

**(1936) 11 AHC CK 0029**  
**In the Allahabad High Court**

(Diwan) Saiyed Ali Rasul

APPELLANT

Vs

Seth Balkishen and Others

RESPONDENT

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**Date of Decision :** 04-11-1936

**Acts Referred:**

**Citation :** (1936) 11 AHC CK 0029

**Hon'ble Judges :** Sulaiman, C.J.;Rachhpal Singh, J;Allsop, J

**Bench :** Full Bench

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## Judgement

Sulaiman, C.J.—The following question has been referred to the Full Bench:

Having regard to the provisions of the Ajmer Courts Regulation 1926 (Regulation 9 of 1926), can a reference be made to this Court under Sections 17 and 18 of Regulation 1 of 1877 on a point of law arising in connexion with an application in execution made after Regulation 9 of 1926 came into force but in connexion with a suit instituted before that Regulation came into force?

2. A suit for sale on a mortgage was filed in 1913; and a decree absolute was obtained in 1920. The first application for execution was filed in 1920. Later, owing to the deaths of the parties, there were proceedings for the substitution of names. An objection was raised by the present appellant in 1925 that he was not the legal representative of the deceased. In 1928 the Subordinate Judge decided in his favour; but the order was upset in appeal in 1930. There was a second appeal to the Judicial Commissioner, who set aside the order and held that the appellant was the legal representative, but left other questions for the decision of the Court below. When the case went back to the first Court, two sets of written objections were filed by the appellant on 3rd January 1931 and 19th January 1931, to which the decree-holder filed written replies. Issues were framed on the points thus raised and evidence was recorded. On 15th March 1933 the Subordinate Judge held that the appellant was the legal representative of the deceased and that only two out of several properties could be sold in execution of the decree.

3. Both parties appealed to the District Judge, who on 16th June 1933 returned the appeals for presentation to the Judicial Commissioner, but this order was on revision set aside on 21st July 1933. The appeals were then again presented to the District Judge who dismissed them on 22nd September 1933. An application for review was rejected on 11th May 1934. Another application for reference to the Allahabad High Court was made on 11th May 1934 and the case was referred to the High Court on 5th December 1933. In the meantime the old Regulation was replaced by the Regulation of 1927. When the reference came before a Bench of this Court a preliminary objection was taken on behalf of the respondent that the case was governed by the new Regulation under which no reference can be made to the High Court. The preliminary objection was overruled, the Bench holding that inasmuch as the suit had started while the old Regulation was in force the execution proceeding was governed, by the old Regulation and not the new Regulation. They however returned the reference on 8th March 1934 on the ground that the questions raised in it were questions of fact and not of law. Thereafter some more applications were dismissed in Ajmer. While the application for reference to the High Court was pending, a fresh set of objections were filed on 12th or 13th November 1932 which were dismissed by the Subordinate Judge on 28th November 1933 on the ground that they were barred by res judicata.

4. An appeal from that order was dismissed on 6th July 1934 and an application for review was rejected on 26th July 1934; but another application containing a set of objections was filed on 11th August 1934 which was dismissed by the Subordinate Judge on 3rd September 1934 on the ground that they were barred by res judicata. The appeal was dismissed on 18th October 1934 on the same ground. An application for reference to the High Court was also dismissed on 2nd January 1934. But on revision the Judicial Commissioner held on 18th July 1935 that the District Court should have referred the matter to the High Court. The District Judge accordingly on 17th January 1936 referred the question whether the consideration of the new objections was barred by the principle of res judicata or not. When the matter came up before a Bench of this Court the point was raised that the reference was incompetent as the case was governed by the new Regulation and not the old Regulation. Accordingly the question quoted above has been referred to this Bench for an answer. The point is certainly not free from difficulty and there is much to be said in support of either view. So far as a right of appeal is concerned it has been held definitely by their Lordships of the Privy Council that it is a substantive right which cannot be taken away by new legislation unless there is a clear intention to that effect manifested. In *Colonial Sugar Refining Co., Ltd. v. Irving* (1905) A.C. 369, their Lordships, after holding that the right of appeal to a superior tribunal is a substantive right, remarked:

To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal

altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

5. In that case the Judiciary Act, 1903, had taken away the right of appeal to His Majesty in Council and allowed an appeal instead to the High Court of Australia. Their Lordships held that nevertheless the appeal lay to them. In AIR 1927 242 (Privy Council) their Lordships while affirming the principle laid down in the Colonial Sugar Refining Co. Ltd. v. Irving (1905) A.C. 369, held that where there was no appeal provided when the order was passed, a new Act cannot be taken advantage of for the purpose of appeal unless there is a clear provision or necessary indication to that effect. In Ram Singha and Another Vs. Shankar Dayal and Another, a Full Bench of this Court applied the same rule in India. It was held that the new Tenancy Act would not affect the right of appeal under the old Tenancy Act so far as pending actions were concerned, and that an appeal being a mere continuance of the original proceeding initiated by the filing of the plaint, the right to continue that proceeding could not be affected by a new Act unless it expressly said so. A Full Bench of the Madras High Court in Daivanayaga Reddiar and Others Vs. Renukambal Ammal, have followed the same rule.

6. In Ram Karan Singh and Another Vs. Ram Das Singh and Others, it was laid down that where the cause of action had arisen under the old Agra Tenancy Act, under which the remedy was to file a suit within 12 years in the civil Court, then even though the suit was actually filed after the coming into force of the new Tenancy Act under which the remedy is in the revenue Court and can be resorted to within six months, the suit was governed by the old Tenancy Act, even though in this case both the forum and the period of limitation were changed by the new Act which had come into force before the institution of the suit though after the cause of action had arisen. In Alley Rasul Ali Khan and Another Vs. Balkishun and Others, already referred to, a Bench of this Court in a matter inter partes applied the same principle to the execution proceedings and held:

The suit out of which these proceedings have arisen was instituted on 13th February 1913 and the present proceedings have arisen out of the execution proceedings following the decree. According to the Full Bench decision all the law that was in force relating to appeals and the Courts to which appeals lay at the date of the institution of the suit would govern the proceeding following the filing of the plaint. In this view these objections fail.

7. As already pointed out the objections on which the reference had been made to the High Court were of 3rd January 1931 and 19th January 1931, and therefore subsequent to the new Regulation. But the execution proceeding had been started in 1925 and had been continuing from before the coming into force of the new Regulation. The suit itself had of course been filed while the old Regulation was in force. Certainly some new points had been taken afresh which had not been taken in the earlier objection raised to the substitution of names in

1925. Nevertheless the Bench held that the case was governed by the old Regulation.

8. In the present case it is not necessary to go to the length of holding that even where the suit was decided under the old Regulation but the application for execution is filed when the new Regulation has come into force, the execution proceedings are governed by the old Regulation, In the, present case, admittedly the execution proceedings started in 1925 and are said to be still continuing. Indeed, if this were not so, the decree-holder's remedy would be altogether barred by time because more than 12 years have expired from the date of the decree and no fresh application for execution can be entertained u/s 48, Civil P.C. The objections which have caused this reference were no doubt filed after the new Regulation came into force, though it may perhaps be said that the objection as regards the appellant being the legal representative is still an old one.

9. In view of the new Regulation there is no longer any likelihood of another case of this nature arising again in this Court. A Bench of this Court on a previous occasion held in a matter arising out of the same execution proceedings and inter partes that the case was governed by the old Regulation, and on that view overruled the respondent's preliminary objection that no reference was entertainable, though ultimately they returned the reference because it did not raise questions of law. The question is not free from difficulty and I am unable to say that the view of the Division Bench should be overruled.

