the Statements of Objects and Reasons, that the delay in the preparation of a formal decree may not stand in the way of a successful decree-holder from going ahead with the execution of the decree and that until a decree is formally drawn up, the last paragraph of the judgment shall be deemed to be the formal decree for the purpose of execution. Rule 6A would obviously apply to such a case where, but for the delay made by the Court in drawing up the decree, there could have been a formal decree immediately on the pronouncement of the judgment and there was nothing to prevent such a decree to come into existence in formal frame at any time after the judgment. But where, as in a decree for partition, no legally operative decree can come into existence at all unless the requisite stamps are furnished by the parties and the decree is engrossed on such stamp papers, Rule 6A can have no application and cannot operate to equate the last paragraph of the judgment with the formal decree for partition outweighing and overthrowing the relevant provisions of the Stamp Act. The words "where the decree is not drawn up" in Rule 6A(2) would obviously contemplate a case where the decree could be, but has not been, drawn up by the Court and cannot refer to a case where, as in a partition suit, the decree could not at all be drawn up and has, therefore, not been drawn up by the Court for the requisite stamp papers not having been furnished by the parties.

6. Reference in this connection may be made to the observations of the Supreme Court in *Udayan Chinubhai v. R.C. Bali* AIR 1977 SC 2319, though made in a somewhat different context of application for the copy of a decree for the

purpose of appeal. The Supreme Court has observed thus : --

"Judgment which is unconditioned by the requirement of any action by a party, stands on a different footing and in that event, the date of judgment will necessarily be the date of the decree.... When the judgment is delivered in the presence of the parties clearly announcing certain steps to be taken by the plaintiff before the decree can be prepared, the matter stands on an entirely different footing. In the present case without deposit of the deficient court-fees by the plaintiff, the decree could not be instantly prepared under the law. Time was given to the plaintiff for that purpose and there could be no decree in existence in law until the plaintiff supplied the court-fees".

7. That was a case where a final decree in a suit for rendition of accounts was granted and the plaintiff was directed to make up the deficient court-fees within one month. If under those circumstances, the Supreme Court has observed that "there could be no decree in existence in law" until the court-fees were put in, then a fortiori, a decree for partition, which is always to be conditioned by the requirement of putting in the requisite stamps by the parties and which cannot, in view of Section 35 of the Stamp Act, be in any way acted upon without such stamps, cannot come "in existence in law" until such stamps are furnished and, therefore, cannot, until then, obviously become enforceable within the meaning of Article 136 of the Limitation Act.

8. Mr. Chakraborty, has however, drawn our attention to an earlier decision of the Supreme Court in *Yeswant Deorao Deshmukh Vs. Walchand Ramchand Kothari*, , which also arose out of a suit for the dissolution of partnership and the taking of accounts and where also the final decree directed the plaintiff to pay the deficit court-fees on the decretal amount. The Supreme Court in that case, however, observed (at page 18, paragraph 5) thus : --

"The decree was not a conditional one in the sense that some extraneous event was to happen on the fulfilment of which alone it could be executed. The payment of court-fees on the amount found due was entirely in the power of the decree-holder and there was nothing to prevent him from paying it then and there; it was a decree capable of execution from the very date it was passed.

9. If these observations run counter to the observations of the Supreme Court in the later decision in *Udayan Chinubhai* (AIR 1977 SC 2319) (supra), then both the decisions having been rendered by three-Judge Benches, we would have to face the most embarrassing and uncomfortable situation which the High Court has to face when confronted with contrary decisions of the Supreme Court rendered by Benches of equal strength, to decide as to which one we are bound or entitled to follow.

10. When faced with contrary decisions of the Supreme Court, the first course to be adopted by the High Court is to ascertain which one of them is decided by a larger Bench and to govern itself by such larger Bench decision, if any. This has been laid down by the Supreme Court itself in a series of decisions and must be

