SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Mohan Das and ors. Vs. Kamla Devi

Mohan Das and ors. Vs. Kamla Devi

SooperKanoon Citation : sooperkanoon.com/751637

Court : Rajasthan

Decided On : Dec-12-1977

Reported in : AIR1978Raj127; 1977()WLN684

Judge : A.P. Sen and; P.D. Kudal, JJ.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 2(2) and 47; Code of Civil Procedure (CPC) (Amendment) Act, 1976 - Sections 97(2); Rajasthan High Court Ordinance, 1949 - Sections 18

Appeal No. : Special Appeal No. 4 of 1977

Appellant : Mohan Das and ors.

Respondent : Kamla Devi

Advocate for Def. : N.M. Kasliwal, Adv.

Advocate for Pet/Ap. : M.B.L. Bhargava, Adv.

Disposition : Appeal allowed

Judgement :

Kudal, J.

1. This special appeal under Section 18 of the Rajasthan High CourtOrdinance, 1949, is directed against the judgment of the learned Single Judge dated May 9,

1977.

2. Learned counsel for the respondent-decree-holder has raised preliminary objection that the appeal is not maintainable in view of the provisions of the Civil P. C. (Amendment) Act, 1976 (hereinafter referred to as the Amending Act), which came into force from Feb. 1, 1977. It was contended that by the Amending Act the definition of 'decree' in Section 2(2) of the Civil P. C. has been amended and the words 'Section 47 or' have been deleted as a result of which any order passed under Section 47 of the Civil P. C. is, therefore, not appealable. It was further contended that the intention of the Amending Act is to shorten the litigation and not to allow it to be prolonged unnecessarily in execution matters. It was further contended that in view of the recent amendment, order passed under Section 47, CPC now does not amount to a decree and. therefore, is not appealable as such. It was further contended that though the right of appeal being a substantive right, and the institution of a suit carries with it the implication that all successive appeals availabale under the law then in force would be preserved to the parties to the suit throughout the rest of the career of the suit. There are however two exceptions to this rule : (1) when by subsequent enactment such right is taken away expressly or impliedly with retrospective effect; and (2) when the Court to which the appeal lay at the commencement of the suit stands abolished. The contention of the learned counsel for the respondent is that the present amendments in the Code of Civil Procedure clearly exhibit the necessary intendment that the appeals, which were available at the time when the lis commenced, are no longer available to the parties. It was also contended that Section 18 of the Rajasthan High Court Ordinance, 1949, cannot provide a right of appeal in the instant case against the judgment of learned Single Judge because such a right of appeal would be inconsistent with the recent amendments in the Code of Civil Procedure and would create anomalous situation. It was also contended that only those appeals are saved under Section 97(2)(a) of theAmending Act which had been institutedbefore Feb. 1, 1977. The present appeal was instituted much after the Amending Act had come into force,

3. Learned counsel for the appellantscontended that the present appeal is maintainable as at the time when the lis commenced, the law provided such an

appeal. By a subsequent enactment, the substantive right of such appeal cannot be taken away. It was also contended that such an appeal is neither expressly barred, nor such necessary intendment can be inferred which bars the maintainability of such an appeal.

4. The respective contentions of the learned counsel for the parties have been considered and the record of the case carefully perused. The relevant facts which are necessary for the disposal of this preliminary point are that the plaintiff-respondent filed a suit for pre-emption in respect of the suit property in the year 1970 which was finally decreed by the High Court on September 1, 1975. The plaintiff-respondent filed an execution petition on Nov. 12, 1975. The appellants-judgment-debtors filed objections under Section 47 of the Civil P.C. These objections were dismissed by the learned Additional District Judge No. 1, Jaipur on Sept. 10, 1976. Thereafter, the judgment-debtor preferred an appeal on Oct, 4, 1976 before this Court, which was dismissed on May 9, 1977. On May 17, 1977, the present special appeal under Section 18 of the Rajasthan High Court Ordinance, 1949, was filed,

