

MANU/BH/0267/1985

Equivalent Citation: AIR1987Pat33, 1986(34)BJR799, 1986PLJR175

**IN THE HIGH COURT OF PATNA  
FULL BENCH**

C.R. No. 1457 of 1979

Decided On: 12.04.1985

Appellants: **Narmada Devi and Ors.**  
**Vs.**

Respondent: **Ram Nandan Singh and Ors.**

**Hon'ble Judges/Coram:**

*S.S. Sandhawalia, C.J., S.K. Jha and S.K. Choudhuri, JJ.*

**Counsel:**

*For Appellant/Petitioner/Plaintiff: Shreenath Singh and A.K. Singh 'Chauhan', Advs.*

*For Respondents/Defendant: S.C. Ghose, Ashutosh Jha, Sukumar Sinha and Nawal Kishore Sharma, Advs. (for No. 6)*

**JUDGMENT**

**S.S. Sandhawalia, C.J.**

**1.** The salient and meaningful questions which arise for determination in this reference to the Full Bench may well be formulated in the terms following:

- 1.** Whether an appeal is still maintainable against an order (other than an interlocutory one) under Section 47 of the Code of Civil Procedure despite the amendment of Section 2(2) thereof, and other statutory changes wrought therein by the Code of Civil Procedure (Amendment) Act, 1976 ?
- 2.** Whether the abolition of a right of appeal by the competent legislature would attract the equality clause of Article 14 of the Constitution and involve any consequential discrimination in this field ?
- 3.** Whether *Parshava Properties Ltd. v. A.K. Bose* 1979 (27) B.L.J.R. 691 lays the law correctly in the aforesaid twin context ?
- 4.** If the answer to question No. 1 is in the negative, would Section 97(2)(a) of the amending Act preserve the right of appeal only in respect of the pending appeals or would extend also to cases where the right to file the appeal had already accrued prior to the 1st of February, 1977 against an order passed under Section 47 of the Code ?
- 5.** If it is held under question No. 4 that Section 97(2)(a) saves the right of appeal even where it had already accrued prior to the enforcement of the amending Act, when does such a right to file appeal accrue ?

**2.** In view of the pristinely legal issues involved, the briefest reference to the facts suffices. Opposite parties Nos. 5 and 6 had instituted Title Suit No. 112 of 1972 in

the court of the Sub-Judge, Bhagalpur, for partition of the properties mentioned in the plaint claiming 1/3rd share for themselves. On behalf of the petitioners it is averred that ultimately the parties settled the differences and filed a compromise petition and a compromise decree was recorded by the learned Sub-Judge on the 18th of August, 1973 with the direction that the compromise petition shall form part of the decree. The petitioners claimed that they had paid the entire amount of Rs. 9,169 barring the marginal figure of Rs. 272 under the said compromise. Yet opposite party No. 1 put the compromise decree in execution (vide Execution Case No. 9 of 1975) for realisation of the entire amount and kept the execution process suppressed and ultimately got sold 22 Bighas out of 33 Bighas of valuable lands representing the share of the petitioners in the papers as well. The petitioners on getting knowledge of the execution proceeding filed an objection under Section 47 of the Code of Civil Procedure (hereinafter to be referred to as the 'Code') which was registered as Miscellaneous Case No. 64 of 1977. After contest, the learned Subordinate Judge passed a detailed order dated the 8th of August, 1978 dismissing the same.

**3.** Against the aforesaid order, the petitioners originally preferred a Miscellaneous First Appeal No. 196 of 1978 in this Court but an objection was taken by the Registry that after the Code of Civil Procedure (Amendment) Act, 1976 (hereinafter to be referred to as the amending Act') no appeal was maintainable and by an order dated 29th of June, 1979 the appeal was permitted to be converted into the present civil revision. It would appear that subsequently the Division Bench judgment in Parshava Properties Ltd. v. A.K. Bose (supra) rendered and on behalf of the petitioners the stand was taken that the impugned order of the Sub-Judge was appeasable and in the circumstances the revision petition should be allowed to be re-converted into a miscellaneous appeal. This was objected to by the learned Counsel for the opposite party and the learned Single Judge by his order dated the 17th of September, 1981 referred the matter to a Division Bench to determine whether the case should be heard as a revision application or an appeal, Before the Division Bench the ratio of M/s. Parshava Properties Ltd.'s case (surpa) was strenuously pressed on behalf of the petitioners in support of the stand that an appeal would still lie against the dismissal of the objection petition by the Sub-Judge, the learned Judges constituting the Division Bench entertained doubts about the correctness of the ratio in M/s. Parshava Properties Ltd.'s case and referred the same, for a decision by the Full Bench on the question as to whether an appeal against any order passed under Section 47 of the Code after its amendment on any point whatsoever would still lie. That is how the matter is before us now.

**4.** Mr. Shreenath Singh, the learned Counsel for the petitioners, rested himself squarely on M/s. Parshava Properties Ltd.'s case. Taking his cue from the reasoning and ratio thereof, he forcefully contended that despite the amending Act of 1976 an appeal would still be maintainable against an order passed under Section 47 of the Code if such an order satisfies the essential characteristics of a decree. It was fairly conceded that after the amendment an appeal against such an order, which is purely interlocutory in nature, would no longer be competent. However, where such an order substantially and conclusively adjudicated on the valuable rights of the parties with regard to all or any of the in controversy, an appeal against the same would still be maintainable. Faced with the hurdle that an execution proceeding is not a suit, it was contended that determination in a proceeding which is continuation of a suit must be taken as a determination in the suit so as to amount to a decree within the meaning of Section 2(2) of the Code. It was further argued that the every developed jurisprudence there is at last one right of appeal on substantial questions and, therefore, an interpretation which would tend to take away such a right should be

avoided. In sum, the learned Counsel canvassed for the acceptance and affirmance of M/s. Parshava Properties Ltd.'s case and, indeed, what he termed as its impeccable reasoning even though he fairly conceded that the weight of precedent in other courts was now decisively against the same.

**5.** At the very outset, it must be admitted that the issue herein is not entirely free from difficulty and there is a sharp cleavage a of judicial opinion. Ere one inevitably adverts to precedent, the issue deserves examination on principle and language of the statute. In essence, it turns on the true intendment of the changes brought in the Code by the amending Act and the true import of the same. In interpreting the existing provisions now, the hallowed rule in Hey den's case is at once attracted. One must inquire into the state of the law as it stood earlier, the mischief which was sought to be corrected and the remedy therefore provided by Parliament, In order to truly appreciate the rival contentions and to perceive the matter in a correct perspective, the legislative history is not only relevant but, indeed, a dominant factor here.

**6.** It is common ground that prior to the amending Act the determination of any question by an order under Section 47 was appeal able. This was so by virtue of a legal fiction which provided that the determination of any question within Section 47 would be deemed to be a decree and, consequently, under Section 96 of the Code an appeal would lie against the same, The existing state of the law had led to the well-acclaimed dictum that in India the trouble of a litigant began after he had secured a decree.

**7.** In the 27th Report the Law Commission considered at length some aspects of the revision of the Civil Procedure Code, 1908 including the expeditious execution of court decrees. In pursuance of the recommendation of the said Report, a Bill to implement the same was introduced in Parliament which, however, lapsed later. The Government of India, when considering the question of re-introduction of the Bill, requested the Commission to examine the Code afresh "from the basic angle of minimising cost and avoiding delays in litigation". The Law Commission submitted the 54th Report suggesting certain amendments in the Civil Procedure Code. This Report did not suggest any change in the definition of the word 'decree' so as to affect the right of appeal against an order passed on objection petition under Section 47. However, in order to avoid delays in execution the Law Commission suggested the insertion of a new provision as Section 99A to provide that no order made on an objection under Section 47 shall be reversed or substantially Varied nor shall any case be remanded in appeal on account of any error, defect or irregularity in any proceeding not affecting the merits of the case or the jurisdiction of the court.

