CALCUTTA HIGH COURT

Nagendra Nath Bose

Vs.

Mon Mohan Singha Roy

(Graham, J.)

13.06.1930

JUDGMENT

Graham, J.

1. This rule was issued to show cause why an order of the District Judge of Hooghly dismissing an appeal arising out of certain rent execution proceedings should not be set aside, or such other order made as might be deemed fitting.

2. The facts are shortly these: The plaintiffs decree-holders, opposite parties in this rule, instituted a suit for rent against the judgment-debtors opposite parties and the petitioner, who is the receiver of their estate, making the pro forma defendants decree-holders parties with them therein and claiming the sum of ₹ 1,306-15-0. The suit having been decreed the plaintiffs decree-holders executed the decree, the defaulting tenure was put up to sale on 20th November 1928, and one Satish Chandra Singha Chaudhury, the present opposite party 4, purchased the same for ₹ 1,600. Thereupon the petitioner applied to have the sale set aside, but his case was dismissed for default.

3. Against that order he preferred an appeal to the District Judge who dismissed it on the ground that it could not be entertained inasmuch as the provision of the amended Section 174, Ben. Ten. Act had not been complied with by making . the deposit required by Sub-section (5) of that section.

4. The petitioner then moved this Court and obtained the present rule. The point of law involved, and it appears to be one of first impression, is whether the provision in question is retrospective in its "operation or not. The answer depends upon whether it is deemed to be a provision affecting procedure only, or whether it does something more than that and affects a substantive right. If it be held to affect prejudicially a substantive right then according to the generally accepted view it will not be deemed to be retrospective unless the intention that it shall have such effect is plainly expressed in the Act itself. On the other hand if the provision is regarded as merely relating to a matter of procedure, then there can be no doubt that the view taken by the learned District Judge is right.

5. Both views have been urged before us. If there were no authority on the point I am bound to say that there seems to be a good deal to be said for the view that the provision in question relates

rather to a matter of procedure than detracts from any substantive right. It cannot be said that the right of appeal is taken away, or even prejudiced in any way. It remains intact subject only to the provision which is in the nature of a formality, that an appeal will only be admitted if the condition laid down in Sub-section (5) is complied with. There is however authority in a recent decision of this Court for the contrary view: *Sheikh Sadar Ali v. Sheikh Dolliluddin Ostagar*[1], In that case the decision of the Judicial Committee of the Privy Council in the Colonial Sugar Company's case [1905] A. C. 369 was referred to as conclusive authority for the view that rights of appeal are not matters of procedure, and that the right to enter the superior Court of appeal is deemed to arise to a litigant before any decision has been given by the inferior ' Court. If that be so it would seem to follow that the substantive right of appeal which the litigant possesses must be deemed to be prejudicially affected by a new provision which has the effect of attaching to it any clog or disability. In that case it would further appear to follow that such a provision cannot be treated as retrospective in its operation when the Act itself is silent as to any such intention.

6. In the result therefore I am of opinion that the rule must be made absolute, the order of the District Judge set aside, and the appeal restored and disposed of according to law. The petitioner is entitled to his costs which we assess at one gold mohur.

Mitter, J.

7. The question raised by this rule is whether retrospective operation should be given to the proviso to Section 174 (5) as amended by the Ben. Ten. Amendment Act (4 of 1928) B.C., and is one of general, importance.

8. The facts relevant to the consideration of this questionn are few and are as follows: It appears that some of the landlords (opposite parties decree-holders in this rule) instituted a suit for rent against the tenants of a tenure and the receiver to their estate (the petitioner in this rule). The suit was valued at ₹ 1,306-15-0. To the suit the co-sharer landlords were added as parties and the suit seems to have been framed as one under Section 148-A, Ben. Ten. Act. This suit was decreed and in execution of the decree the defaulting tenure was put up to sale and was purchased by one Satish Chandra Singha Chaudhury (the auction-purchaser opposite party) on 20th November 1928 for ₹ 1,600.

9. On 19th December 1928 the petitioner made an application under Order 21, Rule 90, Civil Procedure Code to set aside the sale. This application was fixed for hearing on 20th April 1929 on which date the petitioner was not ready as his witnesses though summoned did not appear and he applied for adjournment which was refused. After that the pleader for the petitioner withdrew from the case and the application was dismissed for default.

10. Against this order the petitioner preferred an appeal to the District Judge of Hooghly, who refused to admit the said appeal on 11th July 1929 on the ground that the amount recoverable in execution of the decree had not been deposited as is required by the proviso to Section 174, Clause 5, as amended by the Bengal Tenancy Amendment Act, 1928.

