Madhya Pradesh High Court
Babulal And Ors. vs Ramesh Babu Gupta And Ors. on 2 May, 1990
Equivalent citations: AIR 1990 MP 317, 1990 (0) MPLJ 482
Author: S Jha
Bench: S Jha, K Verma, S Dubey
JUDGMENT S.K. Jha, C.J.

1. This Order will also govern the disposal of Misc. petitions Nos. 442/89 (Moolchand and Anr v. Ramesh Babu Gupta and Ors.) and 443/89 (Mansharam Lahariya and 3 Ors. v. Ramesh Babu Gupta and two Ors).

2. In all these three petitions under Article 227 of the Constitution of India, the sole question for determination is as to whether the amendment brought about in Section 2(9) of the Code of Civil Procedure 1908 (old Code), as amended by the Civil Procedure Code (amendment) Act (Act No. 104 of 1976) by which determination of any question Under Section 47 does not now amount to a decree, can be construed to take away a right of appeal in pending execution cases. Two of the decisions of this Court in case of Chuluram v. Bhagatram, AIR 1980 Madh Pra 16 and Sitaram v. Chaturo, 1981 Jab LJ 171 have taken the view that such a right of appeal, being a vested right, could not be taken away and in orders passed Under Section 47 of the Code of Civil Procedure which were levied in execution proceedings Before the coming into force of the Amending Act could not be taken away and, therefore, the orders would be appealable.

3. It is noteworthy to be mentioned that the Amending Act came into force on the 1st February 1977. The correctness of the said two decisions having been doubted, the question has been referred to a Full Bench. Hence this matter before us.

4. That there is a divergence of opinions for whatever worth it may be cannot be doubted because series of decisions of other High Courts have taken a contrary view and, therefore, the matter needs to be examined in the first instance as a matter of first impression on a construction of the statutory provisions and then the case law relied upon by counsel for either party may be referred to.

5. Shorn of all details, the relevant fact for determination of the question at hand is that a decree having been passed prior to or sometime in 1979, the execution of decree was levied by the respondents decree-holders on 4-1-1979. As has already been stated above, the Amending Act came into force on 1-2-1977. Therefore, the execution proceedings in the present case were initiated much later than the coming into force of that Act. The question is as to whether any order passed in execution proceedings in question would still be appealable after the Amending Act came into force.

6. Let us now look to some of the relevant provisions of the Amending Act. Section 3 of the Amending Act drastically amended Section 2(2) of the old Code and omitted the words and figures "Section 47 or" from it. The result of this omission is that determination of any question within Section 47 of the Code does not now amount to a decree. The relevant portions of Section 97 read thus :

"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 consistent 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 provision of Section 6 of the General Clauses Act 1897 (10 of 1897):

(a) the amendment made to Clause (2) of Section 2 of the Principal Act by Section 3 of this Act shall not affect any appeal against the determination of any such question as is referred to in Section 47 and every such appeal shall be dealt with as if the said Section 3 had not come into force;

(b) the provisions of Section 100 of the Principal Act, as substituted by Section 37 of this Act shall not apply to or affect any appeal from an appellate decree or order which had been admitted before the commencement of the said Section 37 after hearing under Rule 11, Order XLI and every such admitted appeal shall be dealt with as if the said Section 37 had not come into force."

Section 99A runs as follows :

"No order under Section 47 to be reversed or modified unless decision of the case is prejudicially affected; without prejudice to the generality of the provisions of Section 29, no order under Section 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."

It will further be seen that the word 'appeal' has been employed and retained in Section 99, but excluded in Section 99A. While Section 99 explicitly speaks of decrees, Section 99A expressly talks of only an order Under Section 47 and not at all about any decree. Sections 96 and 87 make only decrees appealable and not orders unless they expressly come within any other provision. No provision of the Code now makes any order passed Under Section 47 of the Code expressly appealable.

7. There are some well settled principles to which no exception can be taken. An appeal is a creature of the statute. There is no inherent right of appeal. But once a right of appeal has been given, it can be taken away only, by an express provision in the statute or by necessary intendment. It will be noticed from the provisions of Section 97(1) that with effect from 1-2-1977, any amendment made or provision inserted in the principal Act before the commencement of the Amending Act; stood repealed executing in so far as such amendment or provision was consistent with the provisions of the Principal Act. Therefore, from 1-2-1977, orders passed in execu-tidn proceedings ceased to become decrees which was merely be a legal fiction before the Amending Act was enforced. Unless, therefore, there were compelling reasons to hold that in spite of the fact that orders in execution proceedings ceased to become a decree after coming into force of the Amending Act, they would still be appealable either Under Section 96 or Under Section 100 of the Code of Civil Procedure, It will

further be noticed from the provisions of Section 97 (2)(a) that the amendment made to Clause (2) of Section 2 of the Principal Act by Section 3 of the Amending Act is expressly stated to have been saved only in respect of appeals which were pending determination on the date when the Amending Act came into force. Any other view of the matter will render the provisions of Section 97 (2)(a) of the Amending Act otiose. This view is further fortified by the provisions of Section 97 (2)(a) which expressly enjoin that the substituted Section 100 of the Principal Act, as substituted by Section 97 of the Amending Act, shall not apply to or affect any appeal from an appellate decree or order which had been admitted before the commencement of the said Section 37 and after hearing under Order 41, Rule 11 of the Code of Civil Procedure.

