

AdhIn Singh Vs. Sahab Singh and ors.

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Court : Allahabad

Decided On : May-10-1976

Reported in : AIR1977All26

Judge : R.B. Misra and ;K.C. Agrawal, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rule 2 - Order 34, Rule 5;
Code of Civil Procedure (CPC) (Amendment) Act, 1974

Appeal No. : Ex. First Appeal No. 227 and F.A.F.O. No. 300 of 1975

Appellant : AdhIn Singh

Respondent : Sahab Singh and ors.

Advocate for Def. : N.C. Rajvanshi, Adv.

Advocate for Pet/Ap. : K.B.L. Gaur, Adv.

Judgement :

Agrawal, J.

1. These two connected appeals under Sections 47/96 and under Order XLIII, Rule 1 (m), C.P.C. have been preferred by Adhin Singh the judgment-debtor, against the judgment of the Civil Judge, Saharanpur, dated 12-5-1975 disposing of Miscellaneous Cases Nos. 7 and 85 of 1972. Sahab Singh and others the

respondents, filed a suit for the recovery of money on the basis of a simple mortgage. The suit was numbered as 51 of 1970. A preliminary decree in the said suit was passed on 15-3-1971. As the judgment-debtor did not pay the amount within the time stipulated in the preliminary decree, an application under Order XXXIV, Rule 5 of the Code of Civil Procedure was filed by the respondents for the preparation of a final decree. This was registered as Miscellaneous Case No. 68 of 1971. During the pendency of the proceedings for the preparation of final decree, the judgment-debtor appellant filed an application on January 20, 1972, for recording satisfaction of the decree on the ground that payment of the decretal amount having been made outside the Court, the decree was liable to be entered as satisfied under Order XXI, Rule 2, C.P.C. This application was registered as Miscellaneous Case No. 7 of 1972. Thereafter, he filed another application on October 6, 1972, that the proceedings of Miscellaneous Case No. 7 of 1972 had also been compromised, and that as the respondents were not prepared to get the compromise recorded, he was entitled to the recording of the compromise under Order XXIII, Rule 3 of the Code of Civil Procedure. This application was numbered as Miscellaneous Case No. 85 of 1972.

2. During the pendency of these applications in the court below, the provisions of Order XXIII, Rule 3 of the Code of Civil Procedure were amended by the High Court in 1974. Rule 3 after the amendment is as under:

'Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing duly signed by the parties or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit and obtains an instrument in writing duly signed by the plaintiff, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit:

Provided that the provisions of this rule shall not apply to or in any way effect the provisions of Order XXXIV, Rules 3, 5 and 8.

Explanation: The expressions, 'agreement' and 'compromise', include a joint statement of the parties concerned or their counsel recorded by the Court, and the

expression 'instrument' includes a statement of the plaintiff or his counsel recorded by the Court.'

3. On the basis of the aforesaid amendment, the respondents contended before the learned Civil Judge that as the alleged compromise had not been reduced in writing, the application made under Order XXIII, Rule 3, C.P.C. was liable to be rejected. It was also contended on behalf of the respondents that as the provisions of Order XXIII, Rule 3, C.P.C. are not applicable to a preliminary decree under Order XXXIV, Rules 4 and 5 of the Code of Civil Procedure, therefore, the application for recording the compromise was liable to be rejected on this ground as well. It may be noted that the provision providing that Order XXIII, Rule 3, C.P.C. would not be applicable to a preliminary decree under Order XXXIV, Rule 4 and further proceedings for preparation of a final decree under Order XXXIV, Rule 5 of the Code of Civil Procedure, had also come into force by the aforesaid amendment in the Rules. The court below accepting the objections raised on behalf of the respondents, dismissed the two applications. Feeling aggrieved, the judgment-debtor has come to this Court by means of the present appeals.

4. As stated above, the application filed under Order XXI, Rule 2, C.P.C. by the judgment-debtor had given rise to Miscellaneous Case No. 7 of 1972. First Appeal from Order No. 227 of 1975 has been preferred against the dismissal of the application, while First Appeal From Order No. 300 of 1975 has been filed by the judgment-debtor against the rejection of the application under Order XXIII, Rule 3, C.P.C., which had given rise to Miscellaneous Case No. 85 of 1972. We propose to take up appeal No. 227 of 1975 first.

