

Narhari Shivram Shet Narvekar

Vs

Pannalal Umediram

Civil Appeal No. 909 of 1968

(R.S. Sarkaria, Syed M. Fazal Ali JJ)

16.01.1976

JUDGMENT

FAZAL ALI, J. -

1. This is a judgment debtor's appeal on a certificate of fitness granted by the Additional Judicial Commissioner, Goa, Daman & Diu and arises under the following circumstances.
2. The decree holder/respondent had brought a suit on the original side of the Bombay High Court being Suit No. 203 of 1956 against the appellant/judgment debtor for recovery of certain amount of money. The Bombay High Court passed a decree for Rs. 65,953.79 on June 29, 1960. In the suit brought by the decree holder/respondent summons were served on the defendant/judgment debtor who filed his written statement and thereafter absented himself and did not take any part in the proceedings of the Court. On December 20, 1961 Goa became a part of India and was made a Union territory of India by the Constitution (Twelfth Amendment) Act, 1962 passed on March 27, 1962. Thereafter the decree holder/respondent applied to the Bombay High Court for transferring the decree to Goa court for execution. This prayer was allowed by the Bombay High Court and by its order dated August 28, 1963 the decree was transferred to the Goa court for execution. In pursuance of the order of the Bombay High Court the decree holder filed an execution suit before the executing Court at Panjim on January 21, 1964. The executing Court however by its order dated April 26, 1965 held that the decree transferred to it by the Bombay High Court was not executable and accordingly dismissed the execution. Thereafter the decree holder filed a memo of appeal before the Additional Judicial Commissioner on June 1, 1965 and the appeal was admitted on June 5, 1965. On February 24, 1967 the judgment debtor/appellant filed his reply. While the appeal was pending before the Additional Judicial Commissioner the Code of Civil Procedure was extended to Goa on June 15, 1966. Accordingly the Additional Judicial Commissioner by its order dated June 28, 1967 held that the decree was executable and he accordingly remitted the case to the executing Court for proceeding in accordance with the law. The Additional Judicial Commissioner also held that in view of Article 261 (3) of the Constitution of India the decree passed by the Bombay High Court could not be treated to be a nullity and was, therefore, clearly executable.
3. In support of the appeal Mr. B. N. Lokur submitted three main contentions before us :
 - (1) that the decree passed by the Bombay High Court qua Goa court was a nullity being a decree of a foreign court. Even if the decree was not a nullity it could be executed by a Goa court if the original decree had been approved by the Goa court under Section 50 of the Portuguese Code;
 - (2) that the order of the Bombay High Court transferring the decree for execution to the Goa court

under Sections 38 & 39 of the Code of Civil Procedure was without jurisdiction inasmuch as the Code of Civil Procedure had not been applied to Goa when the order of transfer was passed; and

(3) that as the provisions of the Code of Civil Procedure were applied to Goa after the order of the executing Court was passed and a vested right had accrued to the appellant/judgment debtor the decree continued to be inexecutable and could not be validated by Article 261(3) of the Constitution of India.

4. Mr. D. V. Patel appearing for the respondent/decreed holder submitted that as the judgment debtor had appeared and had participated in the suit for some time the decree passed by the Bombay High Court could not be said to be a nullity. Secondly it was contended that as the Code of Civil Procedure was made applicable while the appeal was pending before the Additional Judicial Commissioner, Goa, the decree became clearly executable and the order of transfer of the decree by the Bombay High Court stood validated. Thirdly it was argued that in view of the provisions of Article 261 (3) of the Constitution of India there was no bar to the execution of the decree which was passed by a court which was in the territory of India.

5. The sheet-anchor of the argument of the learned Counsel for the appellant/judgment debtor, that the decree passed by the Bombay High Court was a nullity either on the ground that it was passed by a foreign court or on the ground that the transfer was invalid under Section 38 of the Code of Civil Procedure, was the decision of this Court in *Raj Rajendra Sardar Maloji Narsingh Rao Shitole v. Sri Shankar Saran* ((1963) 2 SCR 577 : AIR 1962 SC 1737). In that case it appears that the appellant had instituted a suit in the court in Gwalior State in May 1947. The respondents did not appear before the Court and the Gwalior court passed a decree ex parte in November 1948. On September 14, 1951 the Gwalior court transferred the decree for execution to Allahabad, as a result of which the appellant before the Supreme Court filed an application for execution of the decree before the Allahabad court. It was mainly contended before this Court that the decree being that of a foreign court was a nullity and the execution application was not maintainable. In these peculiar circumstances this Court, after considering the entire law on the subject, concluded as follows :

Our conclusion therefore is that the Allahabad High Court had no power to execute the decree either under Section 38 or under Section 43 or 44 of the Code of Civil Procedure. Therefore, even if the decree was not a foreign decree, the decree holder's application for execution was rightly dismissed.

