

MANU/BH/0001/2000

Equivalent Citation: AIR2000Pat1

IN THE HIGH COURT OF PATNA

Misc. Appeal No. 159 and Civil Revn. No. 1163 of 1984

Decided On: 05.08.1999

Appellants: **Dulhin Sundarpati Devi**

Vs.

Respondent: **Ram Surat Koeri and Ors.**

Hon'ble Judges/Coram:

Nagendra Rai , S.N. Jha and R.N. Sahay , JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Arun Kumar Singh, Adv. and Kamal Nayan Chaubey

For Respondents/Defendant: Achaibar Singh, Adv. and S.K. Mazumdar

JUDGMENT

Nagendra Rai, J.

1. Both the Misc. Appeal and the Civil Revision have been filed against the judgment dated the 26th of May, 1984, passed by the Subordinate Judge, Bhabhua, in Misc. Appeal No. 7 of 1980, allowing the appeal filed by the respondents Ram Surat Koeri and others against the order dated 30-1-1980. passed by the Munsif, Bhabhua, in Misc. Case No. 106 of 1974 by which the Munsif had allowed the claim of the appellant under Order XXI, Rule 58 of the Code of Civil Procedure (hereinafter referred to as 'the Code').

2. Both the cases were admitted. Civil Revision was placed for hearing before a learned single Judge and he, by order dated 18-11-1987 referred the matter to a Division Bench. Misc. Appeal was also ordered to be heard along with the said Civil Revision and, accordingly, both the matters were placed before a Division Bench and the Division Bench heard the matter and by order dated 11-9-1995 referred the matter before a Full Bench for a decision on the following Issue :--

"Whether with regard to claim or objection under Order 21, Rule 58 of the Code disposed of after coming into force of the amended provision but filed before the commencement of amended provision the unamended provision of Order XXI, Rules 58 to 63 or Amended Provision of Order XXI, Rule 58 will apply."

3. Shorn of details, the facts necessary for disposal of the present matter are as follows : There was a dispute between Ram Surat Koeri and others, who are respondents and opposite parties in the Misc. Appeal and the Civil Revision respectively (who will be referred hereinafter as the respondents) on the one hand and Tapasi Singh, Ram Nihora Singh and others on the other hand with regard to the land of plot No. 931, measuring 1.13 acres under khata No. 290 situated in village Raipur Baraj, district Bhabhua. Said Tapasi Singh and Ram Nihora Singh are the brother and nephew of Brij Mohan Singh, whose widow Darba Kuer and daughter

Dulhin Sundarpati Devi had filed a claim under Order XXI, Rule 58 of the Code. Darba Kuer died in the year 1976 and her daughter Dulhin Sundarpati Devi is the appellant and petitioner in the Misc. Appeal and the Civil Revision, respectively (who will be hereinafter referred to as 'the appellant').

4. In the year 1969, a proceeding under Section 145 of the Code of Criminal Procedure (hereinafter referred to as 'the Cr. P. C.')} was initiated between respondents on the one hand and aforesaid Ram Nihora Singh and others on the other with regard to the said land. The said proceeding was decided in favour of respondent-Ram Surat Koeri and others. Tapasi Singh, Ram Nihora Singh and others, filed Title Suit No. 81 of 1959 for declaration of their title and recovery of possession over the disputed land against respondent-Ram Surat Koeri and others. The said title suit was decreed on 29-6-1963. Aggrieved by the aforesaid Judgment and decree, respondent-Ram Surat Koeri and others filed Title Appeal No. 42 of 1963, which was allowed by the first appellate Court on 25-7-1970. Aforesaid Tapasi Singh and others filed Second Appeal No. 457 of 1970 before this Court, which was dismissed on 26-7-1974. While the appeal was pending before the first appellate Court, aforesaid Ram Nihora Singh and others levied Execution No. 40 of 1968 for delivery of possession on the basis of the decree rendered by the trial Court and they were given the delivery of possession through the process of the Court on 9-9-1968. When the decree of the trial Court in the aforesaid suit was set aside by the first appellate Court, respondent-Ram Surat Koeri and others filed an application under Section 144 of the Cr. P. C. for recovery of possession, which was allowed on 10-9-1974. Thereafter, they levied Execution Case No, 89 of 1974 against Tapasi Singh and others for delivery of possession of the disputed land. On 26-11-1974, the executing Court issued an order for delivery of possession. Thereafter, Darba Kuer and Dulhin Sundarpati Devi (appellant), widow and daughter of Brij Mohan Singh, respectively, filed Title Suit No. 484 of 1974 for declaration of their title and confirmation of possession over the disputed land. The said suit abated under Section 4(c)- of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956. On 27-11-1974, they filed an application under Order XXI, Rule 58 of the Code. The said petition was ordered to be registered as Misc. Case No. 106 of 1974. On 28-11-1974, an order was passed staying the execution of the delivery of possession.

