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**(2009) 01 DEL CK 0105**

**In the Delhi High Court**

**Case No : C.R.P. No's. 195 and 204 of 1987**

Yashpal Singh

APPELLANT

Vs

Bhagwana and Others <BR> Dharam Pal Singh Vs  
Bhagwana and Another

RESPONDENT

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**Date of Decision : 07-01-2009**

**Acts Referred:**

**Citation : (2009) 156 DLT 513 : (2010) 8 RCR(Civil) 1197**

**Hon'ble Judges : S.N. Dhingra, J**

**Bench : Single Bench**

**Advocate : Ravinder Sethi and L.B. Rai, for the Appellant; N.S. Vashisht, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

Shiv Narayan Dhingra, J.—This revision petition has been preferred against an order dated 3.2.1987 of Senior Sub Judge, Delhi whereby he allowed an appeal against an order dated 8.9.1986 of learned Executing Court dismissing an execution application observing that the decree could not be executed.

2. Brief facts necessary for disposal of the revision petition are that the three brothers i.e. Shri Bhagwana, Shri Rattan and Shri Hira were joint bhumidars and co-owners of 90 bigha and 12 biswa of land situated in the revenue estate of village Tikri Kalan, Delhi. Shri Hira sold his 1/3rd undivided share in the joint holding to S/Shri Yashpal Singh, Dharampal Singh and Mahipal Singh vide a registered sale deed in their favour. Mutation with respect this 1/3rd share sold by Shri Hira in favour of vendees was sanctioned on 21.7.1973.

3. On 19.12.1973, the other two brothers of Shri Hira viz. Shri Bhagwana and Shri Rattan filed a suit for permanent injunction with a prayer that since they were in joint possession of the entire property owned by Shri Bhagwana, Shri Rattan and Shri Hira, they may not be dispossessed without due process of law. It was stated in the suit that the sale deed executed by Shri Hira in favour of

above vendees was invalid being in violation of the Delhi Land Reforms Act. They made a prayer that the vendees and Shri Hira be restrained from interfering in their possession. In the suit, the details of the agricultural land of which they were co-owners to 1/3rd each were given mentioning khasra numbers and area of each khasra number. During the pendency of this suit, Consolidation proceedings and reallocation of holdings of land of individuals was undertaken by the government in the entire revenue estate of village Tikri Kalan. The joint holding of khatahs of different owners, including that of Shri Bhagwana and Shri Rattan was separated by the Consolidation Officer on 22.6.1978. Due to separation of joint khatahs and Consolidation proceedings, each of the landholder was allotted separate holding as per his land holdings before consolidation. In this process, S/Shri Yashpal, Dharampal and Mahipal, being recorded owners, in whose favour mutation had already been done in the revenue record, were also allotted separate plots in lieu of their holdings being plot number 517, 518 and 519 in lal dora of Village Tikri Kalan. After the allotment of these plots took place, the parties were put in possession of their respective plots, before the decision of civil suit. Aggrieved by the decision of the Consolidation Officer dated 22.6.1978 Shri Bhagwana and Shri Rattan filed a revision application u/s 42 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation Act 1948) before the Financial Commissioner, Delhi. This revision application was dismissed by the Financial Commissioner vide his order dated 30.10.1980.

4. In the meantime, the suit for injunction pending before the Court of Sub Judge was decreed in favour of Shri Bhagwana and Shri Rattan on 24.9.1979. The learned Sub Judge also held that the sale deed was in violation of provisions of Delhi Land Reforms Act, 1954 so it was ineffective. He passed a decree of injunction that the plaintiffs (Shri Bhagwana and Shri Rattan) be not dispossessed from the land in question. However, the land i.e. different khasra numbers as mentioned in the suit, was not in existence or in possession of plaintiffs at the time of passing decree. The plaintiffs (respondent No. 1 and 2 herein) had not taken steps to file an amendment application before the Court of Sub Judge for bringing the change in events on record and to modify the plaint so as to bring on record the Consolidation proceedings as undertaken by the Consolidation Officer. Neither the fact of filing a revision by the respondents against order of Consolidation Officer, was brought on record. An appeal was preferred by the present petitioner and his brothers i.e. vendees against the order dated 24.9.1979 of Sub Judge being RCA No. 42/1981, but this appeal was later on withdrawn on 23.2.1983. After withdrawal of this appeal, Shri Bhagwana filed an execution petition No. 15/83. By this execution petition he prayed that the land allotted to the present petitioner in consolidation proceedings should not have possessed by the vendees and should have been allowed to be occupied by himself (Shri Bhagwana) and Shri Rattan. Since the vendees had taken possession of the plots after consolidation proceedings, the decree holder were liable to be restored possession of these plots and the petitioner, if did not restore the possession should be dealt with in accordance with Order 22 Rule 32

CPC and should be detained in prison.