8. There is thus no manner of doubt that only such appeals are saved which were pending and have been duly admitted after hearing under Order 41 Rule 11 of the Code of Civil Procedure on the date the Amending Act came into force, i.e. 1-2-1977. It cannot be argued by any stretch of imagination that since the suit had been decided one way or the other and decree passed before the coming into force of the Amending Act, any order in any execution proceedings passed after coming into force of the Amending Act would still amount to a decree and that the provision of Section 96 or Section 100 of the Civil Procedure Code shall still apply to the same. Furthermore, the provisions of Section 99A been forced this view. It expressly lays down that no order Under Section 47 of the Code of Civil Procedure was to be reversed or modified oh account of any error, defect or irregularity in any proceeding relating to such order unless such error, defect or irregularity had prejudicially affected the decision of the case. This evidently read with the provisions of Sections 97(2)(a) and 97(2)(b), leaves no manner of doubt. All that is saved is that appeals from any orders passed in execution proceedings which were pending on the date the Amending Act came into force and with regard to that too the jurisdiction to interfere with such orders had been further curtailed and brittled down by Section 80, as extracted above.

9. We have, therefore, no hesitation in holding that not only by necessary intendment, but in express words, the right of appeal which had been conceived of a party litigant to go up in appeal against an order passed Under Section. 47 of the Code of Civil Procedure before the Amending Act by virtue of the legal fiction introduced in the definition of the term 'decree' as including any order passed in execution proceedings had been taken away by a valid piece of enactment and that it no longer survived after coming into force of the Amending Act. This then leads us to the case law.

10. We may now refer to the two decisions of this Court reported in AIR 1980 Madh Pra 16 (supra) and 1981 Jab LJ 171 (supra). The principle had been rightly enunciated therein that the amendment cannot be construed to take away the vested right of appeal, but the fallacy from which these two decisions suffer, in that they fail to appreciate that the eight to appeal being a creature of the statute, it could as well be taken away by a valid statutory enactment not only expressly, but by necessary intendment also and as shown above, the Amending Act has expressly taken away the right of appeal against orders passed in execution proceedings under Section 47 of the Code of Civil Procedure by amending the term 'decree'.

11. As against the two decisions of this Court mentioned above, there is a pleathora of decisions mostly of Full Benches of other High Courts which have taken a contrary view. Even the earlier

Patna Division Bench decision in case of Parshavs Properties Ltd. v. A. K. Bose, AIR 1979 Pat 308, has subsequently been overruled by a Full Bench of that Court in case of Masomat Narmada Devi v. Ram Mandar Singh, AIR 1987 Pat 33, which is, with great respect, a rather exhaustive judgment. To the same effect is the judgment of the Full Bench of the Allahabad High Court in case of Pratap Narain Agarwal v. Ram Narain Agarwal, AIR 1980 All 42, a decision of the Full Bench of the Kerala High Court in case of Mohammad Khan v. State Bank of Travancore, AIR 1978 Ker 201, and Division Bench decisions of other High Court viz., AIR 1978 Raj 127 (Mohand Das v. Kamla Devi); AIR 1983 Orissa 127 (Dhusa-san Nayak v. Dhadi Nayak); AIR 1988 Guj 324 (Hansumatiben v. Ambalal Krishnalal Parikh); and AIR 1983 Bom 378 (Ramesh-kumar Swarupchand Sancheti v. Rameshwar Vallabram Batwai).

12. Both on principle and precedence, therefore, we have no hesitation in coming to the conclusion that the two decisions of this Court in case of Chularam (AIR 1980 Madh Pra 16) (supra) and Sitaram (1981 Jab LJ 171) (supra) have been laid down the correct law and they are hereby overruled. As we have already stated above, the execution was levied in the instant case on 4-1-1979; whereas the Amending Act came into force with effect from 1-2-1977. No appeal could, therefore, lie against any order passed under Section 47 of the Code of Civil Procedure in the present case.

13. The question referred to the Full Bench is thus answered and the cases are sent back to the appropriate Division Bench for decision according to law. In the circumstances of the case, we shall make no order as to costs of hearing of these petitions.