**8.** On the basis of the recommendations in the 54th Report of the Law Commission a Bill was drafted which was thereafter referred to a Joint Committee. To pointedly expedite the execution of decrees the Joint Committee suggested a change in the very definition of the word 'decree'. While making this suggestion, the Committee unequivocally observed:

The Committee note that according to the definition of the expression 'decree' in the Code, the determination of any question under Section 47 amounts to a decree, and as such an appeal and second appeal would lie against such determination. The Committee "are of the view that this provision of the Code is mainly responsible for the delay in the execution of decrees. The Committee, therefore, feel that the definition of the term

'decree' should be amended so that the determination of question open under Section 47 may not amount to a decree.

**9.** The recommendation of the Joint Committee on the amendment of Section 2(2) was accepted and a Bill was introduced incorporating the same. In the Bill Section 99A as recommended by the Law Commission was also included. However, as appeals against orders under Section 47 had been abolished, the words 'in appeals originally proposed by the Commission' were pointedly dropped. The Bill was passed by Parliament and thereafter it became the Act and was enforced from the 1st of February, 1977.

**10.** The stage is now set to notice the relevant meaningful changes brought about by the amending Act by juxtaposing the corresponding provisions:

Before amendment	After amendment
<p>2(2) 'decree' means the formal expressions of an adjudication which, so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit and may either preliminary or final. shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144, but shall not include--</p>	<p>2(2) 'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47, but shall not include--</p>
<p>(a) any adjudication from which an appeal lies as an appeal from an order,</p>	<p>(a) Any adjudication from which an appeal lies as an appeal or from an order, or</p>
<p>(b) any order of dismissal for default.</p>	<p>(b) any order of dismissal for default.</p>
<p>47. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.</p>	<p>47. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.</p>
<p>(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court fees.</p>	<p>(2) Omitted by C.P.C. (Amend.) Act, 1976, Section 20 (w.e.f. 1-2-1977).</p>
<p>(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.</p>	<p>(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.</p>
	<p><u>99-A.</u> Without prejudice to the generality of the provisions of Section 99, no order under Section 47, shall be reversed or sub-statically varied, on account of any error, defect or irregularity in any proceeding relating to such order, unless such error, defect or irregularity has prejudicially affected the decision of the case.</p>

**11.** Before one adverts to the larger scheme of the amendment of the Civil Procedure Code in regard to the execution proceedings by the amending Act, it would call for pointed notice that even prior thereto an order under Section 47 was treated as a decree only by sufferance due to an express deeming legal fiction. It is plain that an order under the said section is not passed in a suit nor is it drawn up in the formal form of an adjudication in the style of a decree. In many cases such an order may not at all be a conclusive determination of the rights of the parties with regard to the real matter in controversy, as for example, in the context of interlocutory orders. Thus, at the pre-amendment stage, an order under Section 47 had been clothed as a decree purely by a deeming legal fiction apparently to give a right of appeal against it by virtue of Section 96.

**12.** Now, with the above background, one may turn to the real intent and the scheme of the amendment of Civil Procedure Code by Parliament in this context. Firstly, Section 2(2) of the Code was amended and the deeming provision with regard to orders under Section 47 was expressly deleted. The inevitable result is that thereafter orders passed under Section 47 could not be considered as a decree by any legal fiction. To make the intent clear the Parliament then repealed Sub-section (2) of Section 47 as well. Thus, the somewhat analogous power of converting and proceeding into a suit or a suit into a proceeding was clearly taken off the Statute Book. All that thus remains now is a simple definition of the word 'decree' in Section 2(2) without the deeming provision which included an order under Section 47 and equally the removal of the power of conversion under Sub-section (2) thereof. The intent is further made clear by the insertion of Section 99A. It bears repetition that originally such a provision was suggested by the Law Commission for restricting any interference with orders under Section 47 unless they prejudicially affected the decision of the case. The dropping of the words 'in appeal' in the enacted provision, in contrast to what was proposed, would again be a pointer to the fact that Parliament clearly conceived the intent of abrogation of appeals against orders under Section 47 which, as already noticed, were hamstringing the expeditious execution of decrees. Further it calls for notice that wherever any order is to be made appeal able, the Code expressly confers such a right and even when by amendment the deeming fiction of orders under Section 47 being decrees was taken away, no consequential provision was made anywhere for making some orders there under appeal able. This again is indicative of the legislature's earnestness to take away the right of appeal in this context to which the whole exercise of amendments of the aforementioned provisions seems to be directed. To put it forthrightly, the simple position emerging after the amending Act is that prior to the same orders under Section 4, were by a deeming fiction decrees and were consequently appeal able and subsequent to the amendment all the orders under Section 47 are no longer appeal able, such a right having been expressly abolished by the legislature. To suggest that though, admittedly, certain orders under Section 47 have now been rendered unappeasable, yet some still retain the original attribute of being appeal able is a mere legal hair-splitting, which runs counter to the main grist of the legislative mandate sought to be enforced by the amendment.

**13.** In fairness to Mr. Shreenath Singh, one must notice his contention that the insertion and location of Section 99A suggested that certain orders under Section 47 would still be appeal able. He submitted that Section 99A fell in Part VII of the Code pertaining to appeals from original decrees and not in Part VIII including reference, review and revision. On this premise, it was contended that Section 99A still visualised an appeal against an order under Section 47. It was also submitted that Section 99A would be rendered redundant if the interpretation placed on behalf of the

opposite party was accepted.

**14.** The somewhat superficial plausibility of the submission aforesaid with regard to the location of Section 99A in Part VII falls to the ground when it is noticed that the same is inextricably connected with the preceding Section 99 and is, indeed, in the nature of a proviso thereto. That being so, by sheer force of logic and good draftsmanship it had necessarily to be located in immediate succession to Section 99 and hence in Part VII of the Code. Therefore, nothing at all turns either on the accident or the necessity of locating Section 99A immediately after Section 99 with it is closely allied. Again by way of contrast, it is manifest that the words 'appeal' has been employed and retained in Section 99 yet scrupulously excluded in Section 99A. Yet again it has to be noticed that whilst Section 99 explicitly pertains to decrees, Section 99A expressly talks of only an order Section 47 and not at all about any decree. Plainly enough Sections 96 and 97 make only decrees appeal able and not orders unless they expressly come within another provision making such orders expressly appealable. It is common ground that no provision of the Code now makes an order passed under Section 47 expressly appeal able.

**15.** Equally it would bear repetition that the incorporation of the proposed Section 99A had been recommended by the Law Commission earlier when, as yet, there was no intention of making any amendment, in Section 2(2). Subsequently when the Joint Committee amended Section 2(2) and deleted the legal fiction of making the orders decreed, the words 'in appeal' used in the proposed Section 99A were dropped. As a result, Section 99A as well applies to proceedings other than appeals, i.e., revisions. Hence it is not correct to argue that Section 99A would be redundant if the stand of the opposite party was to be accepted. For all the aforesaid reasons, the tenuous submission rested on the location, language and content of Section 99A raised on behalf of the petitioners must be rejected.

