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**(2008) 03 BOM CK 0043**

**In the Bombay High Court**

**Case No :** Civil Application No. 5500 of 2004 in F.A. No. 620 of 1994

Mahendra Panmal Duggad Jain and Another

APPELLANT

Vs

Bhararilal Panmal Duggad Jain and Another

RESPONDENT

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**Date of Decision :** 10-03-2008

**Acts Referred:**

Bombay Civil Courts (Amendment) Act, 1982 — Section 3

Bombay Civil Courts Act, 1869 — Section 16, 17, 26, 8

Bombay General Clauses Act, 1904 — Section 7

General Clauses Act, 1897 — Section 15Z, 15Z(1), 15Z(2), 6

Income Tax Act, 1961 — Section 27, 274, 274(2)

Maharashtra Civil Courts (Enhancement of Pecuniary Jurisdiction) (Amendment) Act, 1977 — Section 19

**Citation :** (2008) 6 BomCR 699 : (2008) 4 MhLj 803

**Hon'ble Judges :** R.C. Chavan, J;K.J. Rohee, J

**Bench :** Division Bench

**Advocate :** M.G. Bhangde, for the Appellant; M.V. Samel, for the Respondent

**Final Decision :** Allowed

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## Judgement

R.C. Chavan, J.—By this Civil Application the appellants in First Appeal No. 620 of 1994 sought re-transfer of the appeal to this Court. The appeal arose out of suit valued at Rs. 63,710/-, bearing Special Civil Suit No. 31 of 1983 which was decided by the 5th Joint Civil Judge Senior Division, Nagpur by his judgment and decree dated 26-8-1994. The appeal was filed before this Court and was pending when Bombay Civil Court Act, 1869 was amended w.e.f. 13-1-1999. As a result of this amendment the appellate jurisdiction of the District Court was increased from Rs. Fifty Thousand to Rs. Two lakhs. Consequently the Registrar of this Court, by his order dated 6-6-2000, transferred the appeal to the District Court in view of the administrative direction of this Court dated 24-2-2000. The applicants applied to the District Court for re-transferring the appeal to the High Court, contending that the appeals filed and entertained by the High Court prior to the amendment to the Bombay Civil Courts Act which came into force on 13-1-1999 were not liable to be transferred to the District Court. The 6th

Additional District Judge rejected this application. The applicants, therefore, filed present application for re-transfer of the appeal to this Court.

2. In the meantime, the question, as to whether such appeals would lie before the High Court or were required to be transferred to the District Court had been raised before another single Judge of this Court in First Appeal No. 411/1983 *Tukaram v. Smt. Hababi* reported at 102(1) BLR 654, who, by his order dated 16-12-1999, held that the appeal was required to be transferred to the District Court. Similar orders were passed by learned Single Judges in *Shri Khalil Nabi Patel and Others Vs. Shri Gulam Hussain Sharfuddin Patel and Another*, , and *Pune Municipal Corporation v. Kanhayalal* reported at 2005(2) Mh.L.J. 89. The learned Single Judge of this Court, who heard the present application for re-transfer of the appeal, considered the judgment of the learned single Judge but expressed inability to concur with the view taken by the learned single Judge. Therefore, by order, dated 29th October, 2004, he directed the Registry to place the matter before the Hon''ble Chief Justice for being referred to a larger Bench. This is how the present application has been placed before us.

3. The learned Counsel, appearing for the parties upon consideration of law applicable expressed that an appeal which had been filed before the High Court and entertained by it prior to coming into force the amending Act on 13-1-1999 could not have been ordered to be transferred to the District Court.

4. The Bombay Civil Courts Act had been amended from time to time enhancing the jurisdiction of the Civil and District Courts. While amending the Act by the Maharashtra Civil Courts (Enhancement of Pecuniary Jurisdiction and Amendment) Act, 1977 original jurisdiction of the Civil Judge, Junior Division was increased to Rs. 25,000/- and appellate jurisdiction of the District Court was increased from Rs. 10,000/- to Rs. 25,000/-, by amending the provisions of Section 26 of the Act and incorporating a saving clause in form of Clause 19 of the Amending Act, which reads as under:

The amendments made by this Act in any of the Act aforesaid shall not have any effect in respect of and apply to any suits, appeals or other proceedings of a civil nature filed and pending before any Court on the date of commencement of this Act, and such proceedings shall be continued and disposed of by that Court, as if this Act had not been passed; and any appeal, revision application or other proceedings of a civil nature in respect of any decree or order passed by any Court before the date of commencement of this Act shall be filed before and heard and disposed of by the Court competent to entertain such proceedings before such commencement, as if this Act had not been passed.

