
(1978) 01 DEL CK 0011

In the Delhi High Court

Case No : Election First Appeal No. 8 of 1977

Syndicate Bank

APPELLANT

Vs

Rallies India Ltd. and Another

RESPONDENT

Date of Decision : 13-01-1978

Acts Referred:

Citation : AIR 1979 Delhi 40 : (1978) 14 DLT 95 : (1978) RLR 552

Hon'ble Judges : S. Ranganathan, J;Prakash Narain, J

Bench : Division Bench

Advocate : M.S. Dewan, Ravinder Sethi and Y.K. Sabharwal, for the Appellant;

Judgement

Prakash Narain, J.

(1) This appeal is directed against the order of a learned single Judge of this Court passed on the Original Side dismissing an application moved by the appellant under Order XXI rule 58 read with Section 151 of the CPC objecting to attachment of land belonging to the judgment debtors, Messrs. Arden Farms and Shri P. K. Padmanabhan.

(2) MESSRS. Rallies India Ltd., respondent No. 1, obtained a decree for Rs. 1,46,038 with interest *rendente lite*, future interest and costs in suit No. 351 of 1969 brought by the said company against M/s. Arden Farms and its proprietor Shri P. K. Padmanabhan. In execution of the said decree in Execution case No. 92 of 1973 M/s. Rallies India Limited obtained orders for attachment of agricultural land belonging to the judgment debtors known as M/s. Arden Farms in Mehrauli. These attachment orders were passed by a learned single Judge of this Court on the Original Side on February 21, 1974. The attachment was duly effected. The appellant was informed by M/s. Rallies India Limited about this attachment. On March 18, 1974 the appellant filed I.A. 1601 of 1974 in this Court objecting to the attachment. It submitted that the attached property belonged to Shri P. K. Padmanabhan but he had mortgaged the same in favor of the appellant by a registered mortgage deed dated February 28, 1967. The mortgage was effected

by way of security for facilities granted by the appellant Bank to the said Padmanabhan. In March 1967 Padmanabhan had acquired a further 20 bighas 8 bids was of land in village Mehrauli comprised in Khasra Nos. 243, 244 and 245. This land was also mortgaged with the appellant bank. As Padmanabhan's account with the Bank became irregular and he was not able to square up his account, the appellant wanted to take legal action. Padmanabhan thereupon executed a general power of attorney in favor of the appellant on September 1, 1970 authorising it to manage, supervise, sell, dispose of the entire mortgaged property and apply the sale proceeds towards the liquidation of the amount due from him. At that time Padmanabhan's liability to the appellant is said to have been in the neighborhood of Rs. 10,00,000. A suit was also filed by the appellant in this Court being suit No. 326 of 1972 for recovery of this amount from Padmanabhan. It was, however, withdrawn on December 12, 1973 as one H. S. Sandhu who was the guarantor of Padmanabhan offered to compromise. The said Sandhu paid Rs. 8,75,000 to the appellant on March 31, 1973 towards part satisfaction of the liabilities of Padmanabhan and transfer the mortgaged property to Sandhu or his nominee after completing the requisite formalities like obtaining permission from the Delhi Development Authority and clearance certificate from the Income Tax authorities. In these circumstances, it was contended, Padmanabhan had no interest left in the attached property and the same be released. The application was dismissed. The learned single Judge noticed in that order that Mr. Sandhu who appeared as a witness for the appellant admitted that Rs. 8,75,000 had been paid by him to the appellant in full and final settlement of the dues of Padmanabhan. From that order the appellant has preferred the present appeal.

(3) It may be noticed that Padmanabhan has in the meantime been declared an insolvent and an Official Receiver has been appointed of his estate. The present appeal has been brought against M/s. Rallies India Limited and the Official Receiver.

(4) Learned counsel for the first respondent M/s. Rallies India Limited, has raised three preliminary objections to the maintainability of the appeal, viz.:- (a) no appeal is competent inasmuch as the only remedy of the appellant was to file a suit under Order XXI rule 63 of the Code of Civil Procedure; (b) the judgment debtors M/s. Ardens Farms and Shri P. K. Padmanabhan have not been impleaded as parties and so the appeal is not properly framed; and (c) a single appeal has been filed against two orders of the trial Judge whereas two appeals should have been filed separately.

(5) We may straightway dispose of two of the objections.

