

(1979) 12 MP CK 0022
In the Madhya Pradesh High Court
Case No : Revision No. 588 of 1979

Pratap Narayan Saxena and Others

APPELLANT

Vs

Ram Chandra Saxena

RESPONDENT

Date of Decision : 15-12-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 129
General Clauses Act, 1897 — Section 6

Citation : (1980) JLJ 751

Hon'ble Judges : H.G. Mishra, J

Bench : Single Bench

Advocate : J.P. Sharwa, for the Appellant; B.L. Agrawal, for the Respondent

Final Decision : Allowed

Judgement

Mishra, J.—This is a revision directed against order dated 26-7-79 where by the learned Addition D strict Judge has held that the M. P. High Court Amendment in sub-rule (2) of rule 11 of Order 20 C.P.C dated 16 9-1960 stands repealed by virtue of sub-section (1) of section 97 of the C P.C. (Amendment) Act, 1976. (Act. No. 104 of 1976).

2. Facts essential for decision of the revision are as under:--

In a Civil Suit No. 3-B/77 brought in the Court of Fourth Additional District Judge, Gwalior, a decree was passed for recovery of Rs. 13,151.41 P. on 15-5-1979 in favour of the decree-holder non-applicant against the judgment-debtor-applicants. This decree was put into execution In the execution proceedings, the judgment-debtor-applicants submitted an application on 25- -79 under Order 20 rule 11 (2) (as amended by this Court), for grant of instalments without concent of the holder on the ground that they are unable to make payment of the decretal amount in lump sum This application was opposed by the decree-holders inter alia on the ground that the aforesaid M.P. High Court amendment dated 16-9-1960 in sub-rule (2) of rule 11 of Order 20 C.P C stands repealed by virtue

of sub section (1) of section 97 of the C P.C (Amendment) Act. 1976 (Act No. 104/76), for short, "the 1976 Act". This objection has found favour with the executing Court. Hence, this revision.

3. In this revision, Shri J.P. Sharma, learned counsel for the revision-applicants, contended that the interpretation put by the learned Additional District Judge on sub-section (!) of section 97 of the 1976 Act is incorrect, because provisions of Order 20 rule 11 (2) CPC have not been amended by the 1976 Act. As such the M P. High Court Amendment in Order 20 rule 11 (2) CPC cannot be regarded to have been repealed. Reliance, is placed on the ratio of Chand Kaur Vs. Jang Singh and Others,

Shri B. L. Agrawal, learned counsel for the decree-holder non-applicants, contended (i) that the aforesaid M. P. High Court Amendment stands repealed due to operation of the repealing provisions contained in section 97 (i) of the 1976 Act, and (ii) that this is in spite of the fact that no amendment has been brought about in sub-rule (2) of rule 11 of Order 20, C.P.C. This is what flows from the use of the expression "Principal Act as amended by this Act". Reliance is placed on Tungalram v. Smt. Leelavati, AIR 19(sic)8 All. 46.

4. Having heard the learned counsel for the parties, I have come to the conclusion that this revision deserves to be allowed.

5. In order to appreciate the controversy, the provisions of Order 29, rule 11 CPC have to be considered along with (i) the M. P. High Court amendment and (ii) the amendment brought about in the aforesaid rule by the 1976 Act. Accordingly, the relevant provisions are being reproduced below: --

O. 20, rule 11 (1)--Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After the passing of any such decree, the Court may, on the application of the judgment-debtor and with consent of the decree-holder, order that payment of the amount decreed shall be postponed or 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,

The M. P. High Court Amendment dated 16-9-60 brought about the following amendment in sub-rule (2) of rule 11 of Order 20 CPC. --

In sub-rule (2) for the words "and with the consent of the decree-holder," the words "and after notice to the decree-holder" shall be substituted.

By section 70 (vi) of the CPC (Amendment) Act, 1976, in sub-rule (i) the following amendment was inserted:--

(vi) in rule 11, in sub-rule (1), for the words " at the time of passing the decree

order that: "the words "incorporate in the decree, after hearing such of the parties who had appeared personally or by pleader at the last hearing, before judgment, an order "shall be substituted.

Now, section 97 of the 1976 Act, omitting portions which are not relevant for the present purpose, reads as under:--

97. (1) Any amendment made, or any provision inserted in the Principal Act by a State Legislature or a High Court before the commencement of this Act shall, except in so far as such amendment or provision is inconsistent with the provisions of the principal Act as amended by this Act, stand repealed.

(2) Notwithstanding that the provisions of this Act have come into force or the repeal under sub-section (1) has taken effect, and without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897,--

(a) to (zb).....etc.

(3) Save as otherwise provided in sub-section (2), the provisions of the principal Act, as amended by this Act, shall apply to every suit, proceeding, appeal or application, pending at the commencement of this Act or instituted or filed after such commencement, notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been ""acquired or had accrued before such commencement.