5. The claim set out in the application under Order XXI, Rule 58 of the Code by the appellant as that plot No. 931 was allotted to her father Brij Mohan Singh in a family partition between the co-sharers, including Tapasi Singh and Ram Nihora Singh and her father came in possession of the same and became a ralyat and after his death, his widow Darba Kuer came in possession, who, later on, gifted the said property to her daughter Dulhin Sundarpati Devi (appellant). The suit fought between Tapasi Singh and Ram Nihora Singh on the one hand and respondent-Ram Surat Koeri and others was a collusive one brought by Tapasi Singh and others and the judgment rendered in the aforesaid suit was not binding on them for the reason that they were not party to the aforesaid suit and, accordingly, a prayer was made to stay the delivery of possession of the disputed land to the respondents or stay the execution proceeding till the disposal of Title Suit No. 484 of 1974.

6. Respondent Ram Surat Koeri and others contested the aforesaid claim of the appellant and they stated that Brij Mohan Singh died issueless and appellant Dulhin Sundarpati Devi was not his daughter, Said Darba Kuer and her daughter-the appellant had no right, title and interest over the disputed land and they having full knowledge of the civil proceeding, did not appear and contest the same. They have been set up by aforesaid Tapasi Singh and Ram Nihora Singh, who had lost the title

suit up to the High Court. It was further stated on their behalf that the delivery of possession had already taken by them on 28-11-1974 prior to the passing of the order staying the delivery of possession. It was also stated that the application under Order XXI, Rule 58 of the Code was not maintainable at all.

7. Both the parties adduced oral as well as documentary evidence before the Munsif. He allowed the claim of the appellant holding that she and her mother Darba Kuer had right, title and possession over the disputed land and no delivery of possession was effected over the same.

8. The respondents, thereafter, preferred an appeal, which has been allowed by the appellate Court. It held that the appeal filed by the respondents before him was maintainable in view of the amended provision of Order XXI, Rule 58 of the Code by Act 104 of 1976. It also held that the application under Order XXI, Rule 58 of the Code, filed by the appellant and her mother Darba Kuer, was maintainable, but they had no right, title and interest over the disputed land and the delivery of possession was already effected in favour of the respondents much before the passing of the order staying the delivery of possession on 28-11-1974.

9. The said judgment has been challenged by appellant-Dulhin Sundarpati Devi by filing Civil Revision as well as Miscellaneous Appeal, which were referred to the Division Bench as stated above.

10. During the course of hearing before the Division Bench, learned counsel for the appellant relied upon a Division Bench judgment of this Court in the case of Smt. Jyotsna Mehtav. M/s. Ram Bahadur Thakur & Co. reported in MANU/BH/0020/1985 : AIR 1985 Pat 59, wherein it has been held that if attachment of the property under Order XXI, Rule 58 of the Code was subsisting on the date of commencement of Section 72 of the Amending Act and objection was filed prior to commencement but disposed of subsequently, the unamended provision of Order XXI, Rule 58 of the Code will apply in view of the provision of Section 97(2)(q) of the Amending Act, 1976 and the remedy would be to file a suit under Order XXI, Rule 63 of the Code. The Bench did not agree with the view taken in the said case and referred the issue to the larger Bench for decision and this is how the matter has been placed before us for final disposal.