5. The present petitioner and his brothers filed objections before the Executing Court to the execution proceedings. The main objection was that the decree was passed in respect of specific property as mentioned in the plaint. Since the subject matter of the suit as described in the plaint had vanished during the pendency of suit, the decree was a non-est, due to intervention of the Consolidation proceedings during the pendency of the suit itself. This fact was within the knowledge of the Decree Holder, who did not bring it to the notice of the Court. The decree thus, was not executable. It was also stated that the order of the Consolidation Officer was also challenged by the Decree Holder and Decree Holder failed in its challenge. The Decree Holder did not file a writ petition before High Court against the dismissal of his revision petition. The Consolidation proceedings had thus become final. Since the suit property did not exist even at the time of passing of decree, the application was not maintainable. A decree cannot be executed against the property different from one which was mentioned in the decree. The objections were resisted by the Decree Holder on the ground that the decree though in respect of certain khasra numbers in the revenue estate of Village Tikri Kalan, was executable even in respect of the alternate land allotted in lieu of the share of the Judgment Debtor as the Court of Sub Judge, while passing judgment had held that the sale deed executed in favour of the Judgment Debtor was null and void.

6. The learned Executing Court observed that the Decree Holder had filed a separate suit for declaration and permanent injunction with regard to the plots numbers 517, 518, 519 which were allotted to the three brothers and since this suit was pending and declaration had been sought by the Decree Holder that these plots actually belonged to the Decree Holder and had been illegally transferred by consolidation officer in the name of Judgment Debtor, the execution proceedings would not be maintainable. The decree obtained by the Decree Holder, if had been in respect of these plots then only it was executable against plots. Since the decree was not in respect of these plots but was in respect of khasra numbers, it was not executable against the plots and this is how Decree Holder also believed otherwise Decree Holder would not have filed a suit for declaration and permanent injunction in respect of these plots.

7. Against this order of the learned Executing Court, Shri Bhagwana and Shri Rattan preferred an appeal before the Senior Sub Judge and the Senior Sub Judge vide impugned order allowed the appeal holding that Clause 4 of Delhi Land Reforms Act clearly provides the the land which is given in the exchange as a result of Consolidation proceedings is deemed to be the land originally held by the tenure holder or sub-tenure holder therefore, the land received by the JDs was to be considered as to be the subject matter of the decree and the plots allotted to the JDs have to be considered as the subject matter of the decree. The Consolidation Officer proceeded on the presumption that transfer made by Shri Hira in favour of the JDs was a valid transfer and JDs were tenure holders.

But the Judgment of the Civil Court was contrary to this and the allotment of the alternate land done by the Consolidation Officer to the JDs therefore, had to be considered as an allotment in favour of the Decree Holder only. He also held that the JDs were not the tenure holders in the eyes of law and the act of Consolidation Officer was without jurisdiction in allotting land to the JDs. The learned Senior Sub Judge also did not agree with the petitioner's argument that the Civil Court had no jurisdiction to entertain the suit filed by the Decree Holders since the suit was in respect of agricultural land and only revenue authorities would have the jurisdiction or that the decree passed by the Civil Court was a nullity. The Appellate Court held that the judgment of the Trial Court was not without jurisdiction as the Civil Court was fully competent to pass the decree in question.