**16.** Mr. Sreenath Singh, the learned Counsel for the petitioners, had then made a tenuous attempt to bring an order under Section 47 within the basic definition of a 'decree' under Section 2(2) of the Code by contending that execution proceedings being subsequent to a suit are, in essence, a suit and the issues therein must be deemed as matters in controversy in the suit itself.

**17.** The contention aforesaid might well bring some credit to the ingenuity of the learned Counsel for the petitioners but is nevertheless fallacious. It seems somewhat plain that orders under Section 47 cannot come within the basic definition of a 'decree' and it was therefore that these had to be included therein by a deeming fiction prior to the amending Act. Plainly enough an order under Section 47 is not the formal expression of an adjudication and its form has no similarity or identity with that of a decree. Equally it would be doing great violence to the language to hold that the question arising in the course of the execution of a decree are matters in controversy in the suit as spelt out in Section 2(2). Merely because execution proceedings follow a decree in the suit, it cannot be said that these proceedings can also be fictionally termed as a suit strictu sensu. The analogy of an appeal in this context does not appear to be apt to my mind. Apart from the above, a conclusive answer to the contention on behalf of the petitioners is rendered in the following observations of the Division Bench in *Hasumatiben v. Ambalal Krishnalal Parikh* MANU/GJ/0114/1982 : AIR1982Guj324 :

Therefore, an effort was made to argue that an execution proceeding, being a continuation of a suit and if the rights of the parties are conclusively

determined in any of the matters in controversy, the order passed under Section 47 of the Civil P.C. must be construed as a decree though the deeming provision is taken away. If we accept such a proposition, an absurd result would follow. The Civil Procedure Code contemplates one decree and there cannot be two decrees passed under the provisions contained in the Civil Procedure Code. An appeal is a continuation of a suit. In appeal the appellate Court passes an appellate decree but that merges with the original decree. Therefore, what is done in appeal is that either original decree is modified, confirmed or varied or reversed and the result thereafter follows is that there remains one decree which could be executed. Now that, therefore, in appeal a decree could be passed and that decree changes the original decree and as a result so far as the executing Court is concerned, there is only one decree which could be executed. Now if the executing Court which has no power under the Civil Procedure Code to go behind the decree, passes a decree which can neither affirm, vary, modify or reverse the original decree, it could pass only a new decree and the result would be that there would be two decrees and such and absurdity was never contemplated when the Code of Civil Procedure, was amended in 1976.

To the same tenor are the observations in *Pratap Narain Agarwal v. Ram Narain Agarwal and Ors.* MANU/UP/0155/1980 : AIR1980All42 Para 15 and *Mohammad Khar v. State Bank of Travancore* MANU/KE/0041/1978 : AIR1978Ker201 . Consequently, both on principle and precedent, it must be held that orders under Section 47 cannot be equated with matters, in controversy in the original suit itself. The contention of the learned Counsel for the petitioners, therefore, must fail.

**18.** Lastly, in this context, one must also notice the contention of Mr. Shreenati Singh that the right of appeal is a substantive right which vests in the litigant from the date the lis commences and his specific reliance on *Garikapati Veerava v. N. Subbiah Choudhary* MANU/SC/0008/1957 : [1957]1SCR488 . On that basis it was contended that the appellate right in the petitioners which accrued to them because of the filing of the execution petition and the objection prior to the date of enforcement of the amending Act, cannot be taken away.

**19.** There cannot possibly be any quarrel with the legal proposition that the right of appeal once conferred is a substantive right and would accrue to the litigant from the time when he enters the portals of the Court. This has been authoritatively laid down in *Garikapati Veerava v. N. Subbiah Choudhry* (supra) by their Lordships and has thereafter not been deviated from. However, in this very judgment it has been laid down in categorical terms that this vested right of appeal can be taken away by the competent legislature by a subsequent enactment if it is so provided expressly or even by necessary intendment. That being so, the primal question herein is whether by the amending Act the earlier right of appeal against the orders under Section 47 has been expressly or by necessary intendment abrogated retrospectively. It is unnecessary to tread afresh the ground already covered in the earlier part of the judgment with regard to the changes brought about in the relevant provisions of the Code by the amending Act. These changes, in my view, raise an irresistible conclusion that the intention of the Parliament was to affect the vested right of appeal against orders in execution proceedings under Section 47. As noticed earlier, the whole purpose was to cut down the litigate process and to advance the expeditious execution of the decrees. This intention of the Parliament has been manifested by express words as has been shown earlier. Even otherwise the necessary implication of the amendment in Section 2(2) and Section 47 as also the insertion of Section 99A

appears that the right of appeal was being taken away with retrospective operation. Once that finding is arrived at, the submission that the right is a substantive right and accrues to the litigant from the commencement of the lis does not in any way advance or further the case of the petitioners.

**20.** Lastly I am inclined to take the view that the stand taken on behalf of the petitioners would tend to frustrate the very object of the amendment in this context. The very purpose of the deletion of the deeming provision from Section 2(2) of the Code was to make orders passed under Section 47 non-appeal able. If the contention raised on behalf of the petitioner were to be accepted, then such orders would still continue to be appeal able despite such deletion and the abolition of the legal fiction. It is true that on the argument advanced by the learned Counsel any and every order under Section 47 and in particular the purely interlocutory ones may not be appeal able, yet, according to him, every such order, which determines the substantial rights of the parties with regard to all or any of the matters in controversy, would continue to be so. Such a stand would indeed create another hornet's nest as to when an order determines the rights of the parties and whether those rights are to be construed as substantial and further whether all or any of them arise in the suit or the proceeding. It is axiomatic that to the jaundiced eye of cantankerous litigant that every order would fall in such a category. As has been noticed, the evil which the Parliament sought to amend by the amendment was to prevent the filing of frivolous appeals from orders in execution proceedings even after the parties to the dispute had been through the mill of the suit and its consequent appeals. The construction advocated on behalf of the petitioners would not again revive the hierarchy of appeals against order under Section 47 supposedly determining substantial rights of the parties. The larger purpose of the amendment was the expeditious execution of decrees and there is no gainsaying the fact that if appeals are allowed to be carried against orders in execution proceeding itself, the final execution of decree would necessarily be held up. The old adage that problems of the litigant in India begin, perhaps, only after he has secured the decree would again be resuscitated. For all these reasons, I am inclined to the view that the stand taken on behalf of the petitioners herein runs against the very grist of the object and purpose of the amendment.

**21.** As has been noticed earlier, the view I am inclined to take is buttressed by a massive weight of authority in the other High Courts. It is unnecessary to individually advert to these judgments and it suffices to mention that the same view has been taken in express terms or by necessary implication in *Mohammad Khan v. State Bank of Travancore*(sum) *Mohan Das v. Kamla Devi* MANU/RH/0022/1978; *Ram Niwas v. Mithan Lal and Ors.* MANU/PH/0103/1979; *Jagat Ram and Ors. v. Jagjit Singh* MANU/PH/0238/1984; *Pratap Narain Agarwal v. Ram Narain Agarwal and Ors.* (supra); *Tapan Chandra v. Dulal Chandra* MANU/GH/0002/1980; *Kuriakose v. P.K. Narayanan Nair* MANU/KE/0003/1981 : AIR1981Ker18 ; *Hasumatiben v. Ambalal Krlshnalal Parikh* (supra); *Rameshkumar Swarupchand v. Sancheti and Anr.* MANU/MH/0197/1983 : AIR1983Bom378 ; and *Challa Ramamurty v. Pasumarti Adinarayana Sam Regd. Ftrm* MANU/SC/0020/1974 : [1974]3SCR882 .