5. Section 26 of the Bombay Civil Court Act was further amended by the Bombay Civil Court Amendment Act, 1983 which came into force on 24-2-1983, whereby the jurisdiction was raised to Rs. 50,000/- Section 3 of the Amending Act reads as under:

3.(1) The amendments made by the Bombay Civil Courts (Amendment) Act,

1982 which came into force on the 1st January, 1984 (hereinafter in this Section referred to as "the said date") shall not have the effect in respect of, and apply to, any suits, appeals or other proceedings of a civil nature filed and pending before any court on the said date and such suits, appeals or other proceedings shall be continued and disposed of by that Court as if that Act had not been passed; and any appeal, revision application or other proceedings of a civil nature in respect of any decree or order passed by any court before the said date shall be filed before and heard and disposed of by the court competent to entertain such proceedings before the said date as if that Act had not been passed.

6. The Act was again amended by Act No. 3 of 1999 whereby the words "Fifty Thousand rupees" appearing in Section 26 of the Bombay Civil Courts Act were substituted by words "Two Lakh rupees". The amended Section reads as under:

26. In all suits decided by a Civil Judges of which the amount or value of the subject-matter exceeds two lakh rupees the appeal from his decision shall be direct to the High Court.

7. It may be useful to mention that Section 8 of the Act provides that, except as provided in Sections 16, 17 and 26, the District Court shall be the Court of appeal from all decrees and orders passed by subordinate Courts from which an appeal lies under the law for the time being in force. Thus, since Section 26 provides that the appeals from suits decided by Civil Judges, in which the amount or value of subject-matter would exceeds rupees two lakhs, will lie to the High Court, the appeals from suits valued under two lakh rupees would lie to the District Court. This amending Act, however, did not contain a provision like one in Section 3 of the amending Act, 1984 or Section 19 of the amending Act of 1977. Considering this omission in First Appeal No. 411 of 1983 *Tukaram v. Smt. Hababi* (which decision has been subsequently reported in 102(1) B.L.R. 654), the learned single Judge held that pending appeals were required to be transferred. The learned Single Judge relied on, amongst others, a decision of Full Bench in *Vilas Vasantrao Mahajan v. Central Bank of India* reported at 1982 Mh.L.J. 139, in respect of amendment to Section 26 of the Bombay Civil Courts Act introduced by amending Act, 1977. The learned single Judge observed that on all the three occasions when Section 26 of the Civil Courts Act was amended raising valuation of the subject-matter, the legislature has taken special precaution to provide for a saving clause. He observed that the decision of the Full Bench in *Vilas Vasantrao Mahajan* was based mainly on the construction of Section 19 of the Amending Act of 1977. The learned Judge then pointed out that such a saving clause was not included in the Amending Act of 1999 and, therefore, concluded that in the absence of any such provision pending appeals arising out of the decrees and orders passed in suits by Civil Judges prior to coming into force of the Amending Act cannot be saved. The amended provision of Section 26 of the same will have to be given retrospective effect. The learned single Judge, therefore, held that the appeal could not be retained on the file of

High Court and would have to be sent for disposal by District Judge, Pune.

8. It may be useful to mention that another learned single Judge of this Court dealing with First Appeal No. 562 of 1982 was considering the first appeal valued at Rs. 15,000/-. In the context of the Amending Act of 1977 and relying on the judgment of the Full Bench in Vilas Vasantrao Mahajan's case the learned Single Judge held that the appeal had to be heard by the District Court and not by the High Court. Similar view has been taken in First Appeal No. 232 of 1999 in Babalal Husein Sheikh v. Rama Appa Bhandari decided on 24th March, 1999, Pune Municipal Corporation v. Kanhyalal reported at 2005(2) Mh.L.J. 89, Shri Khalil Nabi Patel and Others Vs. Shri Gulam Hussain Sharfuddin Patel and Another, .

9. The learned single Judge dealing with the present civil application held that absence of saving clause in the Amending Act 1999 was not material, since such saving clauses were many times added by way of abundant caution. He held that in view of the provisions of Section 7(b) of the Bombay General Clauses Act repeal of a previous enactment would not affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder and, therefore, unless a contrary intention is indicated by express words or clear implication by the amendment which brings a change in forum, court or tribunal before which the case is pending would have jurisdiction to continue with the same. The learned Judge held that the matter would be governed by Section 7 of the Bombay General Clauses Act and since there is nothing in the Amending Act to indicate a contrary intention pending appeals were liable to be retained in the High Court itself.