taken to be the settled law and reference may be made, among others, to the decision of the Supreme Court in *Union of India (UOI) and Another Vs. K.S. Subramanian*, , even though, it may be noted, a two-Judge Bench of the Supreme Court in *Javed Ahmed Abdul Hamid Pawala Vs. State of Maharashtra*, has thought that "it may be inappropriate for a Division Bench of three Judges to purport to overrule the decision of a Division Bench of two Judges". But when such contrary decisions of the Supreme Court emanate from Benches of equal strength, the course to be adopted by the High Court is, firstly, to try to reconcile and to explain those contrary decisions by assuming, as far as possible, that they applied to different sets of circumstances. This in fact is a course which was recommended by our ancient Jurists -- "*Srutirdwaidhe Srutirdwaidhe Sthalaveda Prakalpate*" -- in case there be two contrary precepts of the *Sureties* or the *Smritis*, different cases are to be assumed for their application. As Jurist Jaimini said, contradictions or inconsistencies are not to be readily assumed as they very often be not real but only apparent resulting from the application of the very same principle to different sets of facts -- "*Prayoge Hi Virodha Syat*". But when such contrary decisions of co-ordinate Benches cannot be reconciled or explained in the manner as aforesaid, the question would arise as to which one the High Court is obliged to follow.

11. One view is that in such a case the High Court has no option in the matter and it is not for the High Court to decide which one it would follow but it must follow the later one. According to this view, as in the case of two contrary orders issued by the same authority, the later would supersede the former and would bind the subordinate and as in the case of two contrary legislations by the same Legislature, the later would be the governing one, so also in the case of two contrary decisions of the Supreme Court rendered by Benches of equal strength the later would rule and shall be deemed to have overruled the former. P. B. Mukharji, J. (as his Lordship then was) in his separate, though concurring, judgment in the Special Bench decision of this Court in *Pramatha Nath Mitter and Others Vs. Hon"ble The Chief Justice of the High Court at Calcutta in the State of West Bengal and Others*, took a similar view. S. P. Mitra, J. (as his Lordship then was) also took such a view in the Division Bench decision of this Court in *Sovachand Mulchand Vs. The Collector of Central Excise and Land Customs and Others*, . To the same effect is the decision of a Division Bench of the Mysore High Court in *New Krishna Bhawan v. Commercial-tax Officer* AIR 1961 Mys 3 and the decision of the Division Bench of the Bombay High Court in *Vasant Tatoba Hargude and Others Vs. Dikkaya Muttaya Pujari*, . A Full Bench of the Allahabad High Court in *U. P. State Road Transport Corpn. v. Trade Transport Tribunal* AIR 1977 All 5 has also ruled to that effect. The view appears to be that in case of conflicting decisions by Benches of matching authority, the law is the latest pronouncement made by the latest Bench and the old law shall change yielding place to new.

12. The other view is that in such a case the High Court is not necessarily bound to follow the one which is later in point of time, but may follow the one which, in

its view, is better in point of law. Sandhawalia, C. J., in the Full Bench decision of the Punjab & Haryana High Court in *Indo Swiss Time Limited Vs. Umrao and Others*, took this view with the concurrence of the other two learned Judges, though as to the actual decision, the other learned Judges differed from the learned Chief Justice. In the Karnataka Full Bench decision in *Govindanaik G. Kalaghatigi Vs. West Patent Press Co. Ltd. and Another*, the minority consisting of two of the learned Judges speaking through Jagannatha Shetty, J., also took the same view (*supra*, at p. 95) and in fact the same has been referred to with approval by Sandhawalia, C. J., in the Full Bench decision in *Indo-Swiss Time* (*supra*).

13. This later view appears to us to be in perfect consonance with what our ancient Jurist Narada declared -- Dharmashastra Virodhe To Yuktivyukta Vidhe Smrita -- that is, when the Dharmashastras or Law Codes of equal authority conflict with one another, the one appearing to be reasonable, or more reasonable is to be preferred and followed. A modern Jurist, Seervai, has also advocated a similar view in his *Constitutional Law of India*, which has also been quoted with approval by Sandhawalia, C. J. in *Indo-Swiss Time* (*supra*, at p. 220) and the learned Jurist has observed that "judgments of the Supreme Court, which cannot stand together, present a serious problem to the High Courts and Subordinate Courts" and that "in such circumstances the correct thing is to follow that judgment which appears to the Court to state the law accurately or more accurately than the other conflicting judgment".