**22.** To conclude on this aspect, it must be held that after the amending Act of 1976, no appeal is now maintainable against any order whatsoever passed under Section 47 of the Code of Civil Procedure.

**23.** Adverting now to the second question, the argument on behalf of the petitioners is again rested on *M/s. Parshava Properties Ltd.'s* case. Learned Counsel for the petitioners contended that if the amending Act may be taken as abolishing the right

of appeal, even where a final determination of rights takes place in an order under Section 47 there will be a violation of the principles of equality as embodied in Article 14 of the Constitution. As a necessary consequence, the relevant amending provisions would become unconstitutional. We were, therefore, invited to either strike down the amending provisions or to read them down in order to bring them within the bounds of constitutionality by retaining the right of appeal against orders under Section 47 which determine substantial rights of the parties.

**24.** To counter the aforesaid contention, Mr. Ghose, the learned Counsel for the opposite party took a twin stand on the issue. It was forthrightly contended that Article 14 can in no way be attracted or applicable to the question of the repeal of a procedural provisions of appeal by a competent legislature. In the alternative, it was argued that even on the assumption that it was attracted, there was a patently reasonable classification in abolishing the right of appeal in one field and retaining it in the other and thus no hostile discrimination would arise.

**25.** The twin question herein has to be examined on the anvil of two foundational premises. The first one turns on the very nature of the procedural provisions of appeal. It seems now settled beyond cavil that this right of appeal is a mere creature of the statute. No one can claim any inherent or fundamental right to appeal to a higher forum unless such a right is conferred by law. It seems unnecessary to delve deeply into this question on principle because it is well settled by authority and no judgment holding to the contrary could be cited. Reference in this connection may be made to the observation of Chandrachud, J., (as the learned Chief Justice then was) in highlighting the basic distinction between the right of a suit and a right of appeal in *Smt. Ganga Bai v. Vijay Kumar* MANU/SC/0020/1974 : [1974]3SCR882 :

...On this question the position seems to us well-established. There is a basic distinction between the right of a suit and the right of appeal. There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bare the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That, explains why the right of appeal is described as a creature of statute.

Even more category are the observations of Khanna, J., in *Anant Mills v. State of Gujarat* MANU/SC/0381/1975 : [1975]3SCR220 . Therein, whilst repelling a similar attack under Article 14 of Constitution against an appellate provision which required a deposit of tax before the entertainment of appeal, it was observed (at page 1241:

The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is

permissible to enact a law that no appeal shall lie against an order relating to an assessment to tax unless the tax had been paid. Such a provision was on the statute book in Section 39 of the Income Tax Act, 1922. The proviso to that section provided that--'no appeal shall lie against an order under Sub-section (1) of Section 46 unless the tax had been paid. 'Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant part and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability or the fulfillment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Article 14 in it.

It is unnecessary to multiply precedent because even on a larger principle it is manifest that the right of appeal is not a guaranteed or a constitutional right. There is nothing whatsoever in the Constitution which may even remotely vest any such unalienable right in the citizen. It is axiomatic that such a right is not a fundamental right nor a constitutional one. That being so, it is equally evident that there is no inherent claim or right to appeal from an original forum. It is, therefore that it has been repeatedly asserted that the right of appeal is a mere creature of the statute. If that be so, it is plain that the creator, which confers such a right, namely, the legislature can within its plenary power equally take away the same. If a competent legislature exercises this plenary power, no issue of the infraction of the right of equality before the law under Article 14 can possibly arise.

**26.** The other equally fundamental premise is epitomized in the adage that no one has any inherent or fundamental right in a particular procedure. Now there is no manner of doubt that in the Light of the above the right of appeal is a right which is either conferred, modified or abrogated by the competent legislature. No one can, therefore, claim any inherent right to be governed by a particular procedure. If the legislature were not to choose to grant a right of appeal, no mandamus would lie that the same must be granted against an original forum. Since there is no inherent or fundamental right in the citizen to claim an appellate form, it follows that such right may either conferred or taken away by the competent legislature in its wisdom. It is true as authoritatively held in . (supra), once a right MANU/SC/0008/1957of appeal has been conferred then the same is a substantive right which accrues from the commencement of the lis. However, equally well settled it is by the very same judgment that such a right may be taken away by the legislature prospectively or retrospectively either in the express terms or even by necessary intendment. It must, therefore, follow that there is no inherent or fundamental right to a particular procedure and the right of appeal being a creature of the legislature, there is equally no inherent or fundamental right to an appellate form. Consequently, it must be held that within the narrow and constricted issue of conferment, modification, or the total repeal of a right of appeal would, in no way,' attract the application or infraction of Article 14.

**27.** In the alternative, one may now proceed to examine the question on the assumption (entirely for the sake of argument) that Article 14 might well be attracted. In this context, Mr. Shreenath Singh again commended the reasoning of the Bench in M/s. Parshava Properties Ltd.'s case by reference to Order 21, Rule 58(4). Thereby any order adjudicating on the claim or objection to the attachment of property under

the said rule has been made appeal able as if it were a decree. It was, therefore contended that it would not only be incongruous but even unconstitutional that where in a some what similar situation a stranger would have the right of appeal, the parties to the decree, who, according to counsel, should be at a better footing, have been denied that right. This, according to the learned Counsel, would be violative of Article 14.

**28.** The submission aforesaid proceeds on an inherent fallacy. It was rightly argued by Mr. Ghose for the opposite party that different classes of litigants cannot be labeled as identical owing to some similarity. The well-known maxim that similarity is not identity has thus to be kept in sharp focus. Therefore, no question of one class of litigants being identical and mathematically equal to another can strictly arise. Hence, the absolute identity of the litigant, in fact, would be a myth. This apart, Mr. Ghose highlighted the fact that persons who were parties to the suit and may thereafter have been equally parties to a protracted litigation by way of appeal and second appeal are a class distinct and separate from those who are strangers to the decree. Whereas in the case of parties to the suit, the legislature might rightly curtail the litigation and deny them any further forum of appeal in execution proceedings, a stranger who had no opportunity to present his case through a hierarchy of forums may well be granted an appellate right. Consequently, to classify a party to the suit or a proceeding and a rank stranger thereto as being either wholly similar or identical is thus fundamentally fallacious. Now once it is held that such a class of litigants are not identical then any differentiation betwixt them cannot possibly attract the equality clause or the concept of hostile discrimination. Article 14, as is too well known, permits reasonable classification and no quarrel can be raised against the legislature's wisdom in classifying the parties to the suit as a category different from strangers thereto. Indeed, Mr. Shreenath Singh, with illimitable fairness, conceded that if the two were distinct and separate or could be reasonably classified then on larger principle the conferment of the right of appeal on one and denial to the other would not attract the equality clause.