10. Shri M.G. Bhangde, the learned senior Counsel for the applicant relied on judgment of the Supreme Court in Commissioner of Income Tax v. Dhadi Sahu reported at 1994 Supp (1) SCC 257. In that case the question pertained to provisions of Section 274(2) of the Income Tax Act as amended by Taxation Laws (Amendment) Act, 1970 w.e.f. 1st April, 1971. The amended Section provided that if the amount of concealed income exceeds a sum of Rs. 25,000/- the Income Tax Officer shall refer the case to Inspecting Assistant Commissioner. On 15th February, 1973 the Inspecting Assistant Commissioner passed orders imposing penalties of Rs. 24,000/- and Rs. 12,500/- respectively for the assessment years 1968-69 and 1969-70. In this context upon review application the appellate Tribunal stated the case to the Orissa High Court, referring the following question of law:

Whether, on the facts and circumstances of the case, and on the true interpretation of Section 274, as amended by the Taxation Laws (Amendment) Act, 1970, the Inspecting Assistant Commissioner to whom the case was referred prior to April 1, 1971, had jurisdiction to impose penalty?

The Orissa High Court answered the question, thus:

If the Inspecting Assistant Commissioner had passed final orders prior to the

amending Act of 1970, there would have been no question of loss of jurisdiction, but as the matter was still pending and by change of procedure the references became incompetent, the Inspecting Assistant Commissioner had no jurisdiction to complete the proceedings, because he had no longer jurisdiction to deal with the matter of this type. We are of the view that the Tribunal came to the right conclusion on the facts of the case. Our answer to the question referred to us, therefore, is:

On the facts and in the circumstances of the case, and on a true interpretation of Section 274, as amended by the Taxation Laws (Amendment) Act of 1970, the Inspecting Assistant Commissioner to whom the case had been referred prior to 1971 had no jurisdiction to impose penalty.

11. It was argued before the Apex Court that although the order of imposition of penalty was passed by the Inspecting Assistant Commissioner after the amending Act had come into force, yet, reference had been made by the Income Tax Officer when the Inspecting Assistant Commissioner continued to have jurisdiction to impose penalty. In other words, it was argued that the amendment brought out in Section 27 of the Income Tax Act w.e.f. 1st April, 1971 was not applicable to pending references. In paragraph 18 of the judgment the Hon'ble Supreme Court stated the general principles as under:

18. It may be stated at the outset that the general principle is that a law which brings about a change in the forum does not affect pending actions unless intention to the contrary is clearly shown. One of the modes by which such an intention is shown is by making a provision for changeover of proceedings, from the court or the tribunal where they are pending to the court or the tribunal which under the new law gets jurisdiction to try them.

11A. The Court then referred to Section 6(b) of the General Clauses Act which corresponds to Section 7(b) of the Bombay General Clauses Act. In paragraph 21 the Court observed as under:

21. It is also true that no litigant has any vested right in the matter of procedural law but where the question is of change of forum it ceases to be a question of procedure only. The forum of appeal or proceedings is a vested right as opposed to pure procedure to be followed before a particular forum. The right becomes vested when the proceedings are initiated in the tribunal or the court of first instance and unless the legislature has by express words or by necessary implication clearly so indicated, that vested right will continue in spite of the change of jurisdiction of the different tribunals or forums.

12. It then took a review of several decisions of several High Courts and provisions of General Clauses Acts and held that since the Amending Act did not show that the pending proceedings would abate it reversed the judgment of the High Court.

13. The learned Senior Counsel also relied on judgment of the Supreme Court in

Air India Vs. Union of India and others, . It pertained to saving of subordinate legislation upon repeal of the parent statute. The learned Senior Counsel relied on this judgment only to point out that the saving provision is very often unnecessary, but is put in *ex abundanti cautela*, to quiet doubts. The Court held that regulations cease to be effective upon the repeal of the parent statute.

14. The learned senior Counsel next placed reliance on the judgment of the Division Bench of this Court in Securities and Exchange Board of India Vs. Sterlite Industries (India), . In that case, the question was of jurisdiction of the High Court to continue to hear pending appeals upon coming into force of the amending Act on 29-4-2002 whereby instead of appeal to High Court provided under the unamended provision of Section 15Z the appeal was provided to the Supreme Court. The Court quoted the proposition laid down by the Supreme Court in Garikapatti Veeraya Vs. N. Subbiah Choudhury, of this judgment as under:

- i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.
- ii) The right of appeal is not a mere matter of procedure but is a substantive right.
- iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.
- iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceedings and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.
- v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.