6. From the language employed, it is clear that sub-section (1) of section 97 of the 1976 Act directs itself to bring about repeal of amendment made or provision inserted in the Principal Act by a State Legislature or a High Court before the commencement of the 1976 Act. While providing so, section 97 (1) of the 1976 Act proceeds to carve out a "Saving" in favour of an amendment made or a provision inserted by the State Legislature or the High Court to the extent to which it is consistent with the Principal Act as amended by the 1976 Act. Accordingly, the consistency of an earlier amendment made or provision so introduced by the State Legislature or a High Court has to be tested on the touch stone of amendments made or provisions inserted in the Principal Act by the 1976 Act. The consistency has not to be tested vis-a-vis the Principal Act which has remained unamended. Had this been the legislative intent, then section 97 (1) of the 1976 Act would have been differently worded. Moreover, the provisions contained in section 12 - to section 129 of the CPC reserving power to High Court to make amendment in Order-part of the CPC would not have been left intact. Accordingly, the real object underlying provisions enacted by section 97 (1) of the 1976 Act appears to work out a repeal by carving out a "Saving" to the extent of consistency between a High Court amendment and an amendment made by the 1976 Act. A similar question had cropped up in *Chand Kaur Vs. Jang Singh and Others*, 6, though in context with the Punjab High Court Amendment in rule of Order 22 C. P. C. vis-a-vis the impact of the "Repeal and Saving" clause enacted by section 97 (1) of the 1976 Act, wherein R.N. Mittal J. speaking for the Court has expressed himself on the point thus :--

"No doubt, section 97 (I) of the Amendment Act provides that any amendment made or any provision inserted in the Code by a High Court before commencement of the Act, shall, if it is inconsistent with the amended Code, stand repealed. But if a rule or sub rule in Schedule I of the Code was amended or substituted by a High Court before the Amendment Act, the amended or substituted rule does not stand automatically repealed by virtue of section 97 (i) for the reason that original rule or sub-rule as framed by the Legislature has not been amended by the Amendment Act. If it had been the intention of the Legislature, it would have stood so specifically. I am, therefore, unable to hold that sub-rule (3) of rule 4 as framed by this Court stands repealed after the Amendment Act."

(Emphasis by me).

7. Mr. B, L. Agarwal, learned counsel for the decree-holder-non-applicants, contended that the ratio of Smt. Chand Kaur's case (*supra*) to the extent indicated by emphasized in aforesaid quotation, should not be regarded as correct inasmuch as it runs contrary to the language employed by the Parliament while enacting Sec. 97 (1) of the 1976 Act. Sec. 97 (1) of the 19/6 Act instead uses the expression--

Shall, except in so far as such amendment or provision is inconsistent with the provisions of the Principal Act as amended by this Act stand repealed.

Although it is true, that the language employed in the aforesaid sub-section of Sec. 97 is different than that stated in the aforequoted observations of the Punjab case, namely, Smt, Chand Kaur vs. Jang Singh and others, (*supra*) yet the ultimate conclusion reached in that case cannot be said to be incorrect. The position will be clear if one were to draw a circle its circumference showing the outer line of the extent of consistency, what will be within the circle will be treated to be saved by virtue of Sec. 97 (1) of the 1976 Act and what will fall beyond it will stand repealed, being beyond the pale of consistency.

8. So far as reliance on the ratio of Tungal Ram Vs. Smt. Leelawati, is concerned it is not available to the non-applicant in view of the fact that the question which fell before the Allahabad High Court for consideration was different. The U. P. Amendment Act No. 14 of 1970 by Sec. 3 the State amendment in Sec. 115 C. P. C. for the words "High Court" wherever occurs, the words "High Court or District Court" were substituted, and the following Proviso was also added in this section : --

Provided that nothing in this section shall be construed to empower the District Court to call for the record of any case arising out of an original suit of the value of twenty-thousand rupees or above.

By the 1976 Amendment Act, vide Sec. 43, the following amendments were inserted in Sec. 115:-

43. Amendment of Section 115 -- Section 115 of the principal Act shall be re-

numbered as sub-section (1) there of, and-

(a) to sub-section (1) as so re-numbered, the following proviso shall be added, namely:--

"Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where.-

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made."

(b) after subsection (1) as so re-numbered the following sub-section and Explanation shall be inserted, namely:--

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

Explanation:--)n this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceedings.

In view of the inconsistency of the said State Amendment with the amendments brought about in Sec 115 by the 1976 Act it was held by Ojha, J. in Tun-gaham's case (supra) that the U P. State Amendment in question was not-saved and stood repealed. However, the test which emerges from Smt. Chand Kaur's case and Tungal Ram's case (supra) in the ultimate analysis is the same. The working test to And out whether a High Court amendment stands repealed or not, may be stated thus: It has to be found out first whether the 1975 Act has brought about any amendment in field covered by the High Court amendment. If no such amendment has been introduced, there is no question of any conflict between the High Court amendment and the amendment made by the 1976 Act. If such amendment has been brought about, then it has to further examine whether both the High Court amendment and the amendment introduced by the 1976 Act, can stand side by side. If yes there is no case of repeal. If they cannot stand simultaneously, the High Court amendment will fall down and the amendment brought about by the 1976 Act will be deemed to stand in its place.

9. Now the sub-rule (2) of rule 11 of Order 20 C.P C. though amended by this Court as stated above, has not amended by the 1976 Act. Accordingly occasion for testing its "consistency" has neither arisen nor can arise.

10. Thus, the amendment made by the M.P. High Court in sub-rule (2) of rule 11 of Order 20 of the Code of Civil Procedure, 1908, being not within the zone of repeal brought by section 97 (1) of the 1976 Act, is a valid and operative provision of law. Accordingly, the construction put by the learned Additional

District Judge on Sec. 97 (1) of the 1976 Act is erroneous. The learned Additional District Judge acted in an illegal manner when he held that the M.P. High Court amendment in question stands repealed there by.

11. In view of the aforesaid discussion the revision succeeds and is hereby allowed. The impugned order is set aside, and it is held that the M.P. High Court amendment in question is in force in spite of the coming into force of the 1976 Act w. e. f. 1-2-1977. The Executing Court will now proceed to decide on merits the application of the revision-applicant. No order as to costs.