An analysis of Shitole's case (*supra*) would clearly show that the facts in that case are clearly distinguishable from the facts in the present case and there are indeed a large number of distinguishing features in the case indicated above which are not at all applicable to the present case. In the first place the decree in Shitole's case was admittedly passed by the Gwalior court in 1947 when Gwalior being a princely State the court which passed the decree was undoubtedly a foreign court. Secondly, the judgment debtors/defendants did not appear before the Gwalior court at all as a result of which an ex parte decree was passed. According to Private International Law it is well settled that an ex parte decree of a foreign court is a nullity if the party against whom a decree is passed does not appear at all and does not take part in the proceedings of the court. Thirdly, it would appear that the provisions of Article 261(3) of the Constitution would not apply to the facts of Shitole's case because the provisions not being retrospective they could not apply to decrees passed before the coming into force of the Constitution. In view of these circumstances therefore it cannot be said that Shitole's case referred to above is of any assistance to the appellant in deciding the issues involved in this case.

6. On the other hand the decision in *Shaligram v. Daulat Ram* ((1963) 2 SCR 574 : AIR 1967 SC 739) appears to be directly in point so far as the facts in the present case are concerned. In that case also a decree was passed by the Bombay High Court which was in the territory of India and to which the provisions of the Code of Civil Procedure applied. The appellant appeared before the court and applied for leave to defend and thereafter absented himself. The decree was thereafter transferred to the Court of District Judge, Bhir in Hyderabad State. This Court held that the decree was executable and observed as follows :

A person who appears in obedience to the process of a foreign court and applies for leave to defend the suit without objection to the jurisdiction of the court when he is not compellable by law to do so must be held to have voluntarily submitted to jurisdiction of such court (*Shaikh Atham Sahib v. Davud Sahib* ((1909) ILR 32 Mad 469 : 19 MLJ 457)). Therefore it cannot be said that this decree suffered from the defects which a foreign ex parte decree without such submission would suffer from. The order for transfer was made at a time when the Indian Code of Civil Procedure because applicable to the whole of India including the former territories of Hyderabad State.

7. In *Lalji Raja & Sons v. Firm Hansraj Nathuram* ((1971) 3 SCR 815 : (1971) 1 SCC 721) this Court reiterated the view taken in *Shaligram's* case (supra). It was also pointed out in the aforesaid case that where a party appears before the court the decree of the court even if it is a foreign court is not a nullity.

8. Learned Counsel appearing for the appellant however submitted that since the Code of Civil Procedure was not applicable to Goa the decree became inexecutable and this being a vested right could not be taken away by the application of the Code of Civil Procedure to Goa during the pendency of the appeal before the Additional Judicial Commissioner. It seems to us that the right of the judgment debtor to pay up the decree passed against him cannot be said to be a vested right, nor can the question of executability of the decree be regarded as a substantive vested right of the judgment debtor. A fortiori the execution proceedings being purely a matter of procedure it is well settled that any change in law which is made during the pendency of the cause would be deemed to be retroactive in operation and the appellate Court is bound to take notice of the change in law. In *Mohanlal Chunilal Kothari v. Tribhovan Haribhai Tamboli* ((1963) 2 SCR 707, 715-716 : AIR 1963 SC 358) it was clearly ruled by this Court that the appellate Court was bound to apply the law as it was found on the date of the judgment. In this connection this Court observed as follows :

But it was during the pendency of the suit at the appellate stage that the second notification was issued cancelling the first. Hence, the Court was bound to apply the law as it was found on the date of the judgment. Hence, there is no question of taking away any vested rights in the landlords.

To the same effect is the decision of this Court in *Gummalapura Taggina Matada Kotturuswami v. Setra Veeravva* (AIR 1956 SC 577, 579 : 1959 Supp 1 SCR 968) where this Court observed as follows :

It is well settled that an appellate Court is entitled to take into consideration any change in the law (vide the case of *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri* ((1940) FCR 84 : AIR 1941 FC 5)).

