

(1976) 06 OHC CK 0008

In the Orissa High Court

Damoda Panigrahi and Others

APPELLANT

Vs

Banchhanidhi Pangrahi and Another

RESPONDENT

Date of Decision : 15-06-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Criminal Procedure Code, 1973 (CrPC) — Section 145, 146, 397, 398, 399

Citation : (1977) CriLJ 142

Hon'ble Judges : S.K. Ray, Acting C.J.; K.B. Panda, J

Bench : Division Bench

Judgement

S.K. Ray, A.C.J.

1. This revision has come before us by way of reference made at the instance of Honourable Das, J., who was of opinion that this case involved important questions of law.

It arises out of a proceeding u/s 145, Criminal Procedure Code in which the petitioners were members of the second party and which was registered as Misc. Case No. 7/1 of 1972 in the court of Sub-divisional Officer and Magistrate, First Class, Bhadrak. The preliminary order was passed on 15-4-1972. The dispute relates to 15 decimals of land appertaining to Plot No. 2137 and 8 decimals of land appertaining to Plot No. 2139 in village Guamal, P.S. Tihidi, District Balasore. The parties concerned filed their affidavits in due course. As the Magistrate was unable to decide as to which of them was in possession of the subject-matter of dispute on the date of the preliminary order, he acted u/s 146 old Criminal Procedure Code by attaching it, drawing up a statement of the facts of the case and forwarding the record of proceeding to the Munsif, Bhadrak for determination of the question as to which the parties was in possession on the date of the preliminary order as explained in Sub-section (4) of Section 145 of old Criminal Procedure Code, On receipt of the records, the Munsif registered a case numbered as Misc. Case No. 47 of 1974 and after observing the procedure contemplated in Section 146, Criminal Procedure Code, passed the final order on

2-5-1975. The Munsif found that the first party members were in possession of only 4 decimals of land appertaining to Plot No, 2137 while the second party members were in possession of the rest of area in Plot No. 2137 in dispute and also of entire area in dispute appertaining to Plot No. 2139. The records with his findings were then transmitted to the court of the Magistrate who, on receipt thereof, proceeded to dispose of the proceeding u/s 145, Criminal Procedure Code in conformity with the decision of the civil court by his order dated 13-5-1975.

2. The first party, thereupon, filed a criminal revision numbered as 28 of 1975 before the Sessions Judge, Balasore u/s 397 of the new Criminal Procedure Code. The learned Sessions Judge by his order dated 2-10-1975 allowed the revision by declaring the possession of the first party members in respect of the entire subject of dispute. Thus being aggrieved by that order of the learned Sessions Judge, the second party members have filed the present revision.

3. Two questions arose for determination:

(a) Whether the present revision directed against the order of the learned Sessions Judge dated 13-5-1975 is governed by the provisions of the new Criminal Procedure Code and, as such, maintainable; and

(b) Whether the learned Sessions Judge had jurisdiction to interfere with the findings of the Munsif rendered in a reference made to him by the trying Magistrate ignoring Sub-section (1-D) of Section 146 of the old Criminal Procedure Code whereunder the finding rendered by a Civil Court on a reference made to it u/s 146 of old Criminal Procedure Code, was statutorily immunised from any review or revision.

4. I will now proceed to deal with the first question, namely, maintainability of the present revision directed against the order of the learned Sessions Judge dated 9-10-1975. It is contended by Mr. B.K. Mishra, learned Counsel for the opposite parties, that since the final order u/s 145, Criminal Procedure Code was passed by the Magistrate on 13-5-1975 after coming into force of the new Criminal Procedure Code revision therefrom to the Sessions Court will be governed by the new Code, and, as such, a second criminal revision to this Court is barred u/s 397(3) read with Section 399(3) of the new Code. It is also contended that right to file a revision is not a vested right and as the impugned order was passed after coming into force of the new Criminal Procedure Code, revisional jurisdiction of the Sessions Court and of the High Court is to be invoked under the new Code, not under the old Code. This is in accord with the plain reading of the language of Sections 397, 398 and 401 of the new Criminal Procedure Code and in conformity with the general doctrine that procedural law is generally retrospective, that is to say, the new procedure shall govern the proceedings which commenced before such procedure came into force and were continuing on the date of such commencement. This is the exact view of another Bench of this Court in the case of *Bhima Naik v. State* (1975) 41 C LJ 674 : 1975

