

CALCUTTA HIGH COURT

G.P. Stewart

Vs.

Brojendra Kishore Roy Chaudhury

(Narsingha Rau, J.)

24.05.1939

JUDGMENT

Narsingha Rau, J.

1. Appeal No. 91 of 1939 (F.M.A.) - This is an appeal from an order passed on 31st January 1939 by the Second Subordinate Judge, Sylhet. The appellant is the Collector and Deputy Commissioner of Sylhet in his capacity as manager of the estate of Kumar Gopika Raman Roy, a ward of Court under the Court of Wards, Assam. The respondent is Brojendra Kishore Roy Chaudhury of Gouripore in the District of Mymensingh in Bengal. The facts, so far as they are necessary for the purposes of this appeal, can be briefly stated: The respondent lent to the aforesaid Kumar various sums of money aggregating to Rupees seven lacs on five simple mortgage bonds and obtained a decree thereon for the sale of the mortgaged properties. On 16-11-1938 the learned Subordinate Judge, on an application by the Deputy Commissioner, Sylhet, stayed execution on the ground that the Court of "Wards in Assam had taken possession of the property of the mortgagor and that in consequence, Section 10-C inserted by the Assam Court of Wards Amendment Act, 1937 (which was passed by the Assam Legislature after 1st April 1937) operated as a bar to execution. Subsequently, there was an application on behalf of Brojendra Kishore Roy Chaudhury for review of the Subordinate Judge's order of 16th November 1938 on the ground, amongst others, that the aforesaid Section 10-C inserted by the Court of Wards Amendment Act did not and could not affect his right to proceed with the execution under the provisions of the Civil Procedure Code. On 31st January 1939, the Subordinate Judge granted the review, holding that the aforesaid Section 10-C was repugnant to certain "existing Indian laws" falling in the Concurrent Legislative List in Schedule 7, Government of India Act, 1935, and not having been reserved for the consideration, or received the assent of the Governor General as required by Section 107(2) of the said Government of India Act was void to the extent of the repugnancy by virtue of Section 107(1) of the same Act.

2. The main question raised before us in this appeal is on the constitutional point just mentioned, namely whether Section 10-C inserted by the aforesaid Assam Act is void. Before dealing with this question, it is necessary to dispose of certain preliminary points raised. It is contended by Dr. Basak on behalf of the appellant that the order granting the review was without jurisdiction, inasmuch as the case does not fall within the limits laid down by Order 47, Rule 1, Civil Procedure Code This Rule provides in effect that the application for a review must be based

upon: (i) the discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time when the original order was made; (ii) some mistake or error apparent on the face of the record or (iii) any other sufficient reason. In the present case we do not think that (i) or (ii) applies, but (iii) does. As interpreted by the Privy Council in *Chhajjuram v. Neki*¹ the expression "any other sufficient reason" occurring in this Rule means any other sufficient reason analogous to those specified immediately previously, that is to say to excusable failure to bring to the notice of the Court new and important matter. We find that in this case there was sufficient reason of this kind. Assuming for the moment that the impugned Assam Act needed the Governor-General's assent to make it completely effective it was a natural presumption for anybody to make that the necessary assent had been obtained. It is true that if the applicant for review had taken care to study all the Assam Gazette notifications that appeared from time to time, he would have noticed that in the Gazette of 17th November 1937, the Act in question had been notified as having received the Governor's assent on 5th November 1937. From this he could have inferred had he been familiar with the provisions of the new Government of India Act relating to assent and reservation, that the Assam Act had neither been reserved for the consideration of the Governor-General nor received the Governor-General's assent. We cannot however hold that his failure to infer this omission and immediately to see its consequences was inexcusable. The new Government of India Act is a long and complicated measure which came into operation comparatively recently (on 1st April 1937); even the Courts have not yet had time to familiarize themselves with its provisions, much less the ordinary citizen. We think therefore that the learned Subordinate Judge had jurisdiction to entertain the application for review.