9. A similar view was taken by a recent decision of this Court in *Jose da Costa v. Bascora Sadasiva Sinai Narconim* ((1976) 2 SCC 917) where this Court observed as follows : [p. 925, para 31]

Before ascertaining the effect of the enactments aforesaid passed by the Central Legislature on pending suits or appeals, it would be appropriate to bear in mind two well-established principles. The first is that "while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment" (see *Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commr.* (54 IA 421 : AIR 1927 PC 242)). The second is that a right of appeal being a substantive right the institution of a suit carries with it the implication that all successive appeals available under the law then in force would be preserved to the parties to the suit throughout the rest of the career of the suit.

In these circumstances, therefore, we are unable to accede to the contention of the appellant that the Additional Judicial Commissioner was not competent to take notice of the change in the law.

10. As regards the argument of the learned Counsel for the appellant that the executability of the decree was a vested right which could not be taken away by the applicability of the Code of Civil Procedure to Goa during the pendency of the appeal, the decision of this Court in *Lalji Raja & Sons'* case (supra) is a clear authority against the proposition adumbrated by the learned Counsel for the appellant. In that case this Court appears to have considered this point in all its comprehensive aspects and was of the opinion that the executability of the decree could not be considered to be a vested right. In this connection this Court made the following observations :

Therefore the question for decision is whether the non-executability of the decree in the Morena court under the law in force in Madhya Bharat before the extension of 'the Code' can be said to be a right accrued under the repealed law. We do not think that even by straining the language of the provision it can be said that the non-executability of a decree within a particular territory can be considered as a privilege. All that has happened in view of the extension of 'the Code' to the whole of India in 1951 is that the decree which could have been executed only by courts in British India are now made executable in the whole of India. The change made is one relating to procedure and jurisdiction . . . It was the invalidity of the order transferring the decree to the Morena court that stood in the way of the decree holders in executing their decree in that court on the earlier occasion and not because of any vested rights of the judgment-debtors By the extension of 'the Code' to Madhya Bharat, want of jurisdiction on the part of the Morena court was remedied and that court is now made competent to execute the decree.

11. It was then argued that as the Code of Civil Procedure was not applicable to Goa at the time when the Bombay High Court passed the order transferring the decree to the Goa court, the order of transfer was absolutely without jurisdiction. We are, however, unable to agree with this contention. To begin with as the decree was passed by the Bombay High Court, Section 38 of the Code of Civil Procedure would clearly apply because the decree passed by the Bombay High Court was not a foreign decree. It is true that at the time when the Bombay High court passed the order of transfer, the Code of Civil Procedure had not been applied to Goa. But that does not put the respondent/decree holder out of court. The decree could be transferred and was valid and executable. But because of an impediment or an infirmity it could not be executed so long as the Code of Civil Procedure was not made applicable to Goa. Thus the only bar which stood in the way of the execution of the decree was the non-applicability of the provisions of the Code of Civil Procedure to Goa. This was, however, not an insurmountable bar or an obstacle and the bar or the obstacle disappeared the moment the Code of Civil Procedure was applied to Goa on June 15, 1966. It is common ground that this was done during the pendency of the appeal before the Additional

Judicial Commissioner passed the impugned order on June 28, 1967. In these circumstances, therefore, it seems to us that this is a fit case in which the doctrine of eclipse would apply and the wall or the bar which separated Bombay from Goa having disappeared there was no impediment in the execution of the decree. The decree lay dormant only so far as no bridge was built between Bombay and Goa but as soon as the bridge was constructed in the shape of the application of the provisions of the Code of Civil Procedure to Goa the decree became at once executable.

12. In *Bhagwan Shankar v. Rajaram Babu Vithal* (AIR 1951 Bom 125, 127 : ILR 1952 Bom 65 : 53 Bom LR 398), Chagla, C.J. as he then was, while delivering the opinion of the Full Bench of the Bombay High Court, observed as follows :

Therefore, as far as this particular decree was concerned, as the defendant, we are assuming did not submit to the jurisdiction of the Sholapur court, qua the Akalkot court, the judgment of the Sholapur court was a foreign judgment passed by a court not of competent jurisdiction and therefore the decree could not be executed in the Akalkot court so long as the Sholapur court continued to be a foreign court. But once it is conceded that the decree was not a nullity and it was valid and binding as far as the Sholapur court was concerned, then there is no difficulty, with respect, in understanding and appreciating the judgment which we have to consider in this Full Bench, because if the character of the Akalkot court changes and if the status of the defendant alters because of that fact, then the impediment which was initially there in the decree being enforced in the Akalkot court disappears and the decree which was unenforceable till that change came about becomes enforceable and executable in the Akalkot court. This is not in any way violating private international law. Private international law remains the same. But under the circumstances of the case the Sholapur court no longer being a foreign court qua the Akalkot court the question of private international law does not arise at all. The decree is then being executed under the municipal law and clearly under the municipal law the decree is executable as it has been passed by a court of competent jurisdiction.