11. Learned counsel for the appellant submitted that as the claim under Order XXI, Rule 58 of the Code as substituted by Patna Amendment was filed by the appellant before the commencement of Section 72 of the Amending Act though the same was disposed of subsequently, the Provision of the Amending Act would not apply with regard to the same in view of the saving provision contained in Section 97(2)(q) of the Amending Act and the same should be governed by the unamended rules and the remedy of the respondent against the above order passed in the claim case was to file a suit under unamended provision of Order XXI, Rule 63 of the Code. It was further submitted that the right accrued in favour of the appellant in terms of the unamended provision of Order XXI, Rule 58 of the Code pertains to the field of substantive law and not adjective law and such vested right under the existing law could not be taken away by the provision of the Amending Act.

12. Learned counsel for the respondents, on the other hand, submitted that the Code of Civil Procedure pertains to the field of procedural law and the appellant has no vested right in procedure. He further submitted that the provision of the Amending Act will apply to even orders passed on an application filed under Order XXI, Rule 58

of the Code prior to the amendment as the amending provisions of Order XXI, Rule 58 are retrospective in operation and the saving clause contained in the Section 97(2) (q) of the Amending Act is not applicable in such matter.

13. Before advertenting to the respective submissions advanced at the Bar, it will be apt to refer to the provisions of the Code having bearings on the question to be decided in the case. Order XXI deals with execution of decree and orders. Rules 58 to 63 of the unamended Code dealt with Investigation of claim and objection. Rule 58 of the Code prior to the amendment was as follows :--

"58(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment. The Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and In all other respects, as if he was a party to the Suit :

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection."

Rule 60 provided that if it was found that the property was not subject-matter of attachment, the property would be released otherwise the claim or objection would be rejected under Rule 61. Rule 63 provided that when an order is made against a party in a claim or objection case then he may institute a suit to establish his right, which he claims to the property in dispute within one year from the passing of the order, failing which, the order passed in the claim or objection case, shall be conclusive. The Order XXI, Rule 58 of the Code was substituted by the Patna High Court on 1-3-1938. The said provision runs as follows :--

"58(1) When any claim is preferred to any property, the subject-matter of the execution proceedings, or any objection is made to the attachment thereof on the ground that the applicant has an interest therein which is not bound under the decree, or that such property is not liable to attachment the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may in its discretion make an order postponing the delivery of the property after the sale pending the investigation of the claim or objection. And in no case shall the sale become absolute until the claim or objection has been decided."

14. According to the Patna Amendment, even the claim can be raised to any property, subject-matter of the execution proceeding though not under attachment on the

ground that the claimant had an interest, which was not bound under the decree.

15. The Code was amended by the Code of Civil Procedure (Amendment) Act, 1976 (Act 104 of 1976) with a view to eliminate the delay in disposal of the cases. It brought about many substantial changes. Chapter III of the Act contained the provision with regard to the amendment of the Orders. Under the said Chapter, Section 72 contains a provision with regard to the amendment/ substitution made under Order XXI of the Code. Sub-heading was substituted as "Adjudication of Claim and Objection". Rules 59 to 63 were substituted by Rules 58 and 59. Other Rules were omitted. Rule 58 as amended/substituted is as follows :--

"58(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property' is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained :

Provided that no such claim or objection shall be entertained;

(a) Where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) Where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title, or interest in the property attached), arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to sub-rule (2) the Court shall, in accordance with such determination

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case It deems fit,

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court under the proviso to sub-rule (1), refuses, to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive."

According to the amending provision, all questions including question of right, title or

interest have to be gone into while deciding the claim or objection in a full-fledged manner and not in a summary manner as provided under the unamended provision and a right of appeal is provided against an order passed adjudicating the claim and objection. Only where the Court has refused to entertain claim and objection, the aggrieved person can institute a suit, In other words, the remedy to file a suit where an order is passed under Order XXI, Rule 58, as provided under the unamended provision, has been taken away and a right of appeal has been provided and only in case of non-entertainment of the claim or objection, remedy of suit has been provided.