3. The second preliminary point which arises in this case is based upon a fact which we ourselves noticed for the first time during the hearing of the appeal. The Assam Act containing the impugned Section 10-C received the Governor's assent on 5th November 1937; but it did not, merely on this ground, come into force on that date. The Act contains a special commencement clause; Section 1(3) provides that it shall come into force on such date as the Provincial Government may, by notification in the local official Gazette, appoint in this behalf. Nothing appears to have been done under this provision until in the Assam Gazette of 12th January 1938 it was notified that "the Governor directs that the Act shall come into force from 5th November 1937." The question arises whether a notification of this kind appointing a date for the commencement of the Act earlier than the date of the notification itself was *intra vires*. To use a convenient term, is a retrospective notification of this kind *intra vires*? The usual rule that an Act is not to have retrospective operation unless the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language does not in terms apply to the present case. The question here is whether a notification under the Act, rather than the Act itself, can have retrospective effect. It seems to us that the same considerations that have led to the enunciation of the rule against retrospective operation of statutes would also lead to the adoption of a similar rule in the case of statutory notifications. That is to say, unless the parent Act itself clearly authorizes the issue of a notification with retrospective effect, it must be presumed that such a notification is forbidden. It is seldom that retrospective notifications are contemplated; and on the rare occasions when they are contemplated, it is usual to say so plainly. Thus, in Section 1, Transfer of Property Act,

¹9 A.I.R. (1922) P.C. 112

1882 power is given to any Provincial Government from time to time by notification in the official Gazette to exempt "either retrospectively or prospectively" any part of the province from

certain specific provisions of the Act. Similarly in Section 3, Succession Act, 1925, power has been given to the Provincial Government by notification in the Gazette "either retrospectively from 16th March 1865, or prospectively" to confer exemptions from the operation of certain specified provisions of the Act. There is no similar provision in the impugned Assam Act, as regards the notification under Section 1(3). On the contrary, the nature of some of the provisions of the Act is such that a retrospective notification cannot have been in the contemplation of the Legislature. To take an example, the new Section 10-G debars execution of decrees against a ward for a certain period of years; supposing the Assam Government did nothing under Section 1(3) for a whole decade after the passing of the Act and then suddenly issued a notification bringing the Act into operation retrospectively from 5th November 1937, what would be the effect on any executions already levied? The very fact that the Act contains no provision on this point is an indication that such a notification was not intended by the Legislature.

4. Another argument pointing to the same conclusion is furnished by the very existence of Section 1(3). Let us consider what the position would have been without this subsection. Under Section 5, Assam General Clauses Act, 1915, as modified by the Government of India (Adaptation of Indian Laws) Order, 1937, where an Assam Act is not expressed to come into operation on a particular day then, if it is an Act of the Legislature, it shall come into operation on the day on which the assent thereto of the Governor is first published in the official Gazette. Therefore, it would have been within the power of the Provincial Government to bring the impugned Act into operation on any date of its own choice by the simple device of notifying the Governor's assent on the desired date. Thus, if the Provincial Government desired to bring the Act into operation on 5th November 1937 itself, (which was the date on which the Governor assented to the Act) the Gazette notification intimating the fact of assent could have been published on that very date; if it was desired to bring the Act into operation on some subsequent date, the Gazette notification of the assent would have been delayed until such subsequent date. Therefore even without Section 1(3) it was within the power of the Provincial Government, by suitably regulating the publication of the Governor's assent, to bring the Act into operation whenever it chose. What then could have been the intention of Section 1(3)? It could only have been this: The Legislature considered that it would be a hardship to the general public if the first intimation of the Governor's assent to the new Act was also to be the date of its commencement. Therefore by way of allowing a breathing space, the Legislature enacted Section 1(3) empowering the Provincial Government by notification in the Gazette to appoint a suitable date for the commencement of the Act. But what the Assam Government did in this particular case was exactly the reverse of what we think was intended by the Legislature. The Governor assented to the Act on 5th November 1937. This assent was first intimated to the public by a Gazette notification of 7th November 1937; but instead of allowing a breathing space, the Gazette notification of 12th January 1938 appointed, as the date of commencement of the Act, not a subsequent date but a previous date, namely 5th November 1937. To uphold this notification in its entirety would be to defeat what we consider to have been the plain intention of the Legislature.