(6) M/S. Ardens Farms was owned by P. K. Padmanabhan. Therefore the two are really one party. Padmanabhan has been declared an insolvent and his estate now vests in the Official Receiver. Inasmuch as the Official Receiver has been made a party respondent in this appeal there is no force in the contention that Padmanabhan and his farm M/s. Ardens Farms should have been impleaded as

party respondents.

(7) No doubt the learned trial Judge passed two orders Ob September 14, 1977. The present appeal, however, is only against the order passed in I.A. 1601 of 1974. There is no appeal against the order passed in I.A. 173 of 1977. The appeal is only against one order and not two orders. The second objection is also, Therefore, rejected.

(8) We now come to the third objection and that is whether the appeal as filed is competent under the provisions of Order Xxi of the CPC or whether a suit had to be filed under Order Xxi rule 63 of the Code of Civil Procedure. Certain provisions of the Code of Civil Procedure, 1908 have recently been amended by the CPC (Amendment) Act, 104 of 1976. The relevant provisions with which we are concerned came into force on February 1, 1977.

(9) Before the amendment afore-mentioned, the provisions regarding investigation of claims and objections vis-a-vis properties attached in execution of decrees were contained in Rules 58 to 63 of Order 21 of the Code. On determination of the claims or objection preferred either under Rule 58 or Rule 62 of Order 21 of the Code the party against whom an order was made in such determination had a right to institute a suit to establish his claim to or right in the property in suit. Under the amended provisions of the Code of right to file a suit has been taken away. Instead of that an appeal is provided from the order determining the claim or objection. Rule 58 of Order 21 of the Code, as amended, reads as under : -

"58.(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained :

PROVIDED that no such claim or objection shall be entertained-

(A)where, before the claim is preferred or objection is made, the property attached has already been sold ; or

(B)where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2)All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit

(3)Upon the determinatioa of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination,-

(A)allow the claim or objection and release the property from attachment either

wholly or to such extent as it thinks fit; or

(B)disallow .the claim or objection ; or

(C)continue the attachment subject to any mortgage, charge or other interest in favor of any person ; or

(D)pass such order as in the circumstances of the case it deems fit.

(4)Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditons as to appeal or otherwise as if it were a decree.

(5)Where a claim or an objection is preferred and the Court under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive."

THE effect of the amended Rule 58 is, Therefore, that the suits contemplated by Rule 63 were not to be filed and a suit to establish a claim or right to a property in dispute could be instituted only where a claim or an objection is preferred under sub-rule (1) of Rule 58 but the Court refuses to entertain it. It is by placing reliance on this provision and sub-rule (4), read above, that the appellant has filed the present appeal. "The question posed on the objection of the respondent is whether the appeal could be preferred under sub-rule (4) of the amended Rule 58 or whether a suit had to be filed under the unamended Rule 63 of Order 21 of the Code.

(10) As we have noticed earlier, in this matter attachment was ordered on February 21, 1974. It was duly effected. The application of objections or claims under Order 21, rule 58 of the Code was filed on March 18, 1974. These objections were decided by an order dated September 14, 1977. The relevant amendments in the Code came into force on February 1st, 1977. The question that arises for determination is whether the provisions of sub-rules (4) and (5) of Rule 58 of Order 21 of the Code are retrospective in operation so as to bar the filing of a suit under the unamended Order 21, rule 63 of the Code. In other words whether sub-rules (2), (4) and (5) of the amended Rule 58 of Order 21 of the Code are retrospective in character in the facts and circumstances of the present case.

11. It is a fundamental rule of law that no statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. Wright, J. in re: Athiumney (1898) 2 A.B. 551, enunciated the rule regarding retrospectivity most succinctly in the following words :-

"PERHAPSno rule of construction is more firmly established than this-that a retrospective operation is not to be given to a statute so as to impair existing

right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

from the above observations another well-established canon of interpretation also emerges. That canon is that a statute is not to be construed to have a greater retrospective operation than its language renders necessary.

(12) Before, however, the presumption against retrospectivity is applied, a Court must be satisfied that the statute is in fact retrospective. As stated in *Craies on Statute Law*, a statute is retrospective "which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty or attaches a new disability in respect to transactions or considerations already past." Other statutes, though they may relate to acts or events which are past, are not retrospective unless it is specifically so stated or can be gleaned by necessary implication by the provisions of the amending statute.