It would appear therefore that an identical phenomenon had taken place in the case before the Bombay High Court and the Full Bench held that the moment the decree became executable and enforceable the status of the defendant/judgment debtor was altered and the decree became executable. On a parity of reasoning, therefore, in the present case also the decree passed by the Bombay High Court having been passed by a court of competent jurisdiction and not being a nullity because the judgment debtor had appeared and participated in the proceedings of the court to some extent, and the order of transfer under Section 38 of the Code of Civil Procedure also not having suffered from any inherent lack of jurisdiction, the decree became enforceable and executable as soon as the Code of Civil Procedure was applied to Goa. As we have indicated above it was the duty of the appellate Court, namely the Additional Judicial Commissioner, to take note of the change in law, namely, the applicability of the Code of Civil Procedure to Goa and the repeal of the Portuguese Code which was in force before the provisions of the Code of Civil Procedure were applied. The Additional Judicial Commissioner was, therefore, fully justified in taking the view that the decree was executable and the bar of inexecutability came to an end, when the provisions of the Code of Civil Procedure were applied to Goa.

13. Mr. Patel appearing for the respondent submitted an alternative argument that even if the transfer of the decree under Section 38 of the Code of Civil Procedure was not valid, under the Portuguese Code there was no provision which required transfer of the decree to that court before the same could be executed. Counsel for the appellant objected to this argument on the ground that it was never raised at any stage of the case and being a question of fact as to whether or not there was any such provision in the Portuguese Code it should not be entertained. In these circumstances,

we do not think it necessary to go into this question, particularly when the order of the Additional Judicial Commissioner can be upheld on other grounds mentioned by us.

14. Finally it appears that this case is clearly covered by the principles contained in Article 261(3) of the Constitution of India which runs thus :

Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

This is a constitutional provision which enjoins that a decree shall be executable in any part of the territory of India according to law. It is obvious that in the instant case the decree was passed by the Bombay High Court after the Constitution came into force and this article would, therefore, clearly apply to the decree passed by the Bombay High Court. The article would also apply the Goa because at the time when the application for execution was made in a Goa court, the Constitution had already been made applicable to that State also. Mr. Lokur, Counsel for the appellant, however, submitted that the words 'according to law' in Article 261(3) would clearly show that the decree would be executable only in accordance with the law in force, i.e. the Portuguese Code. It is true that at the time when the executing Court dismissed the suit of the decree holder/respondent the Code of Civil Procedure had not been applied and the Portuguese Code continued to apply but after the application of the Code of Civil Procedure by virtue of the Goa, Daman and Diu (Extension of the Code of Civil Procedure and the Arbitration Act) Act, 1965 (Act 30 of 1965) the Portuguese Code which was in force in Goa was clearly repealed and the present case does not fall within any of the clauses mentioned in the saving provisions of Section 4 of the Act. Thus when the Code of Civil Procedure was made applicable to Goa during the pendency of the appeal, the appellate Court, namely, the Additional Judicial Commissioner, was bound to decide the matter in accordance with the law that was in force, namely, the Code of Civil Procedure. In Jose da Costa's case (supra) this Court, while dwelling upon the applicability of the Portuguese Code, observed as follows : [pp. 927, 928, paras 36, 39]

Thus considered, it is clear that the procedural provisions of the Portuguese Civil Code were no longer applicable to this case with effect from June 15, 1966. If that be the correct position, there is no legal hurdle in the way of the appellant to the re-agitation in this Court of the issue as to prescription left undecided by the court below.

* * *

To sum up, since on and from June 15, 1966 the Portuguese law relating to Reclamacao stood repealed and no substantive right or obligation had been acquired or incurred under that repealed law within the meaning of the first proviso to Section 4 (1) of Act 30 of 1965, the appellants cannot be debarred from canvassing in this appeal under Article 136, the plea of prescription notwithstanding the fact that they did not file any Reclamacao in the Court of the Judicial Commissioner. We therefore negative the preliminary objection raised by the respondents.

15. For these reasons, therefore, we find ourselves in complete agreement with the view taken by the Additional Judicial Commissioner and hold that the decree passed by the Bombay High Court was clearly executable. The executing Court will now proceed in accordance with the law as directed by the Additional Judicial Commissioner.

16. The appeal fails and is accordingly dismissed but in view of the somewhat uncertain legal

position we leave the parties to bear their respective costs in this Court.

</html