5. For all these reasons we hold that the aforesaid notification of 12th January 1938 was ultra vires. The question however arises whether even so the whole of the notification must be rejected or whether it is open to us to sever it and say that it is bad only as to the period between 5th November 1937 and 11th January 1938 (inclusive) and good as to the period thereafter. No

reported decision exactly in point has been cited to us, but our attention has been invited to the case, *Johnson v. Sargant & Sons*² where an order made by the Food Controller, though dated 16th May 1917, was held good as from 17th May 1917, on the ground that it first became known to the public on the latter date. As we have already said the case is not exactly similar; but it does show that where a statutory order is made on a certain date, Courts can sever it and give effect to it as from a sub-sequent date, on the ground that it was not known to the public until the latter date. In the case before us, the impugned Act was not known to the public as being in force until 12th January 1938, therefore on the above principle we can give effect to it as from that date instead of 5th November 1937 which is the date mentioned in the Assam Government's notification. So long as the notification can be severed in this way, it seems to us immaterial that the rejected part is bad not only for the above reason but also as being ultra vires. Accordingly we hold that the Assam Act in question has been in operation from 12th January 1938.

6. There is one other preliminary point that requires to be noticed before we take up the main question raised in this appeal. It is contended before us on behalf of the respondent that once we hold, as we have held, that the Subordinate Judge's order granting the review was an order within his jurisdiction, no appeal against that order lies except on the limited grounds mentioned in Order 47, Rule 7(1), Civil Procedure Code. We do not think that this objection is sustainable, for the result of the review was that the application of the Deputy Commissioner, Sylhet, for a stay of the original execution proceedings was rejected. Indeed, this was what the Subordinate Judge said in the last part of his order of 31st January 1939. This part of the order, determining, as it did, a question within Section 47, Civil Procedure Code relating to the execution of the decree was itself a "decree" with, in the meaning of Section 2(2) of the Code. Therefore an appeal lies from it as from a decree and consequently it can be attacked upon any ground which the appellant chooses to take.

7. We now turn to the real question in this appeal, namely how far the new Section 10-C is operative. The new Section must be read along with the Sections that precede and follow, all of which have been considerably modified by the amending Assam Act in question. We may explain at the outset that the Court of Wards Act in force in Assam is the Bengal Court of Wards Act, 1879 with certain modifications. The only provisions of that Act which are relevant for the purposes of this appeal are Section 10-A, Section 10-B, Section 10-C and Section 10-D. Prior to their amendment by the impugned amending Act the effect of these Sections was briefly as follows: Section 10-A provided that whenever a Court of Wards assumed charge of any person or property, it was to publish a notice calling upon all creditors having claims against the ward or his immovable property to submit them in writing to the Court of Wards. The Court of Wards was also to make on its own motion such enquiry as it thought fit to ascertain the particulars of all claims against the ward or his property. The Court of Wards was then to frame a schedule

²(1918) 1 K.B. 101

of all claims submitted by creditors or ascertained by enquiry. Section 10-B provided that every creditor submitting a claim was to furnish full particulars thereof. Section 10-C provided:

If a Civil Court has directed any process of execution to issue against any immovable property of a ward or the rents thereof or any crops standing thereon, the Court of Wards may, at any time within one year after it assumes charge of such property, apply to the Civil Court to stay proceedings in the matter of such process; and the Civil Court may, on

such terms regarding interest or compensation for delay as may appear to be just and reasonable, stay such proceedings for such period as it may deem fit.