5. The Civil P.C. (Amendment) Act, 1976, came into force from Feb. 1, 1977. Sub-clause (1) and Sub-clause (2) (a) of Section 97 of the Amending Act read as under:--

'97. Repeal and savings -- (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 provisions of Section 6 of the General Clauses Act, 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 47and every such appeal shall be dealt with as if the said Section 3 had not come into effect.' Sub-section (3) of Section 97

reads as under:-- '(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. The definition of 'decree' has been amended by the Amending Act and Words 'Section 47 or' have been omitted by the Amending Act. Before this amendment an order passed under Section 47, CPC amounted to a decree, and was subject to first and second appeal as provided under the Code of Civil Procedure. The Amending Act, 1976, has been brought with the intention of shortening and curtailing the litigation. Orders passed under Section 47, CPC now no more amount to a decree. No appeal is provided against such orders under Section 104, CPC or the rules framed thereunder. The Amending Act, 1976 came into force from February 1, 1977, when the appeal against the order of the learned Additional District Judge was already pending before the High Court. Pending appeals were saved by virtue of Section 97 (2) (a). The learned Single Judge dismissed the appeal on May 9, 1977. The Amending Act, 1976, clearly bars the right of appeal against the orders passed under appeal under Section 18 of the Rajasthan High Court Ordinance, 1949, is allowed.

7. Learned counsel for the appellants has strenuously argued that the right of appeal is a substantive right, and such a right shall be governed by law which existed at the time when the lis commenced, and would not be affected by any subsequent legislation. Reliance was placed on Garikapati v. Subbiah Chowdhary AIR 1957 SC 540 and Jose Da Costa v. Bascora. AIR 1975 SC 1843. The proposition of law laid down by the Supreme Court in these two rulings can hardly be disputed. The basic question for consideration is, whether by the Amending Act, 1976, the necessary intendment can be Inferred by which aright of appeal has been taken away. In the scheme of the Amending Act, 1976, it is writ large that the litigation should be shortened and curtailed and by omission of the words, 'Section 47 or', the orders under Section 47, CPC are no more appealable. The intention of

the Legislature therefore, is that the decree-holder should be able to reap the fruits of his decree as expeditiously as possible, and that the judgment-debtor should not be allowed to have a second inning by way of frivolous objections and thus defeat the very purpose of the decree. The Legislature further intended that execution matter should be disposed of as expeditiously as possible and hence these amendments. In our considered opinion, the necessary intendment can be clearly inferred from the fact that appeals against the orders under Section 47, CPC are barred.

8. In this view of the matter, there would be no appeal against the order of the executing Court under Section 47, CPC. The learned Additional District Judge dismissed the objections of the judgment-debtor under Section 47, CPC, and the appeal before the High Court had been filed much before the Amending Act, 1976, came into force on February 1, 1977. The appeal before the learned Single Judge was saved by the provisions of Sub-section (2) (a) of Section 97 of the Amending Act. By allowing a further appeal under Section 18 of the Rajasthan High Court Ordinance, 1949, the very intent and purpose of the Amending Act, 1976 would be frustrated. There is no force in this argument of the learned counsel for the appellants that the necessary intendment cannot be inferred from the provisions of the Amending Act, 1976. As stated above, the necessary intendment can be clearly inferred, and a special appeal under Section 18 of the Rajasthan High Court Ordinance, 1949. would thus clearly stand barred. Reliance can be placed on Smt. Priti Parihar v. Kailash Singh 1977 WLN 357. The learned Division Bench in this case placed reliance on Union of India v. Mohindra Supply Co., AIR 1962 SC 256. We see no reason to take a different view.

9. For the reason stated above, we have no hesitation in holding that the present special appeal under Section 18 of the Rajasthan High Court Ordinance, 1949, is clearly barred by the Amending Act, 1976. The preliminary objectionraised by the learned counsel for the respondent is hereby sustained.

10. In the result, the special appeal is held to be not maintainable and is hereby dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com