

HAJI OMAR
v.
BODHIDASA

SUPREME COURT.
FERNANDO, J.,
AMERASINGHE, J. AND
DHEERARATNE, J.
S.C. 48/93.
C.A. 1280/85.
D.C. COLOMBO 739 RE.
SEPTEMBER 27 AND OCTOBER 11, 1994.

Civil Procedure – Execution of decree for rent and ejectment – Civil Procedure Code ss. 217, 337 – Amending Act, No. 53 of 1980 – Interpretation Ordinance s. 6(3) – Procedural legislation – Retrospectivity – Existing Rights and Vested Rights.

Ex parte decree for rent and ejectment was entered but owing to the death of the judgment creditor and later of wife, the execution and delays caused *inter alia* by loss of the record and difficulties in tracing the defendant, nearly a quarter century had lapsed. The substituted judgment creditors applied for execution.

Held :

Section 337 of the Civil Procedure Code which applied was amended by Act No. 53 of 1980. The words "payment of money or delivery of other property" in section 337(1) before amendment should be read *ejusdem* as they are referable to items A (decree to pay money) and B (decree to deliver movable property) of the classification of decrees mentioned in section 217. Item C in the classification

refers to decrees "to yield up possession of immovable property". The word 'delivery' is appropriate to movable property.

At the time he obtained judgment in his favour, the judgment – creditor was not inhibited by any period of time to apply for execution of a decree commanding the judgment – debtor to yield up possession of immovable property.

Under the amended section 337(1) no application to execute a decree shall be granted after the expiration of ten years from the date of the decree subject to certain exceptions.

The presumption of retrospectivity, could be legally attracted to an "existing right" as opposed to a 'vested right'. The general principle is that a statute is presumed not to operate retrospectively so as to affect a vested right. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in regard to events already past. There is however said to be an exception in case of a statute which is purely procedural because no person has a vested right in the rules for the conduct of an action for the time being prescribed. Again a statute which is retrospective in relation to one aspect of a case (e.g. because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g. because it applies only to the post-statute commencement of proceedings to enforce that cause of action).

The Amendment Act No. 53 of 1980 cannot be regarded as purely procedural legislation insofar as it purports to affect (or rather to destroy) the vested right of the judgment-creditor. The amendment is not retrospective.

The decree entered in favour of the judgment-debtor is divisible. As far as that part of the decree to yield up possession of immovable property is concerned, the substituted plaintiffs are entitled to obtain its execution forthwith. As regards the other part of the decree, for payment of money, the original section 337(1) (as it does after the amendment) inhibited granting a subsequent application for writ after expiration of ten years from the date of the decree. Relief will not be granted to the substituted plaintiffs by way of damages for the failure on the part of the judgment-debtor to yield up possession and execution of this part of the decree will not be granted.

Per Dheeraratne J:

"It appears to me where there was a period of time within which a judgment-creditor was permitted to apply for writ of execution and within the unexpired time amending legislation abridged that period, yet leaving time for a judgment-creditor to apply for writ of execution, such legislation would in all probability be termed procedural and

the judgment-creditor would have to proceed in terms of the amending legislation to prosecute his relief on the principle that he had no vested right in the rules of conduct of the action for the time being prescribed. But where there was a time limit or no time limit to apply for execution, and amending legislation abridged or limited that time so as to deprive or destroy the judgment-creditor's right of enforcement such amending legislation could hardly be called procedural as it would affect a substantive right and the presumption of retrospectivity normally attached to procedural legislation will have no application. The right affected in the present case is a vested right inasmuch as it is free from contingencies; it is not a mere hope contingent on the happening of some other event."

Quaere: Whether the judgment-creditor's right was an acquired right under the repealed law within the meaning of section 6(3) (b) of the Interpretation Ordinance.