8. Finally, Section 10-D provided that on the framing of the schedule under Section 10-A, the Court of Wards was to proceed to investigate the claims and to decide which of them were to be wholly or partly admitted or wholly or partly rejected and to communicate its decision in writing to each claimant concerned. These Sections should be read with the old Section 48 dealing with the application of the income of the ward's estate. It provided, inter alia, that the liquidation of debts payable by the ward was, subject to certain rules of priority as regards Crown dues, etc. one of the purposes to which the income of the estate was to be applied. The scheme underlying all these provisions was evidently that the Court of Wards should itself ascertain the debts of the estate and provide as far as possible for their repayment without undue interference from the Civil Courts, these Courts being given a judicial discretion by the old Section 10-C to stay their hand for such period as they might think fit. Subject to these provisions, the law that applied to the execution of decrees against wards of Court was the general law contained in the Civil Procedure Code. Two provisions of this general law require particular notice. First, Section 51, Civil Procedure Code which states that subject to such conditions and limitations, as may be prescribed (by Rules under the Code), the Court may on the application of the decree-holder order execution of the decree by one of certain specified methods. Then we have Order 21, Rule 24 which states that when certain preliminary measures have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree. The result of these general provisions was that save as provided by the old Section 10-C, Court of Wards Act, a Civil Court was normally bound to order execution upon the application of the decree-holder. This was the "existing Indian law" within the meaning of Section 311(2), Government of India Act, 1935, when the impugned Assam Act came into operation. This amending Act, amongst other things substituted new Sections 10-A, 10.C and 10-D for the old Sections and modified Section 10-B. The new Sections 10-A and 10-D as well as the modified Section 10-B require little comment. Although they make certain changes in the old Sections, they substantially retain the old procedure whereby the Court of Wards was to notify the creditors, investigate their claims and decide which of them were to be admitted and to what extent. The new Section 10.C, however, requires to be set out in full:

(1) Where any property is in charge of the Court of Wards no civil Court shall execute any decree or order against the person or property of the ward within four years from the date of the commencement of the Assam Court of Wards (Amendment) Act, 1937, or from the date of the assumption of charge of the property by the Court of Wards, whichever is later, and for seven years thereafter if the interest due under such decree or order be paid in full every year during the said seven years. In calculating the period of limitation applicable to an application for the execution of a decree or order, the time during which the execution of such decree or order is barred under this subsection shall be excluded.

(2) Except as provided in Section 203-A (sic) no property in charge of the Court of Wards shall be sold by any revenue authority under any law so long as the Court remains in charge thereof.

9. It will be seen that the new Section 10.C altogether prohibits a Civil Court from executing any

decree against the ward for a certain specified period, whereas under the old Section 10.C the Court had only a judicial discretion to stay proceedings on terms. It is to be noticed further that the amending Act made a slight change in the old Section 48 by providing specifically for the payment of interest at not more than 4-1/2 per cent, per annum on all debts incurred by the Court of Wards on behalf of the ward (vide Clause 2 under Class II of the new Section 48). It is clear that if the new Section 10-C is operative and if it was in operation, as we have held, at least from and after 12th January 1938 the execution proceedings applied for by the respondent in July 1938 cannot go on, in view of the bar imposed by the Section. Is the new Section 10-C operative? The contention of the respondent is that it is not. The argument is that it is repugnant to certain "existing Indian laws," namely, old Section 10-0, Court of Wards Act, itself and Section 51 as well as Order 21, Rule 24, Civil Procedure Code with respect to one of the matters enumerated in the Concurrent Legislative List, namely, Civil Procedure, and is consequently void under Section 107(1), Government of India Act, 1935, not having received the Governor-General's assent under Section 107(2). This raises constitutional issues of great importance, both as to the meaning of "repugnancy" in Section 107 and as to the true content of the entry "Civil Procedure" in the Concurrent Legislative List.