Cri LJ 1923. There is nothing in the saving Section 484 of the new Criminal Procedure Code to the contrary that the proceeding u/s 145 initiated under the old Criminal Procedure Code will not be entertained under the new Criminal Procedure Code. Therefore, the revision having been filed in the court of the Sessions Judge from the order of the Magistrate dated 13-5-1975, it must necessarily be entertained u/s 397 of the new Criminal Procedure Code, but it must be disposed of as if the new Criminal Procedure Code had not come into force, as will be discussed hereinafter. The ban provided under Sub-section (2) of Section 397 of the new Criminal Procedure Code would also not be attracted as the final order u/s 145 is not an interlocutory order.

It is next to be seen if a second revision to this Court is barred under Sections 397(3) and 399(3) of the new Criminal Procedure Code. Sub-section (3) of Section 397 runs as follows:

If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

Sub-section (3) of Section 399 runs as follows:

Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

It is clear from the language of these provisions that the prohibition is confined to a second revision application by the same person who filed the revision application before the Sessions Judge. Thus, where a person who filed a criminal revision before the Sessions Court and lost it cannot again come to the High Court in revision. The bar does not operate against a person who was opposite party in the Sessions Court and the revision before the Sessions Judge having been allowed he comes up to the High Court in revision. This revision will not be a second revision by him, because he having succeeded before the Magistrate had no cause to come up in revision before the Sessions Judge. Therefore, his application cannot be deemed to be a further application by the same person who filed a revision before the Sessions Judge. The petitioners in the present case who were second party members in the 145 proceeding had no occasion to file a revision before the Sessions Judge. Therefore, this second revision by them is maintainable. This identical view was taken by a Division Bench of this Court earlier in the case of Ramachandra Puja Panda Samant Vs. Jambeswar Patra and Another, as will appear from the relevant passage extracted therefrom as hereinbelow:

7. The language of Section 397(3) and Section 399(3), however, leads to a different conclusion. The statute did not adopt the language used by the Joint Committee of the Parliament. The prohibition is confined to a second revision application filed by the same person. In Section 397(3) the crucial words are "no

further application by the same person shall be entertained by the other of them". Similarly, the material clause in Section 399(3) is "no further proceeding by way of revision at the instance of such person shall be entertained.

It is thus clear that the bar of a second revision was only confined to cases where the criminal revision was dismissed by the Sessions Judge. At the instance of the person who lost the criminal revision before the Sessions Judge no revision to the High Court lies.

An illustration would make the position clear. A proceeding u/s 145, Criminal Procedure Code between X and Y terminated before the Magistrate in favour of X. The criminal revision of Y before the Sessions Judge was dismissed. A criminal revision before the High Court at the instance of Y shall not be entertained.

In the same illustration if Y's criminal revision before the Sessions Judge was allowed, a criminal revision to the High Court against the order of the Sessions Judge at the instance of X is maintainable. This is for the simple reason that the second criminal revision before the High Court is not at the instance of such person who filed the criminal revision before the Sessions Judge.

On the language of Section 397(3) and Section 399(3) conclusion is irresistible that a second revision at the instance of successful party before the Magistrate who lost the revision before the Sessions Judge lies.

In the result, therefore, it must be held that the present revision is maintainable.