(13) Some argument has been advanced as to whether the remedy of filing the appeal or filing of a suit where claim or objection is dismissed or allowed, is a procedural right or a substantive right. contention has been made on the basis of the rule that a change in law pertaining to procedure would have a retrospective effect but a change in law affecting substantive rights will not have retrospective effect unless specifically so provided or it can be inferred from the subsequent enactment by necessary intendment. It, Therefore, becomes necessary to dilate on whether the right to file a suit under the unamended Rule 63 of Order 21 of the Code was a substantive right or merely a procedural one.

(14) The right to file an appeal or file a suit being a matter of procedure only or being something more than a matter of procedure is, perhaps, best illustrated by *The Colonial Sugar Refining Company Limited v. Irving* 1905 A.C. 369. In that case, coming up before the Privy Council, the jurisdiction of the King in Council to entertain an appeal was called in question. The case came from the Commonwealth of Australia. The Collector of Customs for Queensland had required the appellants to pay certain excise duty in respect of sugar. The appellants had disputed the claim. After depositing the excise duty under protest, the appellants had brought an action to recover the sum deposited. The Supreme Court of Queensland held that the Government was entitled to retain the duty and gave judgment for the Collector. In the meantime the Judiciary Act. 1903 had been passed which received Royal Assent on August 25, 1903. By Section 38 of the said Act the jurisdiction of the High Court in certain specified matters was made exclusive of the jurisdiction of the several courts of the States and by Section 39 it was made exclusive in all other matters except those therein provided. Sub-section (2) of Section 39 provided that several Courts of the States shall be invested with Federal jurisdiction in specified matters subject to certain conditions and restrictions, one of which was that every decision of a

Court of State from which, at the establishment of the Commonwealth, an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal may be brought to the High Court. The appellants being dissatisfied with the judgment of the Supreme Court had applied to that Court for leave to appeal to His Majesty in Council. This leave was granted. When the matter came up before the Privy Council an application was moved invoking the provisions of the Judiciary Act, 1903 contending that the Privy Council had no jurisdiction. On this the rule laid down was :-

"As regards the general principles applicable to the case there was no controversy. On the one hand, it was disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore" the only question is. Was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act. or was it a mere matter of procedure ? It seems to their Lordships that the question does not admit of doubt. 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."

(15) In re. Debtor, Ex parte 1936 CD 237, Lord Wright, M.R. quoted with approval the observations of Jessel, M.R., "It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of actions, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section (i.e., S. 10 of the Judicature Act, 1875) is within that exception. I am of opinion that it is not. This an alteration not merely in procedure, but in the right to prove for a debt which is not distinguishable in substance from a right of action before winding up, being simply a legal proceeding to recover a debt against a company in liquidation." The learned Master of Rolls then went on to observe, "Thus while an Appellate Court is able, and bound, to give effect to new remedies which have been introduced by enactments passed after the order appealed from was made by the Court of First Instance, yet with regard to substantive rights it is well established that the Appellate Court must give effect to the same law as that which was in force at the date of the earlier proceeding"

(16) In *New Brunswick Railway Company v. British and French Trust Corporation, Limited* 1939 A.C. 1, the House of Lords considered the effect of a Canadian legislation passed between the date of the judgment of the trial Judge and the decision of the Court of Appeal. It was held that the provisions could have no retrospective effect and could not diminish or destroy the right of creditors who had, prior to the passing of the Act, commenced an action.

(17) In *National Real Estate and Finance Company Ltd., v. Hassan* (1939) 2 K.B. 61, the Court of Appeal was considering the retrospectivity of a legislation where action was not commenced until four years after passing of the Act. The facts were: the Leasehold Property (Repairs) Act, 1939 was passed to amend the law as to the enforcement by landlords of obligation to repair and similar obligations arising under leases. The amending Act had a provision reading, "This Act applies to leases created, and to breaches occurring before or after the commencement of this Act." The question arose as to whether this provision of the amending Act of 1939 had retrospective operation vis-a-vis rights which had crystallised under the original Act, known as the Law of Property Act, 1925, prior to enactment of the amending Act. In an action brought by the landlords for possession of their property on forfeiture of the lease it was held that the provisions of the amending Act would be attracted despite the fact the forfeiture had taken place in 1937 prior to the passing of the amending Act. On appeal by the landlords the judgment was reversed. It was held :-