16. Section 97 of the Act contains a provision with regard to repeal and savings and the provisions relevant for the present case are sub-sections (1), (2)(q) and (3), which are as follows :--

"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,--

xxx xxx xxx

(q) The provisions of Rules 31,32,48A, 57 to 59, 90 and 97 to 103 of Order XXI of the First Schedule as amended or, as the case may be, substituted or inserted by Section 72 of this Act shall not apply to --

(i) any attachment subsisting immediately before the commencement of the said Section 72, or

(ii) any suit instituted before such commencement under Rule 63 aforesaid to establish right to attached property or under Rule 103 aforesaid to establish possession, or

(iii) any proceeding to set aside the sale of any immovable property, and every such attachment, suit or proceeding shall be continued as if the said Section 72 had not come into force.

(3) Save as otherwise provided in subsection (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."

17. According to sub-section (1) of Section 97 of the Amending Act, any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of the Amending Act, shall stand repealed, except those amendments or provisions, which are consistent with the provision of the principal Act as amended by the Amending Act. Subsection (3) of Section 97 of the Act provides that the provisions of the principal Act, as amended by the Amending Act, shall apply to every suit, proceeding, appeal or application, pending at the commencement of the Amending Act or instituted or filed after such commencement, though the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application has been filed, had been acquired or had accrued before such commencement. Subsection (2) of the said section is an exception to the provisions contained in sub-section (3) and it saves the suit or proceeding etc as mentioned therein. It provides, inter alia, that the amended provision of Rule 58 of Order XXI of the Code, will not apply to or affect any attachment subsisting immediately before the commencement of Section 72 or any suit instituted under Rule 63 of the unamended Code to establish a right to the attached property.

18. The Parliament has ample power to legislate with regard to the fields of legislation as provided under the Constitution of India. It can legislate prospectively as well as retrospectively subject to certain constitutional restrictions. However, if the Statute takes away or affects a vested right, acquired under, the existing law or creates a new obligation or imposes a new duty in respect of transactions already passed, it should be presumed to be intended not to have retrospective effect unless the intention is manifested by the 'provision of the Act either expressly or impliedly. So far as the Statute dealing with the procedure is concerned, it is presumed to be retrospective unless a different Inference appears from the same.

19. In the Maxwell Interpretation of Statutes, 12th Edition at page 222, It is stated that no person has vested right In any course of procedure. He has only a right of prosecution or defence in the manner prescribed for the time being by or for the Court, In which the course is pending and if by an Act of Parliament, the mode of procedure is altered, he has no other right than to proceed according to the altered mode. In Halsbury's Laws of England (IVth Edition), Vol. 44, at page 570, paragraph 922, it has been stated that the general rule is that all Statutes, other than those which are merely declaratory or which relate to the matters of procedure or of evidence, are, prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that tills was the intention of the Legislature. At paragraph No. 925, at page 574, It has been further stated that the presumption against the retrospection does not apply to legislation concerned merely with the matters of procedure or of evidence and the same has to be considered as retrospective unless there is a clear intention that such was the intention of the authority making the law. The procedural Statutes are intended to apply not merely to future actions in respect of existing causes, but equally to the proceeding initiated before commencement.

20. The Privy Council in case of Delhi Cloth & General Mills v. Income Tax Commissioner, reported in MANU/PR/0050/1927 : AIR 1927 PC 242, held that the provisions of a Statute, which deal with the procedure only, may have retrospective effect unless the construction is textually inadmissible. However, the provisions, which touch a right in existence at the time of passing of the legislation, are not to be applied retrospectively in absence of an express enactment or necessary intendment.

21. The same view was reiterated by the Apex Court in the case of Gulabchand v.

Kudilal, reported in MANU/SC/0025/1958 : AIR 1958 SC 554. It was further observed that the rule that a Statute is not to have retrospective operation, is only applicable where it is doubtful from the language used whether the same was having retrospective operation or not. Where language of a Statute plainly gives it a retrospective operation, the rule has no application for the reason that the Legislature is competent in its wisdom to make a provision retrospective. It is not as if all efforts should be made so as not to give a Statute retrospective operation whatever its language is. The rule does not require of the Courts an obdurate persistence refusing to give a Statute retrospective operation.