[1] AIR 1928 Cal 640: (1929) ILR 56 Cal 512

11. The petitioner has obtained the present rule for revision of the order of the District Judge refusing to entertain the appeal and it is contended before us that the learned District Judge has

declined jurisdiction in not entertaining the appeal on an erroneous view of the law. It is said Section 174 (5) proviso, Ben. Ten. Act (as amended) cannot apply to an application to set aside the sale which was made on 19th December 1928 for the amended provision did not come into force until 21st February 1929 and this amendment has not been made retrospective in its operation either expressly or by necessary intendment and as this is a matter affecting the right of appeal which is a substantive right, according to the ordinary canons of construction of statutes no retrospective operation can be given to it.

12. We think the contention of the petitioner is well founded and must prevail. That a right of appeal is a substantive right cannot now be seriously disputed. It is not a mere matter of procedure. Prior to the amendment of 1928 there was an appeal against an order refusing to set aside a sale (for that is the effect also where the application to set aside the sale is dismissed (for default) under the provisions of Order 43, Rule (1) Civil Procedure Code That right was unhampered by any restriction of the kind now imposed by Section 174 (5) proviso. The Court was bound to admit the appeal whether the appellant deposited the amount recoverable in execution of the decree or not. By requiring such deposit as a condition precedent to the admission of the appeal a new restriction has been put on the right of appeal the admission of which is now hedged in with a condition. There can be no doubt that the right of appeal has been affected by the new provision and in the absence of an express enactment this amendment cannot apply to proceedings pending at the date when the new amendment came into force. It is true that the appeal was filed after the Act came into force but that circumstance is immaterial for the date to be looked into for this purpose is the date of the original proceeding which eventually culminated in the appeal. This position is now firmly established by authorities both old and new to which I will presently refer. In the case of *Colonial Sugar Refining Company v. Irving*, at p. 372, Lord Macnaughten delivering the judgment of their Lordships of the Judicial Committee of the Privy Council said this:

> And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belong to him as of right is a very different thing from regulating procedure. In principle their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

13. In *Delhi Cloth and General Mills Co. v. Income-tax Commissioner, Delhi*[2], this principle was reaffirmed by their Lordships of the Judicial Committee and it was said that provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. In this case a right of appeal was conferred by a new statute which was held not to have

[2] AIR 1927 PC 242 : 1928-27-LW 179

retrospective operation. Lord Blannesbragh said this:

> Their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality orders which when the statute came into force, were final are provisions which touch existing rights.

14. In a recent decision of a Special Bench of this Court the learned Chief Justice delivering the judgment of the Court said that the reasoning of the Judicial Committee in Colonial Sugar Company's case (above referred to) was conclusive authority to show that rights of appeal were not mere matters of procedure and that the right to enter the superior Court was deemed to arise to a litigant before, any decision had been given by the inferior Court: see *Sheikh Sardar Ali v. Sheikh Dorluddin*[3]*,*

15. In *Attorney General v. Sillem*[4] Lord Westbury expressed himself thus on the question that the right of appeal was not a mere matter of procedure : his Lordship said this:

> The right of appeal is only by statute. It is not in itself a necessary part of the procedure in the action but is the right of entering a supreme Court and invoking its aid and interposition to redress the error of the Court below. It seems absurd to denominate this paramount right part of the practice of the inferior tribunal.

16. It is clear therefore that a change has] been effected with reference to the substantive right of appeal. There 'is no-thing in Section 174 (5) to suggest even by the plainest implication that the amendment was to operate retrospectively. There is no evidence of an intention on the face of the language of the proviso to make it retrospective.

17. It is argued however for the opposite party that the right of appeal is not taken away but only conditions are imposed on the exercise of the right. We can see no difference in principle between abolishing a right of appeal and putting a restriction on the right of appeal which had previously been unrestricted. Before the amendment an appeal had merely to be filed in proper form in order to be admitted but now unless the entire sum recoverable in execution is deposited the appeal will not be admitted. This imposes a new burden on the judgment-debtor seeking to set aside the sale. We think therefore that the order of the District Judge refusing to admit the appeal is wrong and he has declined to exercise a jurisdiction vested in him by law in not entertaining the appeal which he was bound to admit under the law prior to the amendment Act 4 of 1928. The order of the District Judge is set aside and he is directed to hear the appeal on the merits.

[3] AIR 1928 Cal 640: (1929) ILR 56 Cal 512

[4][1874] 10 H. L. C. 704