Cases referred to :

1. *Charles Singho v. Jinadasa Appuhamy* (1960) LV 111 CLW 83.
2. *Martin Silva v. Mahasoon* (1967) 70 NLR 06.
3. *Abeyasinghe v. Gunasekera* (1962) 64 NLR 427.
4. *Ponnamma v. Arumugam* (1905) 8 NLR 223.
5. *Salt v. Cooper* (1880) 16 Ch. Div. 554.
6. *Saravanamuttu v. Solamuttu* (1924) 26 NLR 385.
7. *Suppramaniam Chettiar v. Ward* (1956) 58 NLR 140, 144.
8. *Blyth v. Blyth* (1966) AC 643, 666.
9. *Ran Banda v. River Valleys Development Board* (1967) 71 NLR 24, 28.
10. *Re Edmondson's Estate* (1868) LR 5 Eq. 389, 396-7.
11. *West v. Gwynne* 1911 - Ch. 1, 12.
12. *Yew Bon Tew v. Kenderaan Bas Mara* (Privy Council) (1982) 3 AER 833.

APPEAL from judgment of the Court of Appeal.

H. L. de Silva P.C. with *D. M. Alahakoon* for defendant-appellant.

P. A. D. Samarasekera P.C. with *R. Manikkavasagam* for substituted plaintiff-respondents.

December 06, 1994.

DHEERARATNE, J.

Facts

This appeal relates to an application for execution of a decree made on 22.6.84 by the substituted plaintiff-respondents against the defendant-appellant for recovery of premises called the ground floor section 'A' of premises bearing assessment No. 214, Bandaranayake Mawatha, Colombo, together with damages from 1.12.66 to 31.10.85 amounting to a sum of Rs. 2,27,000. These proceedings have a chequered history spanning about a quarter of a century, a variety of causes having contributed to their prolongation. *Ex parte* decree was entered against the defendant for ejection and damages on 11.7.68 and on 13.1.69 the original plaintiff, who was at that time about 75 years of age, applied for execution of the decree. No steps were taken pursuant to that application as the original plaintiff was ailing; he died on 2.8.70. Testamentary proceedings No. 44 T were instituted in respect of his estate and his widow was appointed executrix. She too died on 9.5.72. Her last will was admitted to probate and the substituted plaintiffs were appointed executors of her estate. The substituted plaintiffs were then appointed in these proceedings in place of the original plaintiff after an inquiry into objections taken by the defendant against such substitution. On 2.4.81 the substituted plaintiffs applied for issue of writ. Upon certain objections taken by the defendant, the application for issue of writ was dismissed granting the substituted plaintiffs liberty to make a fresh application. The record of this case was then missing from the District Court and it had to be reconstructed with the aid of documents in the possession of the substituted plaintiffs' lawyer. Considerable time appears to have been lost thereafter too by the unavailability of the defendant to serve notice as he was said to have left to Pakistan. Ultimately, when it was discovered that the defendant's son held the defendant's power of attorney, notice was served on him and that too by way of substituted service after several unsuccessful attempts. The present application for execution of the writ was made on 22.6.84 and after consideration of the objections raised by the defendant, the District Court made order on 21.10.85 allowing the application for writ of execution. The defendant

appealed from that order but the Court of Appeal dismissed the appeal; the present appeal by the defendant is the sequel.

The law relating to applications for execution of writs

Before the Civil Procedure (Amendment) Act No. 53 of 1980 came into operation on 11.12.1980, section 337 of the principal enactment read as follows:

(1) *Where an application to execute a decree for the payment of money or delivery of other property has been made under this chapter and granted, no subsequent application to execute the same decree shall be granted unless the court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree, or that execution was stayed by the decree-holder at the request of the judgment-debtor. Also no such subsequent application shall be granted after the expiration of ten years from any of the following dates, namely –*

(a) *the date of the decree sought to be enforced, or of the decree, if any, on appeal affirming the same; or*

(b) *where the decree or any subsequent order directs the payment of money or the delivery of property to be made at a specified date – the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.*

(2) *Nothing in this section shall prevent the court from granting an application for execution of a decree after the expiration of the said term of ten years, where the judgment – debtor has by fraud or force prevented the execution of the decree at sometime within ten years immediately before the date of the application.*

The above section as amended by Act No. 53 of 1980 reads as follows:–

(1) *No application (whether it be the first or a subsequent application) to **execute a decree**, not being a decree granting an injunction, shall be granted after the expiration of ten years from –*