22. In the *New India Insurance Co. Ltd. v. Smt. Shanti Misra*, reported in MANU/SC/0547/1975 : AIR 1976 SC 237, a Motor Accidents Claims Tribunal under Section 110 of the Motor Vehicles Act was constituted on 18-3-1967. The accident with regard to which the claim was filed before the Tribunal, had occurred on 11-9-1966. Prior to the constitution of the Tribunal, remedy of suit was available to the claimant. After constitution of the Tribunal, only remedy available was to file a claim under Section 110 of the Act and the suit was barred. In that case, the claimant filed a claim case before the Tribunal and an objection was raised as to the maintainability of the said case on the ground that the cause of action had arisen prior to the constitution of the Tribunal. Dealing with the said matter, the Apex Court held that the change in law was a change of adjectival or procedural law and not of substantive law and as such its operation was retrospective. In paragraph 5, it was held as follows :--

"On the plain language of Section 110-A and 110-F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective. . . .

23. Thus, the Legislature is competent to make the provision of law retrospective or prospective and if the statutory provisions either dealing with the substantive law or adjective law provides for retrospective operation either expressly or by necessary intendment, then that effect has to be given to. Only when the language of the Statute is doubtful as to its operation and the Statute touches right in existence at the time of the passing of the Statute or deals with the substantive right, the rule that such provision does not have retrospective operation, will be applicable. However, if the Statute deals merely with the matter of procedure, then it is presumed to be retrospective unless that construction is textually inadmissible.

24. In view of the foregoing discussion, the Statutory provision of repeal and saving clause as contained in Section 97 of the Amending Act has to be considered with a view to find out as to whether the said amended provisions of Order XXI, Rule 58 of the Code are retrospective or prospective in operation. From a reading of the provision of Sub-section (3) of Section 97 of the Amending Act, it is clear that every suit, proceeding, appeal or application, pending at the commencement of the Amending Act or instituted or filed after such commencement, are to be dealt with in accordance with the provision of the principal Act as amended by the Amending Act.

It further provides that such proceedings may be instituted or filed even after 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.

25. The provision of Sub-section (3) of Section 97 of the Amending Act is subject to the provision contained in Sub-section (2), which is a Saving provision. It is an exception to Sub-section (3). It saves certain suits, appeals, proceedings etc. as mentioned therein from the application of the provision of the Amending Act and such proceedings have to be disposed of and the matter enumerated therein has to be dealt with in accordance with the unamended provision. It further provides that the saving is without prejudice to the generality of the provisions contained in Section 6 of the General Clauses Act, 1897. Section 6 of the General Clauses Act contains a provision with regard to repeal and it provides that in a case of repeal of any Central Act, the repeal will not affect the rights mentioned in the said section unless the different intention appears from the relevant provision. In other words, if any right is saved even after the repeal under Section 6 of the General Clauses Act, with regard to that also the amended provision will not apply. According to the provisions of Section 97(2)(q) of the Amending Act, as quoted above, even after amendment of provisions of Rules 31, 32, 48-A, 57 to 59, 90 and 97 to 103 of Order XXI of the First Schedule as amended or, as the case may be, substituted or inserted by Section 72 of the Amending Act, the amended provision of Order XXI, Rules 58 and 59 of the Code shall not apply or affect any attachment subsisting prior to the commencement of the amending provision of Order XXI, Rule 58 of the Code nor it will apply and affect any suit instituted before such commencement under Rule 63 aforesaid to establish a right to the attached property. Thus, the aforesaid provision saves two things, firstly subsisting attachment order under Rule 58 and pending suit under Rule 63 at the time of commencement of the amended provision of Order XXI, Rule 58 of the Code. It is not stated therein that the amended provision will not apply with regard to the claim and objection pending before the commencement of the Amending Act. If the Legislature wanted that the claim and objection filed prior to the commencement of the Amending Act is to be dealt with under the unamended provision and the remedy available prior to the amendment with regard to the claims and objections, should remain intact, then it should have been mentioned in Sub-section (2)(q) of Section 97 of the Amending Act that the amended provision will not affect claims and objections filed or pending before commencement of the Amending Act.