14. I had also occasion to consider this question in *Gopal Chandra Kalay v. State* 1981 Lab IC 422 (Sikkim) and the *Union of India v. Ashok* AIR 1983 Sikkim 19 at Pp. 23, 25, 26 where, for the reasons stated therein, I accepted this view and agreed respectfully with the views of Sandhawalia, C. J. in the Punjab Full Bench decision in *Indo Swiss Time Limited Vs. Umrao and Others*, and the minority view of Jagannatha Shetty, J., in the Karnataka Full Bench decision in *Govindanaik G. Kalaghatigi Vs. West Patent Press Co. Ltd. and Another*. I held that where there are contrary decisions of the Supreme Court rendered by Benches of equal strength, the High Court, in theory, being bound by each one, is, in effect, bound by none and is not necessarily obliged to follow the later in point of time, but may follow the one which, according to it, is better in point of law.

15. It appears that the Full Bench decision of the Madras High Court in *R. Rama Subbarayalu Reddiar Vs. Rengammal*, would also support this later view where it has been observed (at p. 452) that "where the conflict is between two decisions pronounced by a Bench consisting of the same number of Judges, and the subordinate Court after a careful examination of the decisions came to the conclusion that both of them directly apply to the case before it, it will then be at liberty to follow that decision which seems to it more correct, whether such decision be the later or the earlier one". According to the Nagpur High Court also, as would appear from its Full Bench decision in AIR 1943 340 (Nagpur) in such case of conflicting authorities, "the result is not that the later authority is

substituted for the earlier, but that the two stand side by side conflicting with each other", thereby indicating that the subordinate Courts would have to prefer one to the other and, therefore, would be at liberty to follow the one or the other.

16. Needless to say that it would be highly embarrassing for the High Court to declare one out of two or more decisions of the Supreme Court to be more reasonable implying thereby that the other or others is or are less reasonable. But if such a task falls upon the High Court because of irreconcilable contrary decisions of the Supreme Court emanating from Benches of co-ordinate jurisdiction, the task, however, uncomfortable, has got to be performed.

17. We are inclined to think that a five-Judge Bench of the Supreme Court in *Atma Ram Vs. The State of Punjab and Others*, has also indicated (at p. 527) that such a task may fall on and may have to be performed by the High Court. After pointing out that "when a Full Bench of three Judges was inclined to take a view contrary to another Full Bench of equal strength", "perhaps the better course would have been to constitute a larger Bench", it has been observed that for "otherwise the subordinate Courts are placed under the embarrassment of preferring one view to another, both equally binding on them". According to the Supreme Court, therefore, when confronted with two contrary decisions of equal authority, the subordinate Court is not necessarily obliged to follow the later, but would have to perform the embarrassing task, "of preferring one view to another".

18. It is true that if there are two contrary legislations enacted by the same Legislature, the later would impliedly repeal the earlier and would be the binding law. But we do not think that this legislative analogy would at all be apposite and can help us in solving the question before us because the very same Legislature can always repeal or alter its own law, even impliedly, while overruling being an act of superior jurisdiction, one Bench cannot overrule, expressly or by implication, a decision of a co-equal Bench. It is also true that the view that when there are conflicting decisions rendered by co-ordinate authorities, the later decision would govern us, would be conducive to certainty in the field of law. But the same certainty would also be achieved if it is also ruled that the later Bench being not competent to overrule the earlier decision of a co-ordinate Bench, the earlier decision would still continue to be the good law. A similar view in favour of the earlier decision was in fact taken by a Division Bench of this Court in *Bagala Sundari v. Prosanna Nath* 21 CWN 375 : (AIR 1917 Cal 668) where it was held that even though there might be later decisions not easy to reconcile, since the earlier one was not or could not be overruled, it would be binding, "that being a decision of this Court and the earliest on the point". We are, however, inclined to think that no blanket proposition can be laid down either in favour of the earlier or the later decision and, as indicated hereinbefore, and as has also been indicated by the Supreme Court in *Atma Ram* (supra), the subordinate Court would have to prefer one to the other and not necessarily obliged, as a matter of course, to follow either the former or the later in point of

time, but must follow that one, which according to it, is better in point of law. As old may not always be the gold, the new is also not necessarily golden and ringing out the old and bringing in the new cannot always be an invariable straight-jacket formula in determining the binding nature of precedents of co-ordinate jurisdiction.

19. But even then, we would not like to decide the question finally as the determination of the question is not unavoidably necessary for the disposal of this case and sitting in this Special Bench, decision whereof would be binding on all smaller Benches of this Court until overturned by a larger Bench or by the Supreme Court, we should not decide the question unless such determination is indispensable. We would, therefore leave the question open to be decided on a more suitable occasion where such a question would squarely fall for determination. Here in this case, even if we accept the view that in case of conflict of decisions of Supreme Court rendered by Benches of co-ordinate jurisdiction, the High Court is obliged to follow the later, we would have to govern ourselves by the later decision in *Udayan Chinubhai* AIR 1977 SC 2319 (supra). And if we accept the other view that in such a case the High Court may prefer one to the other, we would prefer the later decision in *Udayan Chinnubhai* (supra) to the earlier decision in *Yeswant Deorao Deshmukh Vs. Walchand Ramchand Kothari*, as observations in *Udayan Chinubhai* (supra) on the relevant questions are more elaborate and would more appositely apply to a decree for partition which cannot in law come into existence until drawn up on requisite stamp papers, whensoever the judgment might have been pronounced. We would accordingly govern ourselves by the decision of the Supreme Court in *Udayan Chinubhai* AIR 1977 SC 2319 (supra) and for the reasons stated hereinabove we would hold that a decree for partition does not become enforceable within the meaning of Art 136 of the Limitation Act, 1963 until engrossed on the requisite stamp papers and the period of limitation, therefore, cannot begin to run until such stamp papers are furnished.

20. As already noted, the terminus a quo for the period of limitation for the execution of decrees under Article 182 of the earlier Limitation Act of 1908 was "the date of the decree" and as under the provisions of Order 20, Rule 7 of the Civil P.C. the decree shall bear the date on which the judgment is pronounced, it was held in a catena of decisions, including that of the Division Bench of this Court in *Kishori Mohan Pal Vs. Provash Chandra Mondal and Others*, , that even for the execution of a partition decree, the time would run from the date of the judgment, even though such a decree is in fact drawn up and engrossed on stamp papers much later. These being decisions under Article 182 of the earlier Limitation Act of 1908 where, as already noted, the starting point of limitation was very much different from that under Article 136 of the present Act, it is not at all necessary for us now to decide in this case as to whether those cases were correctly decided. But we would only note that if a decree for partition does not, in view of the provisions of the Stamp Act, become executable until engrossed on stamps, it was obviously illogical to compute the period of limitation for its

execution from an earlier date when the judgment was pronounced. But as pointed out by Chakravartti, C. J., in the Division Bench decision of this Court in *Lala Baijnath Prosad and Others Vs. Nursingdas Guzrati*, the Law of Limitation is not based on logic and the relevant words in the third column of Article 182 of the earlier Limitation Act, 1908, taken literally, would obviously mean that time was to begin to run from the date of the decree which would have meant the date when the judgment was pronounced. But as pointed out further by the learned Chief Justice, the logic was, however, provided by the Privy Council in *Rameshwar v. Homeshwar* AIR 1921 PC 31 by holding that decrees contemplated by the Article were immediately executable decrees, or, rather, where the decree was not immediately executable, "the date of decree" would be the date when it becomes executable. In view of these observations of the Privy Council in *Rameshwar v. Homeshwar* (supra), we have our doubts as to whether the decision of this Court in *Kishori Mohan Pal Vs. Provash Chandra Mondal and Others*, and the other decisions taking the same view, were good law. But as already noted, it is not at all necessary for us to decide that question in this case as those decisions were under Article 182 of the earlier Limitation Act of 1908 which was very much differently worded and used expressions quite different from the relevant expression used in Article 136 of the present Limitation Act, with which we are concerned in this case.

21. We would accordingly hold that the decree for partition does not become enforceable until the same is engrossed on requisite stamp papers and, therefore, the period of limitation for its execution shall not begin to run under Article 136 of the Limitation Act of 1963 until the decree is so drawn up. That being so, as indicated at the very outset, we would accordingly hold that the execution in this case was not barred by time and we would allow the revision.

22. The revision accordingly succeeds, the impugned order is set aside and the executing Court is directed to proceed with the execution in accordance with law. The records of the case, if any, to go down at once along with a copy of this judgment. In the circumstances and in view of the questions involved, we make no order as to costs. We would like to note that the learned counsel for both the parties have rendered admirable assistance to us and we would like to place on record our appreciation of the services rendered both by Mr. S. P. Roy Chowdhury, the learned counsel for the petitioners and by Mr. Ashoke Chakraborty, the learned counsel for the opposite parties.

Mitra, J.

23. I agree.

Ajit Kumar Nayak, J.

24. I agree.