[except for a minor change the rest of the subsection (1) reads as before; subsection (2) remains unamended; and a further subsection was added]

(3) *Subject to the provision contained in subsection (2) a writ of execution, if unexecuted, shall remain in force for one year only from its issue, but—*

(a) *such writ may at any time before its expiration, be renewed by the judgment-creditor for one year from the date of such renewal and so on from time to time; or*

(b) *a fresh writ may at any time after the expiration of an earlier writ be issued, till satisfaction of the decree is obtained.*

Interpretation of the original section 337(1)

Our attention was invited to the case of *Charles Singho v. Jinadasa Appuhamy*⁽¹⁾ (Basnayake CJ. with Sansoni J. agreeing) wherein it was held that in the context of section 337, the words other property mean other property *ejusdem generis* with money and therefore, mean other movable property; section 337 therefore does not apply to a decree commanding any person to yield up possession of immovable property. Although at first blush we entertained some doubts regarding the correctness of that interpretation, a closer examination of the context in which the repealed section 337 appeared in the Civil Procedure Code, dispelled our doubts. Chapter XXII of the Code is titled "OF EXECUTION" and contains sections 217 to 354. Section 217 classifies the nature of decrees the court may enter, namely decrees—

- (A) to pay money;
- (B) to **deliver** movable property;
- (C) to **yield up possession** of immovable property;
- (D) to grant, convey, or otherwise pass from himself any right to, or interest in, any property;
- (E) to do any act not falling under the foregoing heads;
- (F) not to do a specified act, or to abstain from specified conduct or behaviour;
- (G) which declare a right or status.

Section 217 further adds that the method or procedure to be followed in order to enforce satisfaction or execution of decree by the judgment – creditor against the judgment-debtor, is that which is next specified “according to the above distinguishing heads”. Sections 217 to 335 are grouped under those same heads. Under the head “(A) Execution of decree to pay money” appear sections 218 to 319; under the head “(B) Decrees for delivery of movable property” appear sections 320 to 322; under the head “(C) Decrees for possession of immovable property” appear sections 323 to 330; under the head “(D) Decree for execution of conveyance or transfer of property” appear sections 331 to 333(A); and under the head “(E) & (F) Mandatory and restraining decrees” appear sections 334 to 335. Then comes the head “General Provisions” under which sections 336 to 354 appear. In the context of this legislative framework I find ample justification for the conclusion Basnayake CJ. reached that the words “payment of money or delivery of other property” should be read *ejusdem generis* as they are referable to items A and B of the classification of decrees mentioned in section 217. It is significant to observe that item ‘C’ in that classification refers to a decree “to yield up possession of immovable property.” The word “delivery” is thus appropriate to movable property.

In view of this aspect of the matter, it is right to conclude that at the time he obtained judgment in his favour, the judgment-creditor was not inhibited by any period of time to apply for execution of a decree commanding the judgment-debtor to yield up possession of immovable property.

Application of Amendment Act No. 53 of 1980

Learned counsel for the substituted plaintiffs contended that if the provisions of amendment Act No. 53 of 1980 are applicable to the present application, in terms of subsection 3 of section 337, a writ of execution may be issued at any time until satisfaction of decree is obtained and therefore there is no time constraint for such application. This submission commended itself to the Court of Appeal. I am unable to justify such an interpretation because the amended section 337(1) states that no application to execute a decree shall be granted after the expiration of ten years from the date of the decree, and it is clear that what is stated in subsection (3) must be read subject to that general provision contained in subsection (1) as regards the time frame. Besides, the opening words of subsection (3) “subject to the provisions contained in subsection (2)” would itself

attract the limitation of ten years specified in that subsection. But, the pivotal question, it seems to me, is whether the amended section 337 applies at all to the present application in view of section 6(3) of the Interpretation Ordinance.

Section 6(3) of the Interpretation Ordinance

Section 6(3) reads as follows:-

Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or deemed to have affected:-

(a) the past operation of anything duly done or suffered under the repealed law;

(b) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed law;

(c) any action, proceeding, or thing pending or incomplete when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal.