5. The main point that arises for determination, is whether the provisions of Order XXI, Rule 2, C.P.C. can be applied to the proceedings under Order XXXIV, Rule 5, C.P.C. Order XXI, Rule 2, C.P.C. only applies in execution, and since execution does not begin until a final decree has been prepared for sale of the property mortgaged, it appears to us that Order XXI, Rule 2, C.P.C. is inapplicable to the proceedings pending for the preparation of a final decree under Order XXXIV, Rule 5, C.P.C. This view of ours is fully supported by a decision of the Privy Council in *Madan Theatres Ltd. v. Dinshaw and Co.* . It was held by the Privy

Council in this case that the mortgage continues until a final decree is passed and there is no time-limit and as Order XXI Rule 2, C.P.C. only applies in execution, an application for adjustment or payment is not maintainable. This concludes this Appeal against the appellant.

6. Coming, to the other appeal, No. 300 of 1975, the question that arises for determination is whether the amend-ed provision of Order XXIII, Rule 3 of the Code of Civil Procedure applies to the facts of the present case. The submission made on behalf of the respondents in the court below and also before us was that the amendment made in Order XXIII. Rule 3, C.P.C. being procedural in nature, the same should be given retrospective effect. It was urged on their behalf that there is no vested right in procedure and, accordingly, it is the general rule that any change made in the form of procedure should be given retrospective effect. The submission made on behalf of the respondents was controverted by the learned counsel appearing for the appellant. It was urged by him that amendments made in procedural law generally are given prospective effect, unless contrary intention is expressed or clearly implied.

7. The difference between the procedural law and the substantive law has been stated by the Supreme Court in *Bharat Barrel v E. S. I. Corporation*, : (1971)IILLJ647SC , in the following words:

'It does not, therefore, appear that the statement that substantive law determines rights and procedural law deals with remedies is wholly valid, for neither the entire law of remedies belongs to procedure nor are rights merely confined to substantive law, because, as already noticed rights are hidden even 'in the interstices of procedure'. There is, therefore no clear cut division between the two.'

8. Hence, it will have to be decided in each case whether amendments made affect the substantive law or the procedural law. On examination of the amendment in question made in Order XXIII, Rule 3, C.P.C., we are of the opinion that it is not purely relating to procedure of the Court. It affects the substantive right of a person who could get an oral adjustment recorded under Order XXIII, Rule 3, C.P.C. before the amendment made in 1974. As Order XXIII, Rule 3, C.P.C. before its amendment entitled a person to get a compromise recorded by a

Court in case he satisfied that the suit had been adjusted either wholly or in part by any lawful Agreement or compromise. Admittedly, a compromise before the amendment in Order XXIII. Rule 3, C.P.C. could be oral, and the person setting it up had only to establish the same. Such a compromise could also be in respect of proceedings under Order XXXIV, Rules 4 and 5, C.P.C. But, now as a result of the amendment, a compromise must be in writing only in proceedings under Order XXXIV, Rules 4 and 5, C.P.C. If the amendment is given retrospective effect, the position would be that in a case where oral agreement or compromise had taken place before the amendment, the same will not be accepted. At the time when the compromise in such a case took place there was no provision for the same being in writing. Hence, to our minds, the right of such a person since would be affected, it cannot be said that the amendments made in Order XXIII, Rule 3, C.P.C. are purely procedural. Crain's on Statute Law, 6th Edition, page 400, has also said that:

'In other words if e statute deals merely with the procedure in an action, and does not affect the rights of the parties, it will be held to apply *prima facie* to all actions, pending as well as future.'

9. These observations show that where an amendment deals with the procedure affecting the rights of the parties, the same has to be held to be prospective in operation.

10. Another feature of the case which deserves to be mentioned here is that in the gazette notifying the aforesaid rule, it has also been clearly mentioned that the amendment will come into force from the date of its publication in the official Gazette. The declaration made to this effect, in the circumstances of the present case, has to be construed as meaning that the same would not apply to pending cases. For these reasons, the view of the court below to the contrary in this appeal is erroneous and hence the order rejecting Miscellaneous Case No. 85 of 1972 is liable to be set aside. The case would now be sent back to the Civil Judge for deciding Miscellaneous Case No. 85 of 1972 afresh on merits.

11. In the result, Ex. First Appeal No. 227 of 1975 is dismissed. First Appeal From Order No. 300 of 1975 is allowed, and the judgment of the court below is set

aside. The case shall be sent back to the Civil Judge, Saharanpur, for deciding Miscellaneous Case No. 85 of 1972 on merits, after restoring the same to its original number. In the circumstances of the case, we direct the parties to bear their own costs.

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