**29.** In essence, the rightful submission on behalf of the opposite party is that it does not lie in the mouth of a differently situated litigant that if the legislature has given a right to appeal to X, it must also give such a right to Y though he is not on an identical footing. As has been noticed earlier, the whole thrust of the amendment herein was to expedite the execution proceedings, whose tardiness, as experience has shown, would lead to a virtual failure of justice. Therefore, after full consideration of the matter Parliament has ruled that parties to the suit, who have been through the mill of litigation culminating in the original and appellate decrees, must have all further disputes decided in the execution forum alone and not by way of a further suit or a second spiral of appellate litigation from the execution stage as well. For the advancement of this object, the parties to the suit and the decrees were denied the right of appeal against orders under Section 47 whilst strangers to the decree were given such a right in the context of claim or objection to the attachment of property. Far from there being any discrimination, the provision in essence seems to be rested on a reasonable classification and is otherwise equitable and meritorious, it was pointed out that the amending Act whilst taking away the appellate forum against orders under Section 47 conferred such a right where necessary as, indeed, in the added Rule 46-A of Order 21 which made orders under Rule 46-B, 46-C and 46-E appeal able and similarly the substituted present Rule 103 of Order 21 in place of the earlier one for conferring the right of appeal in the context of the peculiarity of those circumstances. As an example of the legislature's power to reasonably classify the forums of appeal, Mr. Ghose pinpointed Section 25 of the Small Cause Courts Act

which bars any further appeal thereby. It was submitted that in cases where matters of identical valuation were either tried in a court other than the Small Cause Court or where the valuation varies marginally by a rupee, the bar of the right of appeal does not in any way make the said section discriminatory. Therefore, it would follow that even on the anvil of Article 14, the amending Act would conform to the test of reasonable classification.

**30.** To sum up, it must be held that the abolition of a right of appeal by the competent legislature does not attract the equality clause of Article 14 and in any case the amending Act in taking away the right of appeal proceeds on a reasonable classification.

**31.** Coming now to the third question, it is common ground that that corner-stone of the petitioners' stand is rested on the case of Parshava Properties v. A.K. Bose (supra) with regard to both questions 1 and 2 discussed above. A perusal of the judgment would indicate that the issue was not adequately debated before the Bench. The legislative history was not brought into focus nor the clear intendment of Parliament in amending the relevant provisions. The earlier Reports of the Law Commission and the specific recommendation of the Joint Committee seem to have missed notice. The changes brought about in Section 47 by deletion of Sub-section (2) thereof were equally not adverted to, The real import of the proposed Section 99A by the Law Commission and its later modification and insertion as now enacted do not seem to have been adequately canvassed and well projected. The conclusion that execution proceedings should virtually be deemed to be a suit for purposes of Section 2 of the Code does not seem to be well merited. The observation that the view taken would not frustrate the object of the legislature, with respect, does not seem to be entirely tenable. The contrary view in MANU/RH/0022/1978 and MANU/KE/0041/1978 : AIR1978Ker201 (supra) was brushed aside and dissented from without any indepth discussion. As has been shown earlier, later precedents in Ram Niwas v. Mithan Lal and Ors. (supra), Jagat Ram and Ors. v. Jagjit Singh (supra), Pratap Narain Agarwal v. Ram Narain Agarwal and Ors. (supra), Tapan Chandra v. Dulal Chandra (supra), Kuriakose v. P.K. Narayanan Nair (supra), Hasumatiben v. Ambalal Krishnalal Parikh (supra), Sarabai Agarwalla and Ors. v. Harhadan Mohapatra and Anr. MANU/OR/0004/1982 : AIR1982Ori9 and Ramesh Kumar Swarupchand v. Sancheti and Anr. (supra), have now all taken a contrary view and indeed MANU/GJ/0114/1982 : AIR1982Guj324MANU/PH/0238/1984MANU/OR/0004/1982 : AIR1982Ori9 and MANU/AP/0096/1985 : AIR1985AP42 have, after express notice dissented from this case.

**32.** Equally in arriving at the conclusion that certain orders under Section 47 were still appeal able despite the amending Act, the Bench was largely influenced by its view that Article 14 was attracted and taking away the right of appeal would be violative of the same. As has been discussed in detail under question No. 2, the abolition of the right of appeal by Parliament would not attract the equality clause at all and even on the assumption that it would, there appears to be a patent reasonable classification in the amending Act. It is unnecessary to traverse the same ground again and it would suffice to say with great respect that the conclusion arrived at in this context by the Division Bench is not correct. Indeed, even though pressed, learned Counsel for the petitioners could cite no other precedent wherein any change in the procedure had been held to be violative of Article 14. An identical or in any case somewhat similar submission in the context of the amendment of Section 115 of the Code by Section 6 of the U. P. Act was summarily repelled by the Full Bench in Parsidh Narain Pandey v. Kalapnath and Anr. MANU/UP/0182/1973 : AIR1973All523 .

To the same tenor is the observation in Sri Cand and Ors. v. State of Haryana and Ors. MANU/PH/0108/1979 As noticed earlier later precedents have, with virtual unanimity, taken a contrary view or have expressly dissented from M/s. Parshava Properties Ltd.'s case.

**33.** It is unnecessary to specifically advert to the observation and somewhat similar reasoning in Chuluram v. Bhagatram MANU/MP/0005/1980 : AIR1980MP16 and with the deepest respect I would wish to record my dissent there from.

**34.** For the aforementioned detailed reasons as also in the light of the exhaustive discussion under questions 1 and 2 (supra) I am constrained to hold with the deepest deference that on both the points Parshava Properties Ltd. v. A.K. Bose does not lay down the law correctly and is hereby overruled. For identical reasons, Rai Mathura Prasad v. Special Officer, Bihar Hindu Religious Trust Board and Ors. MANU/BH/0067/1984 : AIR1984Pat227 which has equally followed the earlier Division Bench has also to be overruled.

**35.** To conclude on this aspect, for the detailed reasons given above, the answer to question No. 3 is rendered in the negative.

**36.** Coming now to question No. 4, it is obvious that it turns primarily on the language and import of the relevant provisions of Section 97 of the amending Act. It is, therefore, apt to read the relevant provision at the outset:

97(1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed.

(2) Notwithstanding that the provisions of this Act have come into force or the repeal under Sub-section (1) has taken effect, and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897:

(a) the amendment made to Clause (2) of Section 2 of the principal Act by Section 3 of this Act shall not affect any appeal against the determination of any such question as is referred to in Section 47 and every such appeal shall be dealt with as if the said Section 3 had not come into force;

(b) the provisions of Section 20 of the principal Act, as amended by Section 7 of this Act, shall not apply to or affect any suit pending immediately before the commencement of the said Section 7;

(j) the provisions of Section 91 of the principal Act, as amended by Section 30 of this Act, shall not apply to or affect any suit, appeal or proceeding instituted or filed before the commencement of the said Section 30; and every such suit, appeal or proceeding shall be disposed of as if the said Section 30 had not come into force;

(m) the provisions of Section 100 of the principal Act, as amended by Section 37 of this Act, shall not apply to or affect any appeal from

an appellate decree or order which had been admitted before the commencement of the said Section 37, after hearing; under Rule 11 of Order XII; and every such admitted appeal shall be dealt with as if the said Section 37 had not come into force;

\* \* \*

(z) the provisions of Order XLI of the First Schedule, as amended by Section 87 of this Act, shall not apply to or affect any appeal pending 'immediately before the commencement of the said Section 87; and every such appeal shall be disposed of as if the said Section 87 had not come into force;

\* \* \*

(z-b) the provisions of Order XLIII of the First Schedule, as amended by Section 89 of this Act, shall not apply to any appeal against any order pending immediately before the commencement of the said Section 89; and every such appeal shall be disposed of as if the said Section 89 had not come into force.

**37.** Relying on the language employed in Section 97(2)(a), Mr. Shreenath Singh had contended that where the right to prefer an appeal had accrued to a party before the amendment came into force, the same still stood preserved under this provision. According to the learned Counsel, the right to file the appeal had accrued to his clients with effect from the date of the filing of the objections under Section 47 of the Code and the same was sought to be maintained intact by Section 97(2)(a). Counsel highlighted the expressly different phraseology employed in Clauses (b) to (zb) of Sub-section (2) in contrast with that employed in Clause (a). It was submitted that the latter clause was not intended to preserve pending appeals alone but equally every right of appeal from the very inception of its accrual.