10. Meaning of "repugnancy." - It is sometimes said that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says "do" and the other "don't," there is no true repugnancy, according to this view, if it is possible to obey both the laws. For reasons which we shall set forth presently, we think that this is to narrow a test: there may well be cases of repugnancy where both laws say "don't" but in different ways. For example, one law may say "No person shall sell liquor by retail, that is, in quantities of less than five gallons at a time" and another law may say, "No person shall sell liquor by retail, that is, in [quantities of less than ten gallons at a time." Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely the second one; yet it is equally obvious that the two laws are repugnant, for to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified. This was the type of repugnancy that arose for consideration in *Attorney general for Ontario v. Attorney General for Dominion of Canada*³ The Canada Temperance Act, 1886, (a Dominion Act) contained one set of prohibitions, while the Ontario Act, 53 Viet. c. 56 (a Provincial Act), contained another and a rather different set. Their Lordships of the Judicial Committee of the Privy Council held that where the prohibitions of the Dominion Act were or might be in actual operation the Provincial Act was or would be inoperative by reason of repugnancy; but where the former were not in actual operation (by reason of their not having been locally adopted), there could be no repugnancy (pp. 369, 370 loc cit.). The question of repugnancy or

³(1896) A.C. 348

inconsistency has arisen and been considered in several Australian cases, with reference to Section 109, Commonwealth of Australia Constitution Act which provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall to the extent of the inconsistency be invalid. (A summary of the cases will be found in Wynes's Legislative and Executive Powers in Australia; and in Street on Ultra Vires.) In the earlier cases *Federated Saw Mills & c. Employees v. Moore*⁴ *Australian Boot Trade Employees v. Whybrow*⁵ *Federated Engine Drivers & c. of Australia v. Adelaide Chemical and Fertiliser Co*⁶. the test of inconsistency adopted was whether it was possible to obey both the competing laws. But in the case in *Clyde Engineering Co. v. Cowburn*⁷ where the conflict was between an award of the Conciliation Court providing for a working week of 48 hours and a New South Wales Act

providing for payment of overtime for any work in excess of 44 hours, it was recognized that the test was too narrow. Isaacs J. observed that two statutes imposing respectively twenty and twenty-five lashes for robbery might in a sense be both obeyed by infliction of forty-five lashes and he therefore propounded a more satisfactory test thus:

If however a competent Legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another Legislature assumes to enter to any extent upon the same field: (page 490 loc. Cit.)

11. It is unnecessary to mention all the subsequent Australian cases where this test was adopted we content ourselves with citing only *Ex parte Molean Re Firth* (1930) 43 C.L.R. 472 where Dixon J. observed that inconsistency depends on the intention of the paramount Legislature to express by its enactment completely, exhaustively, or exclusively what shall be the law governing the particular conduct or matter to which its intention is directed. When a Federal Statute discloses such an intention it is inconsistent with it for the law of a State to govern the same conduct or matter.

12. In Canada, of course, apart from a few exceptional provisions, such as those relating to agriculture and immigration, the Constitution Act itself does not confer any concurrent powers of legislation. There are only two legislative lists, but it has been settled by a long line of Privy Council decisions that there can be a domain in which provincial and dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear, but that if the field is not clear and in such a domain the two legislations meet, then the dominion legislation must prevail: *Grand Trunk Railway of Canada v. Attorney-General of Canada*⁸.

13. Once again therefore we are led to the same test as that propounded by Isaacs J.: "Is the field completely occupied by the dominant Legislature?" In England, the question of repugnancy has been considered chiefly in relation to byelaws and the general law of the land, a byelaw being treated as ultra vires if it is repugnant to the general law. In *Gentel v. Rapps*⁹ meaning of repugnancy thus is not repugnant to the general law merely because it created a new offence and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes unlawful that which the general law says is lawful. It is repugnant if it expressly or by necessary implication professes to alter the general law of the land. I say by necessary implication' because I

⁴8 C.L.R. 465

⁶28 C.L.R. 1

⁸(1907) A.C. 65

⁵10 C.L.R. 266

⁷37 C.L.R. 466

⁹(1902) 1 K.B. 160

have in mind the cases with respect to bye-laws prohibiting persons from travelling on railways without a ticket. In those cases bye-laws which impose the same penalty as the general law without making a fraudulent intention part of the description of the offence have been held to be bad, because the statute creating the offence says that there must be a fraudulent intention on the part of the person charged with travelling without a ticket and the bye-law therefore