"IN my judgment, the appeal succeeds, and succeeds on the broad ground that there is nothing in the Act of 1938 which is intended to alter past rights which became vested before the new Act came into operation by reason of the parties acting upon, and being entitled to act upon, the law as it stood before the new Act came into operation. The familiar discussion took place before us in this Court Counsel for the appellants, Mr. Etherton, who put the case very succinctly and very clearly, submitted that the learned judge had applied to the decision of the case a principle of a statute interpretation which was not applicable namely, that the matters in question were mere matters of procedure, and that Therefore he could treat the new Act of 1938 as having a retrospective effect entitling the defendant to the benefit of the new Act even to the extent of depriving the plaintiffs, the landlords, of the rights which had become vested in them, as they alleged, by reason of the defendant not having carried out the terms of their notice, and Therefore having given them a right to forfeit the lease under the provisions of the Act of 1925. That is really the essential ground upon which the learned judge decided the case. He cited well known principles of statute interpretation, to which I think both counsel, on the argument before us, expressed complete homage. The question, in my view, is a very short one : Is there anything in the 1938 Act which entitles the defendant to say that it takes away the rights of landlords who have strictly complied with the Act of 1925 and thereby obtained a statutory right of forfeiture on proving the lessee's failure to execute the repairs, on the ground that the Act deals solely with matters of procedure and, Therefore, may be given retrospective effect ? In my view, it is

wrong to treat the new Act as a procedural Act; where vested rights are affected, prima facie it is not a question of procedure. As a general rule, when you speak of an Act as being a procedural Act, you mean it is an Act relating to proceedings in litigation"

(18) A review of the above cases would show that unless the provisions of the new enactment clearly say so or it can be found out as a matter of necessary intendment, the new provisions cannot affect accrued rights and the right to file a suit or an appeal is just as much of a vested right as any other. Indeed, the matter is now well-settled by *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, . In this case it has been laid down that legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by the intrinsic unity and are to be regarded as one legal proceeding.

(19) In the present case the attachment as well as the objections to the attachment were made long before the amendments to the Code coming into force. Therefore, unless there was clear legislation to that effect a right accrued to the parties to the lis to file a suit under the unamended Order 21, rule 63 CPC. As we see it, this matter really admits of no doubt even according to the intendment of the legislation. Section 97 of Act 104 of 1976 makes it amply clear that as far as the vested rights pertaining to attachments are concerned and which came into existence prior to February 1, 1977, the old law would hold the field. Without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897, clause (q) of sub-section (2) of Section 97 of Act 104 of 1976 in terms says, "(q) the provisions of rules 31, 32, 48A, 57 to 59, 90 and 97 to 103 of Order XXI of the First Schedule as amended or, as the case may be, substituted or inserted by Section 72 of this Act shall not apply to or affect-

(I) any attachment subsisting immediately before the commencement of the said Section 72, or

(II) any suit instituted before such commencement under rule- 63 aforesaid to establish right to attached property or under rule 103 aforesaid to establish possession, or

(III) any property to set aside the sale of any immovable property and every such attachment, suit or proceeding shall be continued as if the said Section 72 had not come into force."

Therefore, can be no manner of doubt that in the present case an appeal under the provisions of sub-rule (4) of Rule 58 of Order 21, as amended, is not competent and the appellant would have been better advised to have filed a suit under the unamended Order 21, rule 63 CPC .

(20) A half-hearted attempt was made to urge that the appeal is competent inasmuch as the objections also invoked Rule 62 of Order 21 of the Code besides Rule 58 and, Therefore, clause (q) of Section 97(2) of Act 104 of 1976 cannot be relied upon by the respondents. There is no force in this contention because the

objections were under Order 21, rule 58 CPC and rule 62 was not invoked. This we have seen for ourselves from the record.

(21) Reference was also made by learned counsel for the appellant to sub-section (3) of Section 97 of Act 104 of 1976. This sub-section reads as under :-

"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."

IN our opinion, reliance on sub-section (3) is misplaced because in terms this subsection deals with contingencies other than those provided by sub-section (2) of Section 97.

(22) We, Therefore, dismiss this appeal as being incompetent but leave the parties to bear their own costs.