**38.** The submission aforesaid must be decided on the anvil of the larger scheme of Section 97, the context in which Clause (a) of Sub-section (2) has been laid and, in particular, the language employed therein in contradistinction to other clauses. Sub-section (1) of Section 97 first repeals all those amendments in the Code by the State Legislatures or the High Courts which would be inconsistent with the provisions of the Code as amended. Sub-section (3) then mandates that the amended Code shall apply to every suit, proceeding, appeal or application pending at the commencement of the Act or filed after such commencement irrespective of the fact that the right or cause of action therefore had been acquired or had accrued before the enforcement of the amending Act. What, however, is significant is the fact that by virtue of the non-obstante clause of Sub-section (2) and the saving clause of Sub-section (3) all matters enumerated in Clauses (a) to (zb) of Sub-section (2) are expressly saved from the application of the amending provisions of the Act in the terms provided therein. The core question, therefore, in this context is as to what exactly is saved by Clause (a) of Sub-section (2). Is it the appeal already filed and pending or does it also preserve the right of appeal already accrued against an order passed under Section 47 prior to the 1st of February, 1977?

**39.** Plainly enough, Section 97(2)(a) can be categorised into two distinct classes; firstly where the right of instituting appeals had been exercised by the parties before the enforcement of the Act, and secondly where the right to file the appeal had accrued against an order already passed under Section 47 of the Code but had not been exercised before the time the amendment came into force. There is indeed no

difficulty whatsoever with regard to the first category. It is common ground that the pending appeals on the date of the enforcement of the amending Act are fully protected and are in no way affected by the abolition of the right of appeal consequent on the amendment of Section 2(2) of the Code. However, with regard to the second category it is not possible to go to the length of holding that in all cases where objections had been filed before 1st of February, 1977 the right to appeal would continue to be preserved whenever any order under Section 47 is passed in such an application. The language of Section 97(2)(a) does not permit such an interpretation and, in particular, in the context in which it is laid. The expression "shall not affect any appeal", in my opinion, would not take within its sweep even the cases where execution applications were merely pending before the executing court and the order under Section 47 may yet come to be passed in the future. This expression is capable of explanation that where the right to appeal had accrued expressly because of the passing of an order under Section 47 (which was earlier deemed to be a decree) prior to the amendment, the same would not be affected by the amendment inasmuch as in such a case by a fiction a decree had already come into being. Since such a decree had already come into existence, the law intended to leave the right protected and untouched by the amendment made in Section 2(2). The express amendment in Sub-section 2(2) was that hereafter an order would not amount to a decree and inevitably such an order would cease to be appeal able. However, where such a decree had already come into being, the amendment of Section 2(2) was not to apply. Consequently, the plain intendment of the Legislature was firstly to leave untouched the appeals which had already been filed on the date of the enforcement of the amending Act and, secondly, to protect the right to file an appeal in all those cases where it had already accrued by the passing of an order under Section 47. Mr. Shreenath Singh, learned Counsel for the petitioners, had, however, contended that the scope of Section 97(2)(a) should not be narrowed down to include only the aforesaid two categories. He sought its extension to cover unreservedly all cases where the right of appeal may be deemed to have accrued from the date of the filing of the application so as not to defeat the general proposition that statute which affects the existing right of appeal is not rightly construed to affect the adjudication of pending proceedings.

**40.** The aforesaid argument of Mr. Shreenath Singh, in essence, would mean that the petitioners would continue to have a right of appeal despite the amendment in Section 2(2). Such an interpretation would defeat the very object and purpose of the Act which, as already noticed, was to abolish such a right against orders in execution proceedings. It is a sound canon of interpretation to avoid a construction which frustrates the very object and purpose of a statute. An equally settled rule of interpretation is that the words in a statute draw their color from the context as a whole. What was sought to be preserved by Sub-section (2) was only limited to the enumerated Clauses (a) to (zb) thereof. The preceding Sub-section (1) expressly repealed all State Legislatures or High Courts amendments which were inconsistent with the amended provisions. The succeeding Sub-section (3) would show that the Legislature expressly intended the amended law to apply to every suit, proceeding, appeal or application pending at its commencement or instituted thereafter notwithstanding the fact that the right or cause of action thereof had been required or accrued before such commencement. By a saving clause it only saved what was expressly enumerated in Sub-section (2). The legislature could not have expressed its intention in a more unequivocal language than one employed in Sub-section (3). The intent of retrospectively and to affect even the rights which had accrued before the enforcement of the amending Act is thus writ large with the limited exception of what was saved by Sub-section (2). Therefore, in the context in which Clause (a) of Sub-

section (2) is laid, it is not possible to extend it to an unqualified protection of all rights of appeal which may have accrued prior to the enforcement of the amending Act. To repeat, it is limited only to the two categories enumerated above.

**41.** In fairness to the learned Counsel for the opposite party, one must also notice the firm stand of the learned Counsel for the opposite party that Section 97(2)(a) saves only the pending appeals and no other. Reliance was placed on the crudity Division Bench judgment in *Ram Niwas v. Mithan Lal and Ors.* (supra). This argument has to be appreciated against the background of the hallowed rule that the right of appeal one conferred is a substantive right which can be taken away by a subsequent enactment if, it be expressly provides or by necessary intendment and not otherwise. Following a long line of precedent, this rule has been authoritatively laid out in *Garikapati v. Subbiah Choudhry* (supra), wherein five clear-cut propositions have been enunciated, and has been re-affirmed later in *Jose Da Costa v. Bascora Sadashiv Sinai Narcornin* MANU/SC/0054/1975 : AIR1975SC1843 . Therefore, the Court have to lean strongly against the snatching away of an accrued right of appeal which can be done only by either express or an unequivocally necessary intendment. With the aforesaid rule in mind, what appears to be conclusive is the designed and deliberate use of different phraseology employed in Clause (a) in contradistinction to the remaining Clauses (b) to (zb). Wherever the legislature intended to confine the saving only to the pending appeals or suits, it has said so in no uncertain term in the remaining clauses. Reference may first be made to Clause (z) which again is confined only to appeals and the phraseology used is "shall not apply to or affect any appeal pending immediately before the commencement of the said section." Turning to Clause (b), the language is "shall not apply to or affect any suit pending immediately before the commencement of the said section." Again, Clause (7) uses the similar expression "shall not apply to or affect any suit, appeal or proceeding instituted or filed before the commencement of the said section." The relevant part of Clause (m) is worded as "shall not apply to or affect any appeal from an appellate decree or order which had been admitted before the commencement of the said section." Clause (y) again says "shall not apply to or affect any injunction subsisting immediately before the commencement of the said section." Why does Clause (a) designedly and deliberately refrain from using the identical phraseology ? If the intendment was to confine Clause (a) to only pending appeals, why was the identical language used in Clause (z) with regard to appeals not similarly employed ? The answer seems to be the only one that the legislature was not confining Clause (a) to pending appeals alone but also the appeals where the right had accrued already against an order passed under Section 47. It is a well-known adage of interpretation that the legislature does not waste its words nor does it employ a different terminology to convey an identical meaning. In the context in which Clause (a) is laid, to say that it is confined only to pending appeals alone when the succeeding clauses use expressly different phraseology to convey the same result would, in my view, be deviating from the sound canons of contextual construction. Because of the different and distinct phraseology used in the remaining clauses by the legislature wherever they wish to save only pending appeals, suits or other proceedings, it cannot be said that Clause (a) is also confined to pending appeals alone. The phraseology used--"shall not affect any appeal against the determination of any question as is referred to in Section 47" is different and, consequently, wide enough to include both a pending appeal and an accrued right of appeal against an order passed under Section 47 and has been designedly so employed.

