
(1991) 04 OHC CK 0045
In the Orissa High Court
Case No : Civil Revision No. 155 of 1991

Desabandhu Behera

APPELLANT

Vs

Harimohan Behera

RESPONDENT

Date of Decision : 05-04-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 11(2), 97(1)

Citation : (1992) 1 OLR 514

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : Y.S.N. Murty, P. Misra and M.K. Mohanty, for the Appellant; R.K. Mohapatra, K.B. Kar and B. Routray, for the Respondent

Final Decision : Dismissed

Judgement

A. Pasayat, J.—Two questions of seminal importance are involved in this revision application. Since both of them revolve round interpretation of scope and ambit of Order 20, Rule 11 of the Code of Civil Procedure, 1908 (in short "the Code"), reference to the factual controversy is unnecessary.

2. The two questions which need adjudication are as follows ;

(i) Whether the Orissa High Court Amendment in respect of Sub-rule (2) of Rule 11 of Order 20 as brought in with effect from 7-5-1954 is inconsistent with the provisions contained in the Code and therefore, stood repealed in terms of Section 97(1) of the CPC (Amendment) Act (104 of 1976) (hereinafter referred to as "the Amending Act") ; and

(ii) Whether any Court other than the one that passed the decree has jurisdiction to order for postponement of the amount decreed, or payment thereof by instalments.

In the instant case, an application for grant of instalment filed before the Executing Court was rejected on the ground that the Executing Court had no

jurisdiction.

3. The primary question is whether the Orissa High Court Amendment as indicated above is not consistent with the provisions of the principal Act as amended by the Amending Act, and therefore, stood repealed. Order 20, Rule 11, Sub-rule (2) reads as follows :

"11. Decree may direct payment by instalments :

(1) xxx xxx xxx (2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed and shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him or otherwise. as it thinks fit."

By Orissa High Court Amendment, with effect from 7-5-1954 in Sub-rule (2) for the words "and with the consent of the decree-holder" the words "and after notice to the decree-holder" were substituted. The Orissa High Court Amendment is identical in terms to those inserted by Madhya Pradesh High Court Amendment and almost at par with those introduced by the Andhra Pradesh and Madras High Courts. While the Code mandates consent of the decree-holder before any instalment can be granted, the Orissa High Court Amendment dispenses with the consent and requires a notice to the decree-holder before the matter is taken up. A reading of Section 97 of the Amending Act makes it clear that the Amending Act has effect on the entire Code, consisting of the sections and the first schedule to the Code which contains the Orders and the Rules. The repealing provision in Section 97(1) is not confined in its operation to provisions of the Code including the Orders and the Rules in the first schedule which were actually amended by the Amending Act. This has been put beyond the shadow of controversy by the Supreme Court in the case of Ganpat Giri v. IInd Additional District Judge, Balia and Ors. : AIR 1986 SC 589. In terms of Section 97(1) in case of inconsistency, a State or High Court Amendment shall be deemed to have been repealed with effect from 1-2-1977, i. e. the date from which the Amending Act came into force. The object of Section 97 appears to be that with effect from the said date there should be same procedural law in operation in all the Civil Courts of the country wherever the Code was in force. This of course is subject to such future amendments that may be made either by the State Legislature or by the High Court in accordance with law. Until such time, the Code is amended by the Amending Act is to govern the procedure in Civil Courts which are governed by the Code. To find out whether there was inconsistency between the provisions contained in the Code or in the Orissa High Court Amendment, it would be profitable to refer to the recommendations of the Law Commission in its 54th Report. This is necessary because the Law Commission considered the desirability of any modification in Sub-rule (2) of Rule 11 of Order 20. The observations of the Commission are contained in page 168 of the Report and read as follows:

"20,14. Order 20, Rule 11, which deals with instalments in case of money decrees, consists of two parts Under Sub-rule (1), the Court can, for sufficient reason, order that the money be paid by instalments, or may order postponement of recovery. This power is to be exercised by passing a separate order, unless it is incorporated in the decree.

xx xx xx Sub-rule (2) of this rule authorises the Court to make an order for payment by instalments after the decree. But this requires consent of the decree-holder. With reference to this sub-rule, it may be noted that some local amendments provide, that where the Court proposes to pass an order for payment by instalments, the decree-holder shall be given an opportunity of being heard, but his consent should not be required. One result of such an amendment would be that the Court has to exercise a judicial discretion, and the order would be appealable u/s 47, as has been held in cases under the similar Madras Amendment.