8. The order of the learned Senior Sub Judge has been assailed by the petitioner on the ground that the learned Senior Sub Judge had no jurisdiction to entertain the appeal in view of amendment of CPC in 1976. It is submitted that no appeal could be filed or be entertained against an order of the Executing Court passed u/s 47 of the CPC. The petitioner relied upon a Full Bench decision of Patna High Court in *Masomat Narmada Devi and Another Vs. Ram Nandan Singh and Others*, . He also relied on *Pratap Narain Agarwal Vs. Ram Narain Agarwal and Others*, to this effect. On the other hand respondent argued at length that the right to appeal was a vested right of appellant as the right to file an appeal before the Superior Court accrued to the appellant as per unamended CPC as applicable on the date the lis commenced. It is submitted that the amendment of CPC would not be applicable in this case, since the suit in this case was filed much before the amendment of the CPC and the moment the suit was filed, the right to file appeal, in accordance with the un-amended CPC in execution proceedings got vested in the plaintiff (respondent herein) and the decision of the Senior Sub Judge cannot be assailed on this ground.

9. Patna High Court in *Narmada Devi* case (supra) had considered all earlier decisions on this issue and had also considered pre-amendment and post-amendment provisions of CPC and after detailed analysis observed as under:

6. It is common ground that prior to the amending Act the determination of any question by an order u/s 47 was appealable. This was so by virtue of a legal fiction which provided that the determination of any question within Section 47 would be deemed to be a decree and, consequently, u/s 96 of the Code an appeal would lie against the same. The existing state of the law had led to the well-acclaimed dictum that in India the trouble of a litigant began after he had secured a decree.

10. The stage is now set to notice the relevant meaningful changes brought about by the amending Act by juxtaposing the corresponding provisions :

Before amendment      After amendment

2(2) "decree" means the formal expressions of an adjudication which, so far as

regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144, but shall not include

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(a) any adjudication from which an appeal lies as an appeal from an order, or

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(2) The "Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court-fees.

(2) Omitted by C.P.C. (Amend.) Act, 1976, Section 20 (w.e.f. 1-2-1977).

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court."`

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99A. Without prejudice to the generality of the provisions of Section 99, no order u/s 47, shall be reversed or substantially varied, on account of any error, defect or irregularity in any proceeding relating to such order, unless such error, defect or irregularity has prejudicially affected the decision of the case."`

11. Before one adverts to the larger scheme of the amendment of the CPC in regard to the execution proceedings by the amending Act, it would call for

pointed notice that even prior thereto an order u/s 47 was treated as a decree only by sufferance due to an express deeming legal fiction. It is plain that an order under the said section is not passed in a suit nor is it drawn up in the formal form of an adjudication in the style of a decree. In many cases such an order may not at all be a conclusive determination of the rights of the parties with regard to the real matter in controversy, as for example, in the context of interlocutory orders. Thus, at the pre-amendment stage, an order u/s 47 had been clothed as a decree purely by a deeming legal fiction apparently to give a right of appeal against it by virtue of Section 96.

12. Now, with the above background, one may turn to the real intent and the scheme of the amendment of CPC by Parliament in this context. Firstly, Section 2(2) of the Code was amended and the deeming provision with regard to orders u/s 47 was expressly deleted. The inevitable result is that thereafter orders passed u/s 47 could not be considered as a decree by any legal fiction. To make the intent clear the Parliament then repealed Sub-section (2) of Section 47 as well. Thus, the somewhat analogous power of converting a proceeding into a suit or a suit into a proceeding was clearly taken off the Statute Book. All that thus remains now is a simple definition of the word "decree" in Section 2 without the deeming provision which included an order u/s 47 and equally the removal of the power of conversion under Sub-section (2) thereof. The intent is further made clear by the insertion of Section 99A. It bears repetition that originally such a provision was suggested by the Law Commission for restricting any interference with orders u/s 47 unless they prejudicially affected the decision of the case. The dropping of the words "in appeal" in the enacted provision, in contrast to what was proposed, would again be a pointer to the fact that Parliament clearly conceived the intent of abrogating of appeals against orders u/s 47 which, as already noticed, were hamstringing the expeditious execution of decrees. Further it calls for notice that wherever any order is to be made appealable, the Code expressly confers such a right and even when by amendment the deeming fiction of orders u/s 47 being decrees was taken away, no consequential provision was made anywhere for making some orders thereunder appealable. This again is indicative of the legislature's earnestness to take away the right of appeal in this context to which the whole exercise of amendments of the aforequoted provisions seems to be directed. To put it forthrightly, the simple position emerging after the amending Act is that prior to the same orders u/s 47 were by a deeming fiction decrees and were consequently appealable and subsequent to the amendment all the orders u/s 47 are no longer appealable, such a right having been expressly abolished by the legislature. To suggest that though, admittedly, certain orders u/s 47 have now been rendered unappealable, yet some still retain the original attribute of being appealable is a mere legal hair-splitting, which runs counter to the main grist of the legislative mandate sought to be enforced by the amendment.