**42.** It appears to me that because the legislature intended to cover two types of cases mentioned above, it deliberately did not employ the word 'pending' in Clause

(a) to Section 97(2). If it had used that expression then alone the scope of the same would have been narrowed down to cases where the appeals were pending on the date of the enforcement of the amending Act. Where it wanted to do so, the legislature in terms has done so, as for instance in Clause (z). Advisedly the legislature did not use the same in Clause (a). Patently it did not intend to take away the right of appeal which had already accrued against an order passed on the objection before the commencement of the amending Act because the status of a decree had already been obtained on the date of the disposal of such objection.

**43.** I am not unmindful of the fact that a Division Bench in *Ram Niwas v. Mithan Lal and Ors.* (supra), has taken a contrary view. With the deepest deference, I am constrained to dissent there from. The Achilles heel of the said judgment appears to be its attempt to water down Sub-section (2)(a) of a Section 97 to harmonise it with Sub-section (3). It seems to have been missed that with regard to the matters enumerated in the various clauses of Sub-section (2) the same is the dominant provision and is expressly saved from the operation of Sub-section (3). Clearly enough the provisions of Sub-section (3) cannot affect or override those of Sub-section (2) which had been expressly saved in the very opening part thereof. Sub-section (2), therefore, had to be construed independently with its pristine force. It bears repetition that in its very opening part Sub-section (3) expressly saved Sub-section (2) where it provided otherwise. Equally Sub-section (2) begins with the non-obstante clause. With deep respect, I am also unable to agree with the inference drawn by the Bench with regard to the reference to Section 6 of the General Clauses Act in Sub-section (2). Equally it appears to me that the true import of the employment of expressly different phraseology in Clause (a) from that in others has been missed. The later Full Bench in *Pratap Narain Agarwal v. Ram Narain Agrawal and Ors.*, (supra), has expressly taken a view contrary to that in *With respect I would agree with the Allahabad view.*

**44.** It must, therefore, be held that Section 97(2)(a) of the amending Act protects both the appeals already pending as also the right to file the appeal which had already accrued against an order under Section 47 of the Code passed prior to the enforcement of the amending Act.

**45.** Adverting now to question No. 5, the same stands covered by the preceding discussion under Section 4. As already discussed, the issue, must be construed in the context in which Clause (a) of Section 97(2) is laid. When viewed in that context, it must be held in the light of the aforesaid discussion that the right to file the appeal accrues only on the passing of the actual order under Section 47 of the Code and not earlier.

**46.** To finally conclude on the primal questions formulated at the outset, the answer to question No. 1 is rendered in the negative and it is held that no appeal is now maintainable against an order under Section 47 of the Code whether interlocutory or otherwise after the enforcement of the amending Act.

**47.** The answer to question No. 2 is rendered in the negative and it is held that the abolition of the right of appeal by the competent legislature would not attract the applicability of Article 14 of the Constitution. In any case, in the present context such repeal is rested on reasonable classification.

**48.** The answer to question No. 3 is rendered in the negative and *Parshava Properties Ltd. v. A.K. Bose*, (supra), and the judgments of this Court following the same are

hereby overruled.

**49.** In answer to question No. 4, it is held that Section 97(2)(a) of the amending Act protected the right of appeal with respect to pending appeals as also the said right where it had already accrued prior to 1st of February, 1977 by the passing of an order under Section 47 of the Code.

**50.** On question No. 5, it is held that in the context of Section 97(2)(a) the right to file an appeal accrues only on the passing of the actual order under Section 47 of the Code and not earlier.

**51.** Now, in the light of the above, it is common ground that the order under Section 47 herein was passed by the learned Subordinate Judge, Bhagalpur, on the 8th of August, 1978. This obviously was long after the enforcement of the amending Act on the 1st of February, 1977. Consequently, no appeal against the said order would now be maintainable. The right to move against the order also would accrue on the 8th of August, 1978 and, therefore, cannot even remotely be brought within the ambit of Section 97(2)(a) of the amending Act. Therefore, the claim of the petitioners to a right of appeal must be rejected and they must rest content with the revisional forum. The case would now go back to the learned single Judge for a decision on merits.

**S.K. Jha, J.**

**1.** I entirely agree with the learned Chief Justice and find nothing to be usefully added thereto.

**S.K. Choudhuri, J.**

**1.** I had the advantage of going through the judgment prepared by my Lord the Chief Justice.

**2.** As it was argued vehemently at the Bar that some of the important relevant statutory provisions of the Code of Civil Procedure, 1908 as amended by the Code of Civil Procedure (Amendment) Act, 1976 (Act No. 104 of 1976) hereinafter referred to as 'the Amending Act', were not placed when the decision in Parshava Properties Limited v. A.K. Bose, (supra), was given, the said decision requires reconsideration. I have, therefore, very carefully gone through the aforesaid reported decision and also several important amended statutory provisions relied upon at the time of argument.

On perusal of the Parshava Properties Limited case (supra), it appears that Mr. Lal Narain Sinha, an eminent Counsel of fame, who by his able and persuasive argument could persuade us to accept the view canvassed by him on the basis of the decision in *Dokku Bhushavva v. Katrayadda Ramakrishnayya and Ors.* MANU/SC/0011/1962 : [1963]2SCR499, that the expression with regard to the matters in suit occurring in Section 2(2) of the Code of Civil Procedure and the expression with reference to the suit occurring under Order XXXII, Rule 7 are practically the same and in regard to the final determination, according to the Supreme Court, Order XXXIII, Rule 7 applied, while it would not apply to interlocutory matters. This led us to the conclusion that the expression 'suit' is capable of being interpreted in a proper context, as including an execution proceeding.

**3.** However, in this case we also noticed the well known principle that while interpreting the statute, anomalies and patent injustice should be avoided unless

compelled by express language of the statute and also quoted the relevant portion from the judgment of Lord Simon in *Rugby Joint Water Board v. Fottit and Anr.* 1972-I All ER1057.

On closer examination of the arguments advanced, now it appears that some of the important provisions as inserted by the Amending Act, were not considered then. These provisions are Section 97(2)(a) and other clauses of this sub-section and Section 97(3) of the Amending Act. Reference was also made at the Bar to Section 99A and Order XXI, Rule 46-H and Rule 58(4) and Rule 103, which have been inserted at their proper place in the Code of Civil Procedure by the Amending Act. The other important provision referred to was Section 47 itself and particular attention was drawn to the omission of Sub-section (2) of Section 47 of the Code of Civil Procedure, as it stood before the amendment. The definition of 'order', as defined in Section 2(14) was also referred.

I shall read only a few of the aforesaid provisions, namely, Section 97(2)(a) and Section 97(3) of the Amending Act and Section 99A, which has been inserted in the Code of Civil Procedure by the Amending Act. They read as follows:

**97. Repeal and savings.--**

\* \* \* \* \*

(2) Notwithstanding that the provisions of this Act have come into force or the repeal under Sub-section (1) has taken effect, and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897,--

(a) the amendment made to Clause (2) of Section 2 of the principal Act by Section 3 of this Act shall not affect any appeal against the determination of any such question as is referred to in Section 47 and every such appeal shall be dealt with as if the said Section 3 had not come into force;

(3) Save, as otherwise provided in Sub-section (2), the provisions of the principal Act, as amended by this Act, shall apply to every suit, proceeding, appeal or application, pending at the commencement of this Act or instituted or filed after such commencement, notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement.

