

Dularey Lodh

Vs

Third Additional District Judge Kanpur and Others

Civil Appeal No, 1574 of 2980

(Syed M. Fazal Ali, A. Varadarajan JJ)

03.05.1984

JUDGMENT

FAZAL ALI, J. -

1. This appeal by special leave against a judgment of the Allahabad High Court unfolds a tell-tale plight of an unfortunate litigant who after obtaining a decree for ejection was driven from the said decree executed were stalled sometimes by objections field by the tenant-appellant and sometimes by amendments made in the law with the result that the even after 13 years of litigation the landlord- respondent was not able to get possession of the premises. This was because of statutory amendment which made the decree obtained by him inexecutable and was therefore, lying dormant and ineffective.

2. The Legislature having realized the hardship of the such landlord came to their rescue by an amendment in 1976 to the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972 which was expressly given retrospection operation so as to revive the decrees which has become inexecutable.

3. When the appeal was heard and the arguments were concluded the respondents had made a good gesture in agreeing to allow the undertaking and accordingly we adjourned the case to enable the parties to come to a settlement. However we were informed by counsel for the parties that no settlement could be reached; hence we have now to decide the case on merits.

4. And now to the facts of the case. The respondent-landlord filed a suit for ejection in the year 1971 and obtained a decree for ejection against the appellant. By virtue of the provisions of 1972 Act the case was transferred to the Court of the Judge Small Cause who tried the case and passed a decree in favour of the respondent on April 4, 1973. It may be noted that the tenant did not object to the jurisdiction nor did he prefer any appeal or revision against the said judgment dated April 4, 1979 and the same became final.

5. Thereafter, the decree-holders filed an execution petition being Execution Case No. 4 of 1973. The appellant however, raised a jurisdictional objection on the basis of a judgment of the Allahabad High Court in K. K. Saxena v. S. N. Misra 1875 All LR 360 that the transfer of a suit before conferment of jurisdiction to the Judge. Small Causes Court was not competent and, therefore, the decree was not executable. Counsel for the respondents under some misconception conceded that the suit would have to be tried all over again and the execution case was, therefore, disposed of an Order dated January 31, 1976 passed by the executing Court. The Court held that the decree was without jurisdiction. The respondents however took the stand that a concession on a point of law

was not binding on him nor was his Advocate authorized to make a such a concession. However the decree remained inexecutable but by virtue of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) (Amendment) Act 1976 (hereinafter referred to as the 1976 Amendment Act) Section 9 of the 1972 Act was made applicable with retrospective effect to remove the injustice and remedy the mischief which had been causes to the decree- holder. The relevant portion of the said amendment may be extracted thus;

26. Transitory provision -

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(6) The provision of Section 9 of the Uttar Pradesh Civil Laws Amendment Act, 1972 shall apply and shall be deemed always to have applied in relation to suits of the nature referred to therein which before the commencement of that Act had been transferred to a competent court and were pending immediately before the date of commencement of that Act is such transferee court as they apply in relation to suits which were pending in the court in which they were instituted;

Provided that any such suit decided by the transferee court between the commencement of the said Act and the commencement of this Act on the assumption that the said Section 9 did not apply to such suits shall be deemed to have been validly decided as if the said section did not apply to such suits.

6. As a result of the amendment extracted above the judgment of the Allahabad High Court in K. K. Saksena v. S. N. Misra 1975 All LR 360 stood overruled and effaced.

7. In view of this amendment the respondents filed an applications before the executing Court for revival of the suit and the decree which was accepted by the Court and a civil revision filed against the said Order was dismissed by the High Court hence this appeal by special leave in this Court.

8. In order to understand the implication of the 1976 Amendment Act it may be necessary to peruse Section 26 (5) of the said Amendment which is extracted thus;

26. (5) Notwithstanding any judgment decree or order of any court or authority the provisions of Rule 16 of the Uttar Pradesh Urban Building (Regulation of Letting Rent and Eviction) Rule 1972 shall be deemed to have been made under the provisions of the principal Act and amended by this Act as if this Act were in force on all material dated.

9. A close analysis of the above reveals that the intention of the Legislature was to remove the injustice done to the landlords whose decree became inexecutable. The logical consequence which flows from an interpretation of clause (5) and (6) of Section 26 of the 1976 Amendment Act would be that all decrees which hitherto had been lying dormant would revive and the landlord could get the decree executed.

10. The executing Court as also the High Court upheld the contention of the respondent and directed execution of the decree.

11. The sheet-anchor of the argument of the counsel of the appellant was that in the view of the Allahabad High Court decision 1975 All LR 360 and the 1972 Act the decree stood set aside the

could not be revived or made executable even by the 1976 Amendment Act. It is however impossible for us to accept this contention because the dominant purpose of the 1976 Amendment Act was to remedy the injustice done to the landlord by the 1972 Act.

12. Another flaw in the argument of the counsel for the appellant is that it presumes that the decrees became completely without jurisdiction and stood set aside. That, however could not be the position in law. Even if the 1972 Act were to apply, the utmost consequence would be that the decree would remain inexecutable but could not be struck off from the records of the case. This is a clerk case where the doctrine of eclipse would apply and in view of the 1976 Amendment Act the decree will revive and become executable. This principle has been applied by this Court in several cases and flows from the well-known doctrine of eclipse which has been enunciated not only in India but in other countries also. In Sutherland Statutory Construction by Horack (Vol I Third Edn) the following passages may be noted;

In a majority of the jurisdictions the courts recognize the mistake of the Legislature and try to determine and give effect to its intent. If the Legislature has expressed its purpose intelligible in the mandatory act and provided fully upon the subject considered a majority of courts hold that it is a reasonable conclusion that the Legislature did not intend to make the enforcement of the statute contingent on the continued existence of the repealed statute.... (p. 329)