20.15. The Commission, in its earlier Report considered the question, whether such a change need be made. It took the view that the present provision is a good and just one. We agree with this view."

The Commission also noticed the recommendations of the Law Commission in its earlier Report (The 27th Report at page 17) where the Law Commission did not think it desirable to dispense with the requirement of consent with a mere notice to the decree-holder. It is, thus, seen that even though Rule 11 was not amended by the Amending Act its retention in the form in which it was originally there in the Code had been recommended by the Law Commission after indicating reasons therefor. As observed by the Law Commission, as a result of the Orissa High Court Amendment the Court has to exercise judicial discretion and the order shall be appealable u/s 47. It did not think it proper to change from requirement of consent to that of mere notice. Looked at from another angle the insistence on consent is more logical because by grant of instalment the decree in terms is varied, (See *Perumal Naicker v. Davood Rowther* : AIR 1917 Madras 118 (1); *V. Nageswar Rao v. P. Chandra Rao* : (1973) 1 Andhra W.R. 47). This is permissible only with the consent of the decree-holder. Therefore, the requirement that if any instalment is to be granted the same can be so done with the consent of the decree-holder is in line with the accepted position that there can be no variation in terms of the decree without consent of the decree-holder. In *Ganpat Giri's* case (supra), the Supreme Court was considering the effect of non-amendment to Rule 72 of Order 21 by the Amending Act and the Allahabad High Court Amendment prior to 1-2-1977. It was held that the amendment which was in force in the State of Uttar Pradesh stood repealed in view of Section 97(1). In my view, the mere notice to the decree-holder would not be sufficient for grant of instalment. By such grant the terms of the decree are varied for which consent of the decree-holder is mandated. The Orissa High Court Amendment, therefore, is not consistent with the relevant provisions of Sub-rule (2) of Rule 11 of Order 20 and therefore,

stood repealed with effect from 1-2-1977. As a consequence and corollary, by operation of the Sub-rule (2) of Rule 11 of Order 20 consent of decree-holder is a must before grant of instalment. It appears that a contrary view has been taken in *Devendra Kumar v. Jaidayal* : AIR 1981 M. P. 160 : The basis for the view indicated is that the Amending Act did not touch the concerned order and therefore, Section 97 of the Amending Act has no application. Such a view was disapproved by the Supreme Court in *Ganpat Giri's case* (supra). Though provisions similar to Orissa High Court Amendment were introduced by Madras High Court Amendment, it was held by the Madras High Court in *Shriram Chits and Investments (P)Ltd., represented by its Executive Director v. S. Padmanaban and Ors.* : (1981) I M. L. J. 472, that of instalment without consent of decree-holder is illegal after the Amending Act came into force. I concur with the view. In view of this conclusion, the resolution of the other question is merely academic. But that need not detain me any further in view of a decision of this Court in *Gobinda Chandra Mohapatra v. Gouranga Chandra Lenka* ; 34 (1968) CLT 1347. After referring to the divergence of views of various High Courts, it was held that the power to grant instalment is not restricted only to the Court which passed the decree, and the Executing Court can direct such grant. It appears that an opposite view has been taken by this. Court holding that it is the Court which passed the decree and not the Executing Court which has jurisdiction to grant instalment. (See 1987 (II) OLR 628 : *Nrusingha Charan Baisakh v. State Bank of India, Dhenkanal*. Unfortunately the decision in the case of *Gobinda Chandra Mohapatra* (supra) was not noticed Further in view of the decision of the Supreme Court in *Motilal v. Md. Hasan Khan* ; AIR 1968 SC 1087 (see paragraph 6) the view of this Court in *Gobinda Chandra Mohapatra's case*(supra) is correct. This binding decision was also not noticed in the latter case. The ineluctable conclusion, therefore, is that the Executing Court has jurisdiction to grant instalment, if the decree-holder gives consent. In the instant case, there is no consent of the decree-holder to the grant of instalment and therefore, there is no scope for grant of any instalment. Though the Executing Court did not consider this aspect, yet it held that the application for grant of instalment was not tenable. The order is sustained on grounds different than those indicated by the said Court.

The revision application is accordingly dismissed. No costs.