99-A. No order under Section 47 to be reversed or modified unless decision of the case is prejudicially affected.--Without prejudice to the generality of the provisions of Section 99, no order under Section 47 shall be reversed or substantially varied, on account of any error, defect or irregularity in any proceeding relating to such order, unless such error, defect or irregularity has prejudicially affected the decisions of the case.

**4.** It is not necessary to quote the definition of 'decree' in Section 2(2) as it stood before the amendment and as it stands now, as also Section 47 because they have already been quoted in the main judgment. The definition of term "Order" has been defined under Section 2 (14) in the following language:

'Order' means the formal expression of any decision of a Civil Court which is not a decree.

It is then to be noticed the change which has been brought about in Section 47 by the Amending Act. By this amendment, Sub-section (2) of Section 47, which read as, "The Court may, subject to any objection as to limitation of jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding and may, if necessary, order payment of any additional court-fees" has now been dropped. In view of the several changes brought about by the Amending Act in the principal Act, namely, the Code of Civil Procedure, 1908, the legislature thought it proper to introduce a new section, namely Section 99A already quoted above under Chapter VII headed by "APPEALS".

It was argued that in view of the insertion of Section 99A in Chapter VII after Section 99, an appeal would lie from such order, if it attracts the first part of the definition of "Decree" as defined in Section 2(2). It was argued that in spite of dropping of the deeming provision, which gave any order passed under Section 47 the force of a decree, if an order under Section 47 comes within the first part of the definition of 'decree', an appeal would certainly lie. While elaborating the argument, it was pointed out that the definition says that "Decree" means, 'the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy....' This argument in the first instance appeared to me to be very attractive, but on closer scrutiny of the relevant provisions of the Act, which were not noticed in the Parshava Properties Limited case (supra), the argument advanced appears to have no substance.

**5.** Section 99A became necessary to be inserted by the Amending Act to save such appeals filed against orders passed under Section 47, which were pending before the commencement of the Amending Act and also such appeals which may be filed against the orders passed under Section 47 before the amendment came into force and by virtue of the deeming fiction of the definition of "decree" as it stood before the amendment, such orders were deemed to be decree.

**6.** It may be pointed out here that Section 99A has not used the word 'pending' and it had positive purpose behind such omission, because the legislature contemplated to save not only the pending appeals, but also save appeals from orders passed before the Amending Act came into force. This word 'pending' before the word 'appeal' has also purposely not been used by the legislature, in Section 97(2)(a) of the Amending Act, though the word 'pending' has been used in several other clauses of this sub-section. These two sections read together confirm the view in favor of negation of the argument that by insertion of Section 99A under Chapter VII, appeals would lie from such orders under Section 47 which falls within the first part of the definition of 'decree', even after the deletion of "Section 47 or" from it.

**7.** The appeals from orders which had the force of a decree by virtue of the deeming fiction in Section 47 to be a decree, under Section 2(2) and dropping Sub-section (2) of Section 47, which gave right to a court to treat a proceeding under Section 47 as a suit or a suit as a proceeding and to realise court fee, if necessary and insertion of Section 99A and Section 97(2)(a) read with Section 97(3) clearly show that after the amendment of the definition of 'Decree' in Section 2(2), it was never the intention of the Legislature to keep alive a right of appeal from an order passed under Section 47. That right has been expressly taken away by amending the definition of the "decree".

.It will also be apposite to notice that the decree in the suit has already been passed which is under execution and a controversy has been raised in the execution stage by filing an application under Section 47 in relation to execution, discharge and satisfaction of the decree. An order passed on such an application cannot again be considered to be another decree passed in the same suit and thereby giving a right to appeal to a suitor. The deeming provision in Section 2(2) which now stands deleted save that right of appeal previously, The word 'suit' to include 'execution proceeding' has been interpreted in Dokku Bhushayya's case (supra) in a different context. The said principle cannot therefore apply in the present case.

**8.** Section 97(3) of the Amending Act quoted above if read with Sub-section (2) carefully, the only interpretation that can be given to Sub-section (3) is that whatever has not been saved in Sub-section (2), the principal Act as amended by the Amending 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, has been acquired or accrued before such commencement. It will not be out of place to mention here that various clauses of Sub-section (2) of Section 97, it carefully read and properly scrutinised, it would be found that different clauses use different expressions for saving some litigations. The expressions like, 'pending immediately before the commencement of, 'shall not apply to or affect any suit'; 'appeal or proceeding instituted or filed before the commencement of...', 'shall not apply to or affect any appeal from an appellate decree or order which have been admitted before the commencement of,...'; shall not apply to or affect any appeal pending immediately before the commencement of,...', have been used by the Legislature, so as not to affect those litigation by the Amending Act. The injunction order as also the abatement order passed before the commencement of the Amending Act have also been saved. Pending suits have also been saved and it has been said that the amended Section 20 of the principal Act shall not affect such pending suits.

**9.** Thus it would appear that Sub-section (2) of Section 97 has saved various litigations which the Legislature thought proper to save them. Sub-section (3) of Section 97 has covered all other litigations not covered by Section 97(2).

**10.** Now in order to strengthen my conclusion, I will also refer to three of the amended provisions of Order XXI of the Code of Civil Procedure. One has to read these provisions keeping in view that the deeming provisions which gave all orders passed under Section 47 the force of a 'decree', has been dropped from the definition of 'decree'. The Legislature, therefore, in view of dropping of such right of appeal which was given to the litigants against any order passed under Section 47, thought it proper in the circumstances of the case to give right of appeal against some orders passed in the execution stage by inclusion of deeming provision in some of the Rules thereof. Reference may be made to Order XXI, Rule 46-H, Rule 58(4) and Rule 103. Orders passed under these provisions in the execution proceedings by virtue of the deeming provision, have been inserted in the Amending Act giving the force of a decree thereby giving right of appeal which were not there previously.

Order XXI Rule 46-H reads thus:

46-H. Appeals.--

An order made under Rule 46-B, Rule 46-C or Rule 46-E shall be

appeal able as a decree.

Rule 58(4) of Order XXI, CPC reads thus:

Where any claim of 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.

Lastly reference is made to Rule 103, which may be read as:

103. Orders to be treated as decrees--Where any application has been adjudicated upon under Rule 28 or Rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.

Lastly notice of the following provisions may be taken which give express right of appeal against some type of orders passed in the execution stage. Those provisions are Order XLIII, Rule 1(i), (j) & (j-a) and we read here as follows:

(1) An appeal shall lie from the following orders under the provisions of Section 104, namely,

(i) an order under Rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;

(j) an order under Rule 72 or Rule 92 of Order XXI setting aside or refusing to set aside a sale;

(j-a) an order rejecting an application under Sub-rule (1) of Rule 106 of Order XXI, Provided that an order on the original application that is to say, the application referred to in Sub-section (1) of Rule 105 of that order is appeal able.

**11.** Thus it appears that the Legislature took special care to give right of appeal against matters in the execution stage as the general right of appeal from any order passed under Section 47 has been taken away under the amended Act.

**12.** In view of the discussions made above and after giving my anxious consideration on the question posed I cannot but agree with the main judgment given by my Lord Chief Justice.

© Manupatra Information Solutions Pvt. Ltd.