5. The second question is now taken up for consideration. The contention in this connection of Mr. Mishra, the learned Counsel for the opposite parties, in essence, is that after the final order is passed by the Magistrate u/s 145 on 13-5-1975, revision preferred therefrom will be governed by Sections 397, 398, 399 and 401 of the new Procedure Code. By reason of Sub-section (1) of Section 484 of the new Criminal Procedure Code the old Code stands repealed with effect from 1-4-1974 except to the extent saved under Sub-section (2) thereof. The saving is only to the limited extent of protecting the applicability of old procedure in respect of any appeal, application, trial, inquiry or investigation pending in a particular court or forum at the time of repeal, but does not extend to continuation of such proceedings higher up by way of appeal or revision in a Superior Court. For the purpose of such continuation what is to be applied is the new Procedure Code as the old Code must be held to have been completely obliterated from the records of the Parliament. Therefore, Section 146 of the old Code must cease to exist in the eye of law and the Superior Court while dealing with an appeal or revision, as the case may be, is debarred from looking into the old provisions. The Sessions Judge, in the instant case, therefore, while dealing with the revision before him must exercise all powers conferred upon him u/s 399 of the new Criminal Procedure Code, which includes all powers exercisable by the High Court u/s 401; in other words, the Sessions Judge would be competent to exercise the powers of an appellate court and would, necessarily, have the power to interfere with the order of the Magistrate on merits also, apart

from satisfying himself as to the correctness, legality or propriety of the order under revision on other grounds. The finding of the Civil Court adopted by the Magistrate would be assailable by the Sessions Judge notwithstanding anything to the contrary in old Procedure Code. In support of his contention, Mr. Mishra has placed reliance on State of Punjab Vs. Mohar Singh, and on the majority decision of the Full Bench decision of the Patna High Court in the case of Raja Singh and Another Vs. Mahendra Singh and Others, . In the Supreme Court case their Lordships have said that under the law of England, as it stood prior to the Interpretation Act of 1889, the effect of repealing a statute was said to be to obliterate it as completely from the records of Parliament as if it had never been passed, except for the purpose of those actions, which were commenced, prosecuted and concluded while it was an existing law. That was so because nothing was saved as the repealing Act did not contain any saving clause. This is clear from the following sentence in the judgment of their Lordships at page 87:

... A repeal therefore, without any saving clause would destroy any proceeding whether not yet begun or whether pending at the time of the enactment of the Repealing Act and not already prosecuted to a final judgment so as to create a vested right:

Therefore, the correctness of Mr. Mishra's contention is to be judged by construing Section 484 of the new Code which is a provision regarding repeal and saving. This section reads as follows:

484. Repeal and savings:

(1) The Code of Criminal Procedure, 1898, is hereby repealed.

(2) Notwithstanding such repeal,-

(a) if, immediately before the date on which this Code comes into force, there is any appeal, application, trial, inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1898, as in force immediately before such commencement, (hereinafter referred to as the old Code), as if this Code had not come into force:

Provided that every inquiry under Chapter XVIII of the old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code;

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The rest of the provisions of Section 484 being irrelevant for the present purpose need not be extracted.

The mandate of Section 484(2) of the new Criminal Procedure Code is that notwithstanding the repeal of old Criminal Procedure Code all inquiries, applications etc., made thereunder shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of old Code as was in force