In paragraphs 8, 9 and 11 the Division Bench observed as under:

8. It is no doubt well settled that right to appeal is a substantive right and it gets vested in the litigant no sooner the lis is commenced in court of the first instance and such right or any remedy in respect thereof will not be affected by any repeal of the enactment conferred such right unless the repealing enactment either expressly or by necessary implication takes away such right or remedy in respect thereof. The question, however, is whether a litigant has or can have, vested right in a particular forum. Can he contend as a matter of right that his suit or application should be tried by the forum which exist on the date when his cause of action arose. Forum belongs to realm of procedure and does not

constitute substantive right of a party or a litigant. Therefore, the appeal the right to which has arisen after a repealed Act, will have to be filed in a forum provided for by the repealing Act....

9. In this context a reference may also be made to the observations of the Supreme Court in *New India Insurance Co. Ltd. Vs. Smt. Shanti Misra, Adult*, . The question in that case was when there is change in the forum and new period of limitation is provided whether the change operates retrospectively. The court held that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is well established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right to action accrued prior to the change of forum. He will have vested right of action but not a vested right of forum. If by express words the new forum is made viable only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective. The Court also held that the expression, "arising out of an accident" occurring in Sub-section (1) and "over the area in which the accident occurred" mentioned in Sub-section (2) clearly show that the change of forum was meant to be operative retrospectively irrespective of the fact as to when the accident occurred. II. The only question that remains to be considered is whether the appeals pending in this Court which were filed prior to coming into force of the amending Act would not survive in view of the amendment to Section 15Z. Mr. Sundaram submitted that if right to appeal to a particular forum is not a vested right and a new forum is prescribed by the statute without providing as to what would happen to the pending appeals filed under old Section 15Z, it is clearly implied that all the pending appeals would come to an end. He submitted that there is nothing in the amending Act which would save pending appeals as under the said Act no saving has been provided. According to the learned Counsel if the forum is within the realm of the procedure then Section 6 will not be attracted and the pending appeals will also be affected. In support of this proposition Mr. Sundaram placed reliance on the decision of the Supreme Court in *Arka Bikas Chakravorty v. State Bank of India and Ors.*, (1997) 10 SCC 417 and *Kolhapur Canesugar Works Ltd. and Another Vs. Union of India and Others*, . We are unable to accept the submission of Mr. Sundaram. It is well settled that law which brings out a change in the forum does not affect the pending actions unless the intention to the contrary is clearly shown. One of the modes by which such an intention is shown is by making a provision for change over of proceedings, from the court or the tribunal where they were pending to the court or the tribunal which under the new law gets jurisdiction to try them. Wherever legislature has intended to transmit pending appeals to the new forum specific provision to that effect has been made in the statute, for example, *The Recovery of Debts Due to Banks and Financial Institutions Act, 1993*, *Patents (Amendment) Act, 2002* etc. It is true that no litigant has any vested right in a matter of forum but when the appeals have been filed in the tribunal or court before the new law bringing the change in

the forum is brought into force, unless the Legislature by specific words or by necessary implication clearly so indicated, the court or the tribunal would continue to have jurisdiction to entertain the appeals. However, the position would be different if the forum is abolished as held in the case of Jose Da Costa. We find nothing in the amending Act to indicate that the legislature intended to affect the pending appeals which were filed long prior to the coming into force of the Amending Act.

(Emphasis supplied)

15. We have carefully considered the ratio of judgments on which the learned senior Counsel for the applicant placed reliance. The judgment in *Tukaram v. Hababi* is principally based on the absence of saving clause in the Amending Act of 1999. The learned single Judge had concluded that it was because of such saving clause that the appeals before the High Court were saved when Section 26 was amended on three times in the past in 1949, 1977 and 1983. The learned Judge had also relied on Full Bench judgment in *Vilas Vasantrao Mahajan v. Central Bank of India* which had relied on saving clause in Section 19 of the amending Act of 1977. In that case the amending Act, 1977 had come into force on 1-1-1978. The decrees in the appeals in respect of which a question had been referred to the Full Bench were passed after 1-1-1978. The appellants objected on the ground that the suits in these cases were filed before 1-1-1978 and, therefore, the right to appeal to the superior Court such as High Court was vested on the appellant on the date of suit. In this context after referring to the provisions of the saving clause in form of Section 19 of the Amending Act, the Court held that in respect of decrees or orders passed by any Court before 1-1-1978, even if an appeal was not filed and, therefore, was not pending, the appeal would lie before the High Court. The Court also referred to the pending matters, which were referred to in the first part of the saving clause, and observed as under in paragraph 11 of its judgment:

11. Pending matters adverted to in the first part and matters not so pending or to be filed, referred to in second part are expressly required, under both the parts of Section 19, to be disposed of "as if this Act had not been passed." In other words, cases covered by either of the parts are intended, as expressly indicated, to be covered by the unamended and not by the amended provisions of the Act. The appeals referred to in both the parts are intended to be immune from the effect of amendments. This is now the rights in respect of the pending proceedings and proceedings not pending but arising out of the order and decrees passed before 1-1-1978, covered by the said cases can be said to have been saved from the impact, of the amending provisions as the heading of Section 19 itself indicates. This positive saving provision in respect of the appeals, against orders and decrees passed before the Act, clearly reflects the legislative intent not to save any other rights or appeals. Such positive saving provision also secondly imply implication (sic, non-application) of saving provision in the General Clauses Act.



(Emphasis supplied).

16. It may be seen first, that question before the Full Bench was not in respect of the appeals which had already been filed and were pending before the amending Act came into force and, therefore, observations in respect of such pending appeals would not form the ratio of the judgment. Secondly, it is not possible to deduce from this judgment, particularly paragraph 11, quoted above, that pending appeals could have been saved only because of the saving clause in form of Section 19 of the Amending Act. The underlined sentences in paragraph 11 of the judgment are significant.

It may be seen that what the Full Bench meant to convey is that this positive saving provision was intended to imply non-application of saving provision in the General Clauses Act i.e. intention to restrict the saving provision to what was clearly stated in the saving clause and nothing more. As a corollary, it would follow that the absence of saving clause would make the provisions of Bombay General Clauses Act applicable. They had not been considered by the learned single Judge deciding *Tukaram v. Hababi*. In view of the provisions of Section 7(b) of the Bombay General Clauses Act the repeal of part of Section 26 of Bombay Civil Courts Act, relating to the reference to the sum of Rs. Fifty Thousand, would not affect the proceedings which had already commenced or had been initiated in the High Court. We may, however, add that right to forum being in the realm of adjectives or procedural law would not entitle the suitor who had filed suit in the trial Court before Amending Act came into force to insist that even his appeal may be heard and decided by the forum prescribed under the unamended provisions. This question has already been concluded by the Full Bench in *Vilas Vasant Mahajan v. Central Bank of India*. However, unless clear legislature intent can be discerned to indicate that even pending matters were required to be transferred to the new forum, mere absence of a saving clause like one in the form of Section 19 of the Amending Act of 1977, would not warrant transfer of cases to the new forum.

17. We, therefore, express our respectful agreement with the learned single Judge, who directed this application to be placed before the Division Bench. We are unable to subscribe to the view taken by the learned single Judges in *Tukaram v. Hababi* 102(1) BLR 654, as also two other cases referred to earlier, for the reasons mentioned above. We are, aware that after the 1999 amendments there have been three reported judgments (mentioned in earlier part of this judgment) subscribing to the view taken in *Tukaram v. Hababi*. Therefore, a large number of appeals might have been transferred from High Court to District Courts and likewise a large number of suits might have been transferred from Courts of Civil Judge Senior Division to the Courts of Civil Judge Junior Division, applying analogy of appeals. These Courts might have dealt with the proceedings so transferred to them. We are also aware that the interpretation of law by the Court relates back to the date when the provision of law was so enacted and therefore, may have a potential of opening a floodgate of

litigation as well as confusion. Since the question raised goes to the root of the jurisdiction of the Court trying the suit or hearing an appeal, the possibility of enterprising litigants seeking to have the clock turned back cannot be ruled out. We may, point out that the transfers of suits from the Courts of Civil Judges, Senior Division to the Courts of Civil Judges, Junior Division or transfer of appeals from High Court to the District Courts would provide right of an additional appeal to the litigants and therefore, would not prejudice them by being relegated to a forum lower than the one in which they could have had their lis decided, but for the interpretation of the Amending Act of 1999. Therefore, we would clarify that this judgment shall not affect civil suits or appeals which have been already decided upon the transfers to Courts concerned in view of the judgment in *Tukaram v. Hababi*. Such course had been resorted to in *State of Kerala and Others Vs. Allasserry Mohammed and Others*, , while overruling the view in *Rajaldas Gurunamal Pamanani Vs. The State of Maharashtra*, .

18. Therefore, in our view, as we allow the civil application and overrule the judgment in *Tukaram v. Hababi*, we direct that the suits or appeal already decided may not be reopened.