10. If in a pending suit after an Act changing the forum of an appeal has been, amended an application for the appointment of a receiver or an application for injunction were made, I presume that an appeal would lie to the former Court. I am inclined to think that in a pending, execution case subsequent objections could not change the forum. If we were to hold otherwise, then while an execution case is pending and an Act is changed, appeals would lie to different Courts according to the dates of the objections in the same execution case. No doubt for purposes of convenience the objections are treated as separate miscellaneous cases and the orders are appealable separately, but they are all passed u/s 47, Civil P.C., and are not treated as a separate and independent proceedings in Order 21 Just as when a suit is filed the appellate forum is determined no matter whether the written statement is filed before or after the amendment of the Act, in the same way when an application for execution has been filed the appellate forum is fixed no matter whether, the objection to the execution is filed before or after the amendment of the Act. It seems to me that objections are in the nature of a defence and not an attack, and accordingly they are more analogous to a written statement filed against a plaint, than analogous to the plaint itself. The mere fact that each order passed by the Court is separately appealable does not in my opinion put objections on the same footing as a plaint.

11. Even if objections be regarded as being on the same footing as a plaint,

then, according to the principle laid down by the Full Bench the crucial date is the date of the cause of action and not the institution of the suit. I think that the right to object accrues to a judgment-debtor when the application for execution is made, and on the principle laid down by the Full Bench the Act which is in force at the time when the application for execution is made should govern the proceedings, even though objections are filed from time to time subsequently, provided the same execution case continues. I think that considerable inconvenience would be caused if orders passed on different objections were appealable to different Courts as a consequence of the change of the enactment not laying down any express rule. In the present case I do not think that on principle there should be any difference because of the right of getting the reference made to the High Court instead of a right to file an appeal. Regn. 1 of 1877, Clause 17, provided:

When the Court of first appeal confirms the decision of the Court of original jurisdiction on a question of law, or usage having the force of law, or the construction of any document, or the admissibility of any evidence affecting the merits of the case, no further appeal shall lie but the party, aggrieved by such decision may apply to such Court of first appeal to draw up a statement of such question and to submit it...to the High Court.

12. Clause 18 provided:

If the Court to which such application is made...consider that there is a question of the nature specified in Section 17, it shall draw up a statement of the same...and shall submit such a statement...to the High Court.

13. It follows that if the question raised were a substantial question of law as specified in Section 17, the reference could be claimed as of right, though it may be conceded that it was for the appellate Court to consider that the question raised was of such a nature. I am therefore of the opinion that, while the execution proceeding started on an application for execution is pending, the Regulation in force has been amended denying all right of appeal, the old Regulation should for purposes of this appeal be applicable. I would however not express an opinion on the further question whether if the application for execution were started after the coming into force of the new Regulation, the old Regulation would still be applicable. I accordingly hold that the previous ruling of this Court which was really inter partes and in which the point was decided expressly against the respondents on a preliminary objection raised on their behalf should not be overruled, and the question referred to us should be answered in the affirmative.

Rachhpal Singh, J.

14. I agree that the reference should be answered as proposed by my Lord the Chief Justice. In *Alley Rasul Ali Khan and Another Vs. Balkishun and Others* it has already been decided inter partes that when a new Act is passed subsequent to the filing of a suit, the suit and an appeal or the proceedings in execution arising

therefrom are governed by the old Act unless the new Act expressly provides that they will be governed by the new Act. I do not think it desirable that this view should be disturbed in subsequent proceedings between the same parties. In *Colonial Sugar Refining Co., Ltd. v. Irving* (1905) A.C. 369, their Lordships of the Privy Council observed:

To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right, is a very different thing from regulating procedure. In principle, their Lordships see no difference in abolishing an appeal altogether and transferring the appeal to a new tribunal.