The amending Act No. 53 of 1980 contains no express provision regarding pending actions. It is contended on behalf of the substituted plaintiffs that within the meaning of subsection 6(3) (c) the action against the defendant was still **pending or incomplete** when the amending Act No. 53 of 1980 came into operation inasmuch as the decree in favour of the judgment creditor had still to be satisfied. This position is tenable and amply supported by decided authorities. See *Martin Silva v. Mahasoon* ⁽²⁾; *Abeysinghe v. Gunesekera* ⁽³⁾; *Ponnamma v. Arumugam* ⁽⁴⁾; *Sait v. Cooper* ⁽⁵⁾; *Saravanamuttu v. Solamuttu* ⁽⁶⁾; *Suppramaniam Chettiar v. Wahid* ⁽⁷⁾.

Is amended section 337 of the CPC procedural and therefore presumed to be retrospective in operation?

The decision of this case would have rested there if not for the formidable argument advanced by learned counsel for the appellant regarding inapplicability of the provisions of section 6(3) (c) of the Interpretation Ordinance. It was contended that it is a well

established rule of interpretation that changes in procedure have retrospective effect in the absence of provisions to the contrary. (Maxwell on Interpretation of Statutes 7th edition 222; Craies on Statute Law 7th edition 401). As stated by Lord Denning in the case of *Blyth v. Blyth* ⁽⁸⁾.

"The rule that an Act of Parliament is not given retrospective effect only applies to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure, or the admissibility of evidence, or the effect which the courts give to evidence."

This leads to an investigation as to whether the amendment to section 337 is procedural as contended on behalf of the appellant. In the case of *Ran Banda v. River Valleys Development Board* ⁽⁹⁾, Weeramantry, J. observed *"there is no general principle which affords a test for deciding whether a given rule belongs to the realm of substantive law or to the realm of procedure, but it is important to look to substance and real effect rather than to form in determining the question. The fact that a rule appears in form to be procedural does not necessarily make it so, for what may be procedural in appearance may well be substantive in effect. Thus Salmond (Jurisprudence 12th Ed. p462) observes that although the distinction between substantive law and procedure is sharply drawn in theory, there are many rules of procedure which, in practical operation, are wholly or substantially equivalent to rules of substantive law. Rules relating to limitation are among categories cited by the same authority as being wholly or substantially equivalent to rules of substantive law"*.

What is the substance and real effect of the amendment to section 337 as far as it affects the action filed by the judgment-creditor? The object of an action is the redress of a wrong. (see section 5 of the CPC for definitions of "action" and "cause of action"). The judgment-creditor was not circumscribed by any temporal limitation to apply for execution of the decree but, the amending law, if applicable, imposes a time limitation reducing the decree obtained by him to an empty shell; he is totally denied the fruits of his successful litigation.

Presumption of retrospectivity could be legally attracted to an "existing right" as opposed to a "vested right". The general principle is that a statute is presumed not to operate retrospectively so as to affect a vested right and that a Court would always lean in favour of the interpretation which leaves a vested right unaffected. On this

distinction between an existing right and a vested right, in *Ran Banda v. River Valleys Development Board* (*supra*) Weeramantry J. expressed himself as follows:

"The word 'vested' would appear to have a legal meaning which is understood as being 'free from all contingencies' (Re Edmondson's Estate ⁽¹⁰⁾) and the distinction between such right and existing right has been well explained by Buckley LJ. in West v. Gwynne ⁽¹¹⁾ in these terms. "Suppose that by contract between A and B there is an event to arise a debt from B to A and suppose that an Act provides that in respect of such a contract no debt shall arise. As an illustration take the case of a contract to pay money upon the event of a wager or the case of an insurance against a risk which an Act subsequently declares to be one in respect of which the assured shall not have an insurable interest. In such a case, if that event has happened before the Act was passed, so that at the moment when the Act comes into operation a debt exists, an investigation whether the transaction is struck at by the Act involves an investigation whether the Act is retrospective ... but if at the date of the passing of the Act the event has not happened, then the operation of the Act in forbidding the subsequent coming into existence of a debt is not a retrospective operation, but is an interference with existing rights in that it destroys A's rights in an event to become creditor of B. It was held that there was nothing in the language of the new enactment excluding from its scope contracts entered prior to its date of operation. The rights affected were merely existing rights and there was no presumption against interference with existing rights."