19. There cannot possibly be any quarrel with the legal proposition that the right of appeal once conferred is a substantive right and would accrue to the litigant

from the time when he enters the portals of the Court. This has been authoritatively laid down in *Garikapati Veeraya v. N. Subbiah Choudhry* (supra) by their Lordships and has thereafter not been deviated from. However, in this very judgment it has been laid down in categorical terms that this vested right of appeal can be taken away by the competent legislature by a subsequent enactment if it is so provided expressly or even by necessary intendment. That being so, the primal question herein is whether by the amending Act the earlier right of appeal against the orders u/s 47 has been expressly or by necessary intendment abrogated retrospectively. It is unnecessary to tread afresh the ground already covered in the earlier part of the judgment with regard to the changes brought about in the relevant provisions of the Code by the amending Act. These changes, in my view, raise an irresistible conclusion that the intention of the Parliament was to affect the vested right of appeal against orders in execution proceedings u/s 47. As noticed earlier, the whole purpose was to cut down the litigative process and to advance the expeditious execution of the decrees. This intention of the Parliament has been manifested by express words as has been shown earlier. Even otherwise the necessary implication of the amendment in Section 2(2) and Section 47 as also the insertion of Section 99A appears that the right of appeal was being taken away with retrospective operation. Once that finding is arrived at, the submission that the right is a substantive right and accrues to the litigant from the commencement of the lis does not in any way advance or further the case of the petitioners.

22. To conclude on this aspect, it must be held that after the amending Act of 1976, no appeal is now maintainable against any order whatsoever passed u/s 47 of the Code of Civil Procedure.

39. Plainly enough, Section 97(2)(a) can be categorised into two distinct classes : firstly where the right of instituting appeals had been exercised by the parties before the enforcement of the Act and, secondly, where the right to file the appeal had accrued against an order already passed u/s 47 of the Code but had not been exercised before the time the amendment came into force. There is indeed no difficulty whatsoever with regard to the first category. It is common ground that the pending appeals on the date of the enforcement of the amending Act are fully protected and are in no way affected by the abolition of the right of appeal consequent on the amendment of Section 2(2) of the Code. However, with regard to the second category it is not possible to go to the length of holding that in all cases where objections had been filed before 1st of February, 1977 the right to appeal would continue to be preserved whenever any order u/s 47 is passed in such an application. The language of Section 97(2)(a) does not permit such an interpretation and, in particular, in the context in which it is laid. The expression ``shall not affect any appeal'', in my opinion, would not take within its sweep even the cases where execution applications were merely pending before the executing Court and the order u/s 47 may yet come to be passed in the future. This expression is capable of explanation that where the right to appeal had accrued expressly because of the passing of an order u/s 47 (which

was earlier deemed to be a decree) prior to the amendment, the same would not be affected by the amendment inasmuch as in such a case by a fiction a decree had already come into being. Since such a decree had already come into existence, the law intended to leave the right protected and untouched by the amendment made in Section 2(2). The express amendment in Sub-section (2) was that hereafter an order would not amount to a decree and inevitably such an order would cease to be appealable. However, where such a decree had already come into being, the amendment of Section 2(2) was not to apply. Consequently, the plain intendment of the Legislature was firstly to leave untouched the appeals which had already been filed on the date of the enforcement of the amending Act and, secondly, to protect the right to file an appeal in all those cases where it had already accrued by the passing of an order u/s 47. Mr. Shreenath Singh, learned Counsel for the petitioners, had, however, contended that the scope of Section 97(2)(a) should not be narrowed down to include only the aforesaid two categories. He sought its extension to cover unreservedly all cases where the right of appeal may be deemed to have accrued from the date of the filing of the application so as not to defeat the general proposition that statute which affects the existing right of appeal is not rightly construed to affect the adjudication of pending proceedings.