26. There is a wrong impression that the institution of a suit under the unamended provision of Order XXI, Rule 63 is a continuation of the proceedings under Order XXI, Rule 58. Both proceedings are quite different proceedings. The claims and objections were dealt with in a summary way and in case of an adverse order passed in the said proceeding, the remedy of suit was available otherwise the decision rendered rejecting the claim and objection was final. The cause of action to file a suit arose only when an adverse order was passed and prior to that, there was no right to file a suit. The Supreme Court in the case of *Sawai Singhai v. Union of India*, reported in MANU/SC/0016/1965 : AIR 1966 SC 1068, has held that the suit under Order XXI Rule 63 is not a continuation of the objection proceeding nor is it an appeal against the order passed in the objection proceeding. It further held that an order passed in an objection proceeding under Order XXI, Rule 58 is a cause of action. Thus, unless an order is passed under the unamended provision of Order XXI, Rule 58, no cause of action arises to file a suit. Only if an adverse order is passed prior to coming into force of the amended provision, then it can be said that some vested right has been created in favour of the person to file a suit and in such a situation, it can be said

that the unamended provision would apply and remedy to the aggrieved person would be to file a suit under Order XXI, Rule 63. If the objection or claim is filed prior to coming into force of the unamended provision, but the matter is disposed of after coming into force of the Amending Act, then cause of action in such a case would arise after the enforcement of the amended provision and then the remedy, available according to the amended provision, would be attracted in such a case. Thus, the provision of sub-section (2) of Section 97 of the Amending Act or provision of Section 6 of the General Clauses Act is not attracted in a case where an objection or claim filed prior to coming into force of the Amending Act is disposed of subsequent to the enforcement of the amended provision.

27. At this stage, I would like to advert to the judgments relied upon by the learned counsel for the appellant. The first case relied upon by him is a Division Bench judgment of this Court in the case of Smt. Jyotsna Mehta v. M/s. Ram Bahadur Thakur, reported in MANU/BH/0020/1985 : AIR 1985 Pat 59. It appears that in that case, a decree was passed in 1963 and the attachment was made in 1964 in execution of a decree levied by the decree-holder. Smt. Jyotsna Mehta-appellant filed an objection under Order XXI, Rule 58 of the Code in 1965. It was decided on 26-3-1979 against her. She filed an appeal under Order XXI, Rule 58(4) of the Code as amended. An objection was raised on behalf of the respondent in the appeal that the appeal was not maintainable and the remedy of the appellant was to file a suit under Order 21, Rule 63. This Court held that Section 72 of the Amendment Act, by which the provision of Order XXI, Rule 58 was amended, came into force on 1-2-1977 and the attachment was subsisting at that time and as such the old law, which existed at the time of attachment, would hold the field, even though the order was passed after the Amending Act came into force and, accordingly, the appeal filed under Order XXI, Rule 58(4) was not competent.

28. The other cases relied upon by the learned counsel for the appellant is a Division Bench of the Delhi High Court in the case of Syndicate Bank v. Rallies India Limited, reported in MANU/DE/0165/1978 : AIR 1979 Delhi 40 and the two judgments of Andhra Pradesh High Court in the case of Smt. Tilat Saheenv. Omprakash Gupta, reported in MANU/AP/0086/1986 and the case of Nandidpati Tati Reddi v. Syed Meera Hussain, reported in MANU/AP/0066/1979 : AIR 1979 A P 70. It is not necessary to state the facts of the aforesaid cases suffice it to say that in those cases also, it was held that in a case where the claim was made before the Amending Act but rejected after coming into force of the Amending Act, the remedy provided under the unamended provision of the Code would apply.

29. In all the said cases, the primal ground for coming to the aforesaid conclusion is that as the provisions of the Amending Act will not apply to an attachment subsisting on the date of the commencement of Section 72 in terms of the provision of Section 97(2)(q) of the Code, the vested right pertaining to attachments, which were existing prior to 1-2-1977, will also be governed by the old law. In other words, the law, which was in force at the time of attachment, would be applicable and in a case of an order passed in a claim case filed before amendment even after coming into force of Section 72 on 1-2-1977, the remedy would be to file a suit as provided under the unamended law and not an appeal as provided by the amending provision. I am unable to agree with the reasoning given by the learned Judges. If the intention of the Legislature was as held in the aforesaid cases, then in that case there was no need to specifically provide in Section 97(2)(q)(ii) that the amending provision shall not apply to the pending suit under Order XXI, Rule 63. The provision of subsisting attachment alone was sufficient to save the existing right of the claimants, which

included filing of claim and after rejection of the suit under Order XXI, Rule 63. Thus, Section 97(2)(q) only saves the existing attachment and the pending suit under Order XXI, Rule 63 and nothing else. Pending claims under Order XXI, Rule 58 will be governed by sub-section (3) of Section 97 and that has to be disposed of in terms of the amending provision and the adverse order passed in the said case would be subject to appeal in terms of the amending provision. In none of the said cases, their Lordships have noticed that the cause of action of suit under Order XXI, Rule 63 arises when an adverse order is passed under Order XXI, Rule 58. In all the aforesaid cases as well as in the present case, the order in the claim case has been passed after coming into force of the Amending Act and as such the cause of action arose after the enforcement of the Amending Act and as such the remedy provided under the Amending Act has to be resorted to. The remedy of suit under Order XXI, Rule 63 of the Code under the unamended provision was not a continuation of the claim or objection proceeding under Order XXI, Rule 58 and the suit would be filed only when a cause of action arose in the shape of passing of an adverse order in a proceeding under Order XXI, Rule 58 and as such filing of an objection or claim under Order XXI, Rule 58 prior to coming into force of the Amending Act will not confer any vested right in the claimant or objector to have a right of suit even if his objection or claim is disposed of after coming into force of the provisions of the Amending Act.

30. Thus, it is held that with regard to the claim and objection filed under the unamended provision of the Code but disposed of after coming into force of the Amending Act (104 of 1976), the provision of the Amending Act would apply. The Division Bench judgment of this Court in the case of Smt. Jyotsna Mehta MANU/BH/0020/1985 (supra) taking contrary view is overruled.

31. There is another reason in this case to hold that the provision of the Amending Act will apply to an order passed in a proceeding or a claim case under Order XXI, Rule 58 filed earlier but disposed of after coming into force of the Amending Act. Admittedly, there was no attachment prior to coming into force of the Amending Act. The claim was filed in terms of the Patna Amendment, which provided that even if property is not under attachment, the claim can be filed with regard to the property, subject-matter of the execution case and as such on the date when the Amending Act came into force, there was no attachment and, therefore, there is no question of applicability of the provision of Section 97(2)(q) of the Amending Act even if it is accepted that in a case of subsisting attachment, the remedy, available under the unamended provision with regard to the claim and objection is to be resorted to. Patna amendment shall be deemed to be repealed after coming into force of the amended provision being inconsistent with the provision of the principal Act as amended by the Amending Act in terms of provision contained in Section 97(1) and as such after coming into force of the amended provision, no order could have been passed in terms of the unamended provision, which stood repealed.

32. Coming into the facts of the present case, it would be found that the learned Munsif has disposed of the proceeding in terms of the amending provision as he has allowed the parties to lead evidence and, thereafter, has gone into the question of right, title and interest in the properties between the parties. He has not dealt with the matter in summary way as provided under the unamended provision. The order allowing the claim of the appellant under Order XXI, Rule 58 was passed after enforcement of the Amending Act. As such, the remedy of the decree-holder-respondent was to file an appeal and as such the filing of the appeal by them against the order of the Munsif allowing the claim of the appellant was maintainable. Thus, the submission advanced on behalf of the appellant regarding maintainability of the

appeal before the first appellate Court is to be rejected.

33. The appeal filed by the appellant against the judgment of the first appellate Court is also maintainable In terms of the provisions of Order XXI, Rule 58(4) of the Code. No other substantial question of law has been raised by the appellant except the maintainability of the appeal before the first appellate Court and as the same having been decided against the appellant, the appeal filed before this Court Is dismissed. So far as the Civil Revision filed by her is concerned, the same is not maintainable in view of the maintainability of the appeal against the judgment of the first appellate Court in terms of the aforesaid provision.

34. Accordingly, the Civil Revision is dismissed as not maintainable. In the facts and circumstances, there shall be no order as to costs.

S.N. Jha, J.

35. I fully agree. I have already taken a similar view in the case of Sk. Was Ahmad v. Santeshwar Mishra, reported in 1993 BBCJ 546.

R.N. Sahay, J.

36. I agree.

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