A useful discussion of this aspect of the matter in relation to a cause of action is found in the more recent case of *Yew Bon Tew v. Kenderaan Bas Mara* ⁽¹²⁾. Lord Brightman observed at page 836 :-

"Apart from the provisions of the interpretation of statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in case of a statute which is purely procedural, because no person has a vested right in the rules for the conduct of an action for the time being prescribed."

But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (e.g. because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g. because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself. (emphasis added)

It appears to me that where there was a period of time within which a judgment-creditor was permitted to apply for writ of execution and within the unexpired time amending legislation abridged that period, yet leaving time for a judgment-creditor to apply for writ of execution, such legislation would in all probability be termed procedural and the judgment-creditor would have to proceed in terms of the amending legislation to prosecute his relief on the principle that he had not vested right in the rules of conduct of the action for the time being prescribed. But where there was a time limit or no time limit to apply for execution, and amending legislation abridged or limited that time so as to deprive or destroy the judgment-creditor's right of enforcement such amending legislation could hardly be called procedural as it would affect a substantive right and the presumption of retrospectivity normally attached to procedural legislation will have no application. The right affected in the present case is a vested right inasmuch as it is free from contingencies; it is not a mere hope contingent on the happening of some other event.

I feel fortified in the view I have taken by the judgment of T. S. Fernando, J. in *Suppramaniam Chettiar v. Wahid* (*supra*) where consideration of an analogous situation arose. It was held in that case that the amendment of section 218(m) of the CPC, by Act No. 20 of 1954 exempting from seizure in execution of a decree to pay money, the salary and allowances of an employee in a shop or office, if such salary and allowances do not exceed Rs. 500 per mensem, does not have any retrospective operation so as to deprive a judgment-creditor, who had obtained a decree in his favour before

the date on which the amending Act came into force (viz. 17th March 1954) of his right to seize the salary and allowances payable to his judgment-debtor even after the date of the amendment. At page 144 T. S. Fernando, J. said :-

*"A decree might for all practical purposes be an empty decree if all that it permits its holder to do is to seize such sums of money as are in existence at the date of entering the decree. It cannot be doubted that at the date on which the decree in the present case was entered viz. 21st May 1953, the judgment – creditor had a right to seize all sums of money falling due even after the date of decree until the decree in his favour was satisfied. **Such a right is truly a vested right. What is there in the Amendment Act of 1954 to compel one to conclude that the legislature intended to take away that vested right?**"* (emphasis added)

For the foregoing reasons, I hold that the Amendment Act No. 53 of 1980 cannot be regarded as purely procedural legislation insofar as it purports to affect (or rather to destroy) the vested right of the judgment-creditor. The contention of learned counsel for the appellant that the amendment is retrospective fails. In view of this conclusion I have reached, consideration of the further question as to whether the judgment-creditor's right was an "acquired right under the repealed law" within the meaning of section 6(3)(b) of the Interpretation Ordinance does not arise.

Conclusion

The decree entered in favour of the judgment-creditor is divisible. As far as that part of the decree to yield up possession of immovable property is concerned, I hold that the substituted plaintiffs are entitled to obtain its execution forthwith. As regards the other part of the decree, for payment of money, the original section 337(1) (as it does after the amendment) inhibited granting a subsequent application for writ after expiration of ten years from the date of the decree. Our attention was not drawn to any basis upon which we could grant relief to the substituted plaintiffs by way of damages for the failure on the part of the judgment-debtor to yield up possession. The substituted

plaintiffs will therefore not be entitled to obtain execution of that part of the decree. However, the substituted plaintiffs will be entitled to recover costs in connection with the writ application in the District Court, costs in the Court of Appeal, and costs of this court fixed at Rs. 10,000. Subject to what is stated above the appeal is dismissed.

FERNANDO, J. – I agree.

AMERASINGHE, J. – I agree.

Writ of execution of the part of the decree for yield up possession of the immovable property allowed.

Writ of execution of the part of the decree for payment of money and damages refused.