44. It must, therefore, be held that Section 97(2)(a) of the amending Act protects both the appeals already pending as also the right to file the appeal which had already accrued against an order u/s 47 of the Code passed prior to the enforcement of the amending Act.

46. To finally conclude on the primal questions formulated at the outset, the answer to question No. 1 is rendered in the negative and it is held that no appeal is now maintainable against an order u/s 47 of the Code -- whether interlocutory or otherwise -- after the enforcement of the amending Act.

10. I am in full agreement with the view taken by Patna High Court in respect of jurisdiction of the Appellate Court in entertaining the appeal. I consider that the learned Senior Sub Judge had no jurisdiction to entertain the appeal and the order passed by the learned Senior Sub Judge is liable to be set aside on this ground.

11. Even otherwise mutation of an agricultural land is a subject matter, which falls exclusively within the purview of revenue authorities. In this case, the mutation of property sold by Shri Hira to the vendees was carried out by the revenue authorities on 21.7.1973. The respondent had a right to challenge this mutation before revenue authorities and not before the Civil Court. It is settled law that what is not permitted directly cannot be done indirectly. If the Civil Court had no jurisdiction to cancel the mutation done by the revenue authorities on the basis of transfer of agricultural land by Shri Hira in favour of the three brothers viz. S/Shri Yashpal, Dharampal and Mahipal through a sale deed, the Civil Court could not have entertained a suit for cancellation of transfer of agricultural land or its mutation. The respondents filed a suit for injunction that

they be not dispossessed from the agricultural property fully knowing the fact that one of their brothers had sold his share of the property, and the same had already been mutated in the name of the purchasers. Respondents No. 1 and 2 very well knew that during the pendency of the suit, consolidation proceedings had been initiated by consolidation officer and as a consequence, alternate plots had been allotted by the order of Consolidation Officer to the petitioners. Respondents/Decree Holders did not bring this fact on the record of the Sub Judge and did not amend the plaint so as to have effective relief against the plots, but continued with a suit when the subject matter of the suit had already gone away. It is not a case where the consolidation had taken place after the passing of decree. But it is a case where consolidation had taken place before passing of decree and during pendency of the suit. It was therefore incumbent upon the Decree Holders to amend the suit and to bring on record the necessary change of events and change of facts. The Decree Holders had preferred a revision petition against the order of Consolidation Officer (which was the only course available to the Decree Holder as per law) hoping that they would succeed in revision petition. They did not succeed in the revision petition and thereafter, gave up the challenge.

12. At the time when consolidation officer passed its order there was no decree of Civil Court in existence and mutation of the land in the revenue record was in the name of the JDs who had purchased it through a sale deed. The consolidation officer therefore was bound to act as per law and allotment of alternate plot to vendees was legal. Shri Hira Singh, the vendor had no problem so Shri Hira had not challenged this sale, nor objected to the mutation, nor objected to allotment of alternate plots to the petitioner but his brothers wanted to get the sale negated. The Consolidation Officer was within his rights to consider the mutation as a valid mutation and the sale deed as a valid sale deed as there was no challenge made to the sale deed before revenue authorities. The order of consolidation officer was first in time. The order of Senior Sub Judge came later. The challenge to the order of Consolidation Officer before the Financial Commissioner in revision failed and the order of Consolidation Officer became final. The order of Senior Sub Judge also became final thus there were two orders, one passed by the Consolidation Officer first in time and second by the Senior Sub Judge which was subsequent in time. It cannot be said that the order of the Consolidation Officer was beyond his jurisdiction. Even if it is considered that there is conflict between the two orders, the order of Consolidation Officer would prevail and have precedence since it was passed according to the procedure laid down by the Delhi Land Reforms Act and in respect of subject matter which was within the jurisdiction of the revenue authorities. Whereas the order/decreed of the Sub Judge was only in respect of a land which had ceased to exist and the Sub Judge was not informed about the change in the entire scenario and about the consolidation proceedings.

13. Under these circumstances, I consider that the order of the learned Appellate Court even on merits was not tenable and is liable to be set aside. I, therefore

allow this petition and the order dated 3.2.1987 of the learned Senior Sub Judge is hereby set aside.