The unconstitutional act physically exists in the official statutes of the state and is there available for reference and as it is only unenforceable the purported amendment is given effect. If the law as amended is constitutional it will be enforced. (P. 335)

13. It is true that the American Constitution as also the American courts have been most reluctant to apply the doctrine of eclipse but this Court has pointed out in more than one case that the American view cannot be applied to our Constitution. The matter first came up for consideration before this Court in *Bhikaji Narain Dhakras v. State of M. P.* (1955) 2 SCR 598; AIR 1955 SC 781; 1956 SCJ 48 where in a similar situation the doctrine of eclipse was fully applied and the Court observed thus;

The true position in that the impugned law became as it were, eclipsed for the time being by the fundamental right. The effect of the Constitutional (First Amendment) Act 1951 was to remove the shadow and to make the impugned Act free all purposes. They existed for the purposes of pre-Constitution rights and liabilities and they remained operative even after the Constitution as against non-citizens..... In our judgment after the amendment of clause (6) of the Article 19 of June, 18, 1951 the impugned Act ceased to be constitutional and became revived and enforceable against citizens as well as against non-citizens. But after the amendment of clause (6) the impugned Act immediately became fully operative even as against the citizens.

14. In *Deep Chand v. State of U. P.* 1959 Supp 2 SCR 8; AIR 1959 SC 648; 1959 SCJ 1069 similar observations were made by this Court which may be extracted thus;

As, however, our learned Brother has thought fit to embark upon a discussion of these questions, we desire to guard ourselves against being understood as accepting or acquiescing in the conclusion that the doctrine of eclipse cannot apply to any post-Constitutional law. A post-Constitutional law may infringe either a fundamental right conferred on citizens only or a fundamental rights conferred on any person citizens or non-citizens. In the first case the law will not stand in the way of the exercise by the citizens of that the fundamental right and, therefore, will not have any operation on the rights

of the citizens but it will be quite effective as regards non-citizens. In such a case the fundamental right will qua the citizens throw a shadow on the law which will nevertheless be on the Statute Book as a valid law binding on non-citizens and if the shadow is removed by a constitutional amendment the law will immediately be applicable even to the citizens without being re-enacted..... In other words the doctrine of eclipse as explained by this Court in *Bhikaji Narain Dhakras v. State of Madhya Pradesh* (1955) 2 SCR 589; AIR 1955 SC 781; 1956 SCJ 48 also applies to a post-Constitution law of this kind.....

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A pre-Constitution law stating in the words of Das, J., as he then was exists notwithstanding that it does not exist with respect to the future exercise of the fundamental rights. That principle has been extended in this decision by involving the doctrine of eclipse. As the law existed on the statute book to support pre-Constitutional acts the Court held that the said law was eclipsed for the time being by one or other of the fundamental rights and when the shadow was removed by the amendment of the Constitution the impugned Act became free from all blemish or infirmity.

15. In *Mahendra Lal Jaini v. State of Uttar Pradesh* 1963 Supp 1 SCR 912; AIR 1963 SC 1019 this Court held as follows;

The pre-Constitution laws which were perfectly valid when they were passed and the existence of which is recognized in the opening words of Article 13 (1) revive by the removal of the inconsistency in question. This is effect is that doctrine of eclipse which if we may say so with respect was applied in *Bhikaji Narain* case (1955) 2 SCR 589; AIR 1955 SC 781; 1956 SCJ 48

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So far as pre-Constitution laws are concerned the amendment of the Constitutional which removes the inconsistency will result in the revival of such laws by virtue of the doctrine of eclipse as laid down in *Bhikaji Narain* case (1955) 2 SCR 589; AIR 1955 SC 781; 1956 SCJ 48 for the pre-existing laws were not still-borne and would still exist though eclipse on account of the inconsistency to govern pre-existing matters.

16. In two recent decisions this Court has applied the doctrine of eclipse in similar situations. In *S. Anbalagan v. B. Devarajan* (1984) 2 SCC 112 the following observations were made; (SCC p. 119 para 13)

Unless the practice of the caste makes it necessary no expiatory rites need be performed and ordinarily the person regains his caste unless the community does not accept him..... The and however repugnant it may appear to our moral and social sense is so deep-rooted in the Indian people that its mark does not seem to disappear on conversion to a different religion. If it disappears it disappears only to reappear on reconversion.

17. Similarly in the case of *Kailash Sonkar v. Maya Devi* (1984) 2 SCC 91) to which one of us (Fazal Ali J) was a party this Court made the following observation; (SCC p 105 para 34)

In our opinion when a person is converted to Christianity or some other religion the original caste remains under eclipse and as soon as during his/her lifetime the person is recovered to the original religion the eclipse and the caste automatically revives.

18. Thus, applying the rule of law laid down by this Court, there would be no difficulty in upholding the judgments of the courts below in this particular appeal. By virtue of the 1972 Act the decree could not have been set aside or invalidated and the only consequence which would ensue is that the decree would be lying dormant and could not be executed. Once the bar placed by the 1972 Act is removed by virtue of the doctrine of eclipse the decree will revive and become at once operative and executable. The courts below have rightly decided that after the 1976 Amendment Act the decree became legally executable.

19. Some other arguments were also advanced on behalf of the appellant but in view of the express language of the 1976 Amendment Act and the doctrine of eclipse they seem to be futile.

20. For the reasons given above we uphold the decree for ejection passed by the courts below against the appellant and dismiss the appeal with costs. As the litigation has taken more than a decade it is not possible for us to give any time to the tenant for vacating the premises and the decree may now be executed forthwith and the landlord put into possession.

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