15. These remarks were made in a suit which had been pending when the new Act came into force. The question as to whether or not the same rule was to govern execution proceedings taken subsequent to the passing of the new Act was not before their Lordships. In *Alley Rasul Ali Khan and Another Vs. Balkishun and Others* above quoted, the learned Judges assumed that the rule laid down by their Lordships of the Privy Council applied to execution proceedings as well, I most respectfully dissent from this, view. According to my view execution proceedings are quite distinct and separate from proceedings in a suit. If a cause of action has accrued to a person under an old Act under which he had a right of appeal to a particular Court and rights of other kinds were secured to him, then those rights cannot be taken away by a subsequent change in the law unless there, is an express provision in the new Act to that effect. But I am not prepared to hold that this rule would be applicable to execution proceedings which commenced after a new Act, came into force. I am further of opinion that every fresh application of objections to the execution of a decree made after the new Act comes into force will be governed by the provisions of the new Act though the application for execution might have been made when the old Act was in force. No one has a vested right in procedure, and the general rule of law is that procedure has retrospective operation. In the case, before us the objections giving rise to the present reference were filed by the judgment-debtors long after the new Act came into force and in my opinion they were governed by the procedure now prevailing under the provisions of Regulation No. 9 of 1926. In view, however, of the fact that the point under consideration has already been decided *inter partes*, I agree that the reference should be answered in the manner indicated by my Lord the Chief Justice.

Allsop, J.

16. As a member of the Bench which made this reference I should like to explain that we understood at the time that the execution proceedings had begun after the new Regulation came into force but that the suit had been decided at the time when the old Regulation was operative. It now appears that the execution proceedings had been instituted at a date long before the new Regulation became law. It is even somewhat doubtful whether the objections which are the subject of this case can be said to have been raised before or after the passing of the new Regulation. The question in these circumstances which is really before

the Full Bench is whether this Court has jurisdiction to entertain the reference and give an opinion upon it. My Lord the Chief Justice and my brother Rachhpal Singh are both agreed that the reference should be heard because there is an order of this Court passed on a previous reference arising out of some execution proceedings between the same parties that a reference to this Court lies and I am not prepared to disagree.

17. I understand that there is no intention of laying down a general rule which will govern all cases. If a general rule were to be laid down I should agree with my learned brother Rachhpal Singh. In my opinion, the cases Colonial Sugar Refining Co. Ltd. v. Irving(1905) A.C. 369 and Ram Karan Singh and Another Vs. Ram Das Singh and Others should be treated as authority only on the points which they decide. In the former case it was held that a right of appeal to a superior tribunal is a substantive right which comes into being when the proceedings out of which the appeal may arise are instituted. In the latter case it was decided that the Agra Tenancy Act of 1926 did not take away the right of a tenant to institute a suit in the civil Court against another person claiming the tenancy within a period of 12 years from the time when the cause of action arose. Under the previous Tenancy Act it had always been held that there was such a right. On the interpretation of the later Tenancy Act it was held that a right of this kind was to be claimed in the revenue Court within a period of six months from the date when the cause of action arose. It is obvious that there may have been a number of people whose rights of action would have been abolished as soon as the Act came into force if it had been held that the Act was intended to be retrospective upon this point. In view of the well known principle that a statute is not to be interpreted as taking away a substantive right already in existence unless it manifests a clear intention of so doing, it seems to me that the decision could not have been otherwise than it was. I do not think, however, that the case can be regarded as an authority for the proposition that the rules of procedure must ordinarily be those which were in force at the time when the cause of action arose. It seems to me that the rule in Colonial Sugar Refining Co. Ltd. v. Irving (1905) A.C. 369 is that the right of appeal becomes a substantive right when the controversy arises between the parties by the institution of proceedings in Court. When a plaintiff institutes a suit he immediately raises a controversy because he cannot get a decree without establishing his allegations even if the defendant does not choose to appear. On the other hand, an execution proceeding will continue until a positive objection is raised by the judgment debtor or some other person who is entitled to raise an objection. It is the objection which gives rise to the controversy, and every objection is the subject of a different proceeding which results in an order which has the force of a decree. I am of opinion, therefore, that ordinarily a right of appeal arising out of proceedings on an objection taken to execution proceedings arises when the objection is filed in Court.

18. The answer is in the affirmative.