immediately before commencement of the new Code as if the new Code had not come into force. Section 399 of the new Criminal Procedure Code is subject to Section 484(2). Therefore, notwithstanding conferment of larger powers on the Sessions Court u/s 399 of the new Criminal Procedure Code, it must determine the propriety and legality and correctness of the findings of the Magistrate in the instant case in accordance with the provisions of the old Criminal Procedure Code, as if the new Criminal Procedure Code had not come into force. If the Sessions Judge is satisfied that the Magistrate has faithfully adopted the finding of the Civil Court and has passed his final order in strict conformity with it, he has to uphold the order unless it is assailable on other grounds. His jurisdiction and powers must be circumscribed by the old Procedure Code. If the Sessions Judge could not interfere with the finding of Civil Court as adopted by the Magistrate under the old Code, he cannot do so because he has entertained the revision application after commencement of new Procedure Code. Under the old Procedure Code, according to one view, the finding of the Civil Court could be interfered with as a part of the Magistrate's order, but the other contrary view which is also in the field has found favour with this Court (see *Bijoyananda Das and Others Vs. Sirish Chandra Das and Others*, . This is a single Judge decision, but on an independent consideration of the matter we do not feel inclined to differ from it. The reason is very simple. Sub-section (1-B) of Section 146 of the old Criminal Procedure Code provides for the Civil Court to conclude the inquiry and transmit its finding to the Magistrate and for the latter to dispose of the proceeding u/s 145 in conformity with the decision of the Civil Court. The Magistrate is bound to adopt the finding of the Civil Court and to give effect to it by declaring possession in accordance therewith. He cannot give any finding of his own. When the policy of the law is to get a final finding as to possession by a Civil Court which is more competent than a Magistrate to deal with civil rights of possession and to make the Magistrate pass his final order in accordance therewith and when the order of the Civil Court is saved from interference by way of appeal or revision under the Civil Procedure Code, it will be incongruous to contend that the finality of the Civil Court's finding can still be impeached by a criminal court in an appeal or revision from the Magistrate's order. If that were not so, the very purpose of enacting Section 146(1B) would be meaningless. Proceeding u/s 145, Criminal Procedure Code is of summary nature and jurisdiction has been conferred on the Magistrate only on existence of apprehension of breach of peace; in other words. Magistrate's jurisdiction arises only in an emergency and continues so long as emergency continues. Having regard to this context, Section 146(1B) was enacted and the legislative contemplation apparently was to give the finality to the Civil Court's decision and make it mandatory on the Magistrate to act in conformity with it and to end the emergency so soon as possible. In this view, the Sessions Judge had no jurisdiction to reverse the finding of possession adopted by the Magistrate.

Even if the other view is accepted, revision before the Sessions Judge being a continuation of Section 145 proceeding commenced before the new Criminal

Procedure Code, would be dealt with in accordance with the old Procedure Code, even though it has been filed after commencement of the new Criminal Procedure Code and the Sessions Judge would be incompetent to interfere with the finding of the Magistrate in exercise of his revisional powers; all he could do was to refer the matter to the High Court. The aforesaid construction of Section 484(2) appears to have been accepted by the Supreme Court in the case of P. Philip Vs. The Director of Enforcement, New Delhi and Another, . In that case an application had been filed in the trial court before the commencement of new Criminal Procedure Code. The application having been dismissed, a revision was carried before the Sessions Judge u/s 435, Criminal Procedure Code requiring him to make a reference to the High Court u/s 438, also before the new Criminal Procedure Code came into force on 1-4-1974. The Sessions Judge dismissed that application on 6-8-1974 and against that order a Criminal Revision was filed in the High Court which dismissed it on the ground that it was not maintainable in view of Section 399(3) of the new Code. While reversing the decision of the High Court the Supreme Court held that the application before the Sessions Judge was an application within the meaning of this saving clause and, as it was pending before him when the new Criminal Procedure Code came into force, it was to be disposed of according to old Procedure Code. Under the old Code, if the Sessions Judge refused to make a reference, a second revision lay to the High Court also under the old Procedure Code. In declaring the High Court's opinion that in view of Section 399(3) of the new Criminal Procedure Code a second revision did not lie to it, to be an error, the Supreme Court must be held to have decided that provisions of old Criminal Procedure Code governed the proceeding in revision both before the Sessions Judge as well as before the High Court, This is clear from its final order in directing the High Court to dispose of the revision before it in accordance with law, which means accordings to the provisions of the old Criminal Procedure Code as the root of the proceeding was implanted under old Cri. Procedure Code. Therefore, the Sessions Judge had no jurisdiction to reverse the finding of possession rendered by the Civil Court and adopted by the Magistrate.

6. The same conclusion is reached when viewed from another angle. It is true that procedural law is generally retrospective, but where rights have been determined and become final under the old procedural law, the provisions of the new procedural law cannot operate retrospectively on such rights. Where a part of the old procedure has already been applied and concluded before the amendment came into force, that part of the old procedure cannot be reopened after amendment. To put it another way, validity or operation of any order validly passed or any act validly done by a judicial tribunal under an adjective law for the time being in force cannot be affected by any subsequent change in the said law. This principle seems to have received judicial approbation.

In the case of Ram Singh Vs. The Crown, it has been held.

When it is said that a change in the procedural law has a retrospective operation

it only implies that the new rules of procedure coming into existence as a result of the change should be applied even to the pending proceedings. These new rules, however, can be applied only to such pending proceedings as are actually covered by them. They cannot be applied to proceedings for which they do not even purport to provide and to which they are otherwise clearly inapplicable. If there are any proceedings which are not covered by the new rules or for which the new rules do not provide, it is obvious that the Courts shall have to deal with those proceedings in accordance with the law in force at the time of initiation of those proceedings. The retrospective operation given to a rule of adjective law cannot be taken to destroy the operation of another rule of the same law in relation to proceedings for which the new rule does not provide, which proceedings had been properly and legally initiated in accordance with that other rule and at a time when the said rule was actually in force.

In the case of *Nani Gopal Mitra Vs. The State of Bihar*, , an appeal had been preferred from the conviction u/s 5(2) of the Prevention of Corruption Act. During the pendency of the appeal Sub-section (3) of Section 5 was repealed. It was contended in appeal that the presumption u/s 5(3) of the Prevention of Corruption Act would not be available to be drawn in appeal. This contention was negatived by the Supreme Court and it was held that whatever procedure was correctly adopted and concluded under the old law cannot be opened again for the purpose of applying new procedure and that the presumption was rightly drawn.

In the case of *Keshavlal Jethalal Shah Vs. Mohanlal Bhagwandas and Another*, , Section 29(2) of Bombay Act 57 of 1947 was amended by Act 18 of 1965 conferring upon the High Court a jurisdiction wider than the jurisdiction exercisable u/s 115. Civil Procedure Code. This amendment was made while a revision filed against the appellate order u/s 29(1) of the Bombay Act 57 of 1947 was pending. The question was whether the High Court in exercise of its amplified jurisdiction under the Amending Act could set aside, modify or alter the decision of the Appellate Court. It was held that the High Court could not exercise the amplified jurisdiction, and the revision had to be decided in accordance with the limitations imposed u/s 115, Civil Procedure Code.

In the case of *Indraj Singh v, Savitri* AIR 1966 All 234, it was held that the procedural law is generally retrospective. But where by the enforcement of such an amendment the validity of a judicial order validly passed, is affected, it cannot be given retrospective effect.

In the case of *Ajit Kumar Palit Vs. The State*, it was held that where a part of the old procedure had already been applied and concluded before amendment came into force, it cannot be reopened after amendment.

In the case of AIR 1927 242 (Privy Council) , it was held that the provisions touching rights which have become final are not ordinarily retrospective.

7. Thus considering the various principles enunciated by the aforesaid decisions

and keeping in mind the mandatory provisions of Sub-section (2) of Section 484 of the new Criminal Procedure Code there can be no doubt that a proceeding u/s 145 of the old Criminal Procedure Code initiated before commencement of the new Criminal Procedure Code must be continued and completed, or in other words, disposed of in accordance with the provisions of the old law. Thus, "if under the old law a finding of the Civil Court accepted by the Magistrate is made unassailable, it has to remain so even where that proceeding is impugned in revision or appeal under the provisions of the new Criminal Procedure Code. The Sessions Judge has to decide the revision before him in accordance with the limitations imposed u/s 146 Criminal Procedure Code (old.) The power of an appellate court conferred on the Sessions Judge u/s 399 of the new Criminal Procedure Code must necessarily be subject to the statutory directions contained in Sub-section (2) of Section 484 of the new Criminal Procedure Code that the Section 145 proceeding must be disposed of in accordance with the provisions including limitations of the old Criminal Procedure Code. In interfering with the finding of the Munsif the Sessions Judge obviously acted without jurisdiction inasmuch as he exceeded his powers under the old Criminal Procedure Code and ignored the ban imposed under Sub-section (1-D) of Section 146 thereof.

8. In result, as the order dated 6-10-1975 of the Sessions Judge passed in Criminal Revision No. 28 of 1975 was without jurisdiction, the same is hereby quashed. The order of the Magistrate is restored. This revision, for the aforesaid reasons, succeeds and is accordingly allowed.

Revision is allowed.

K.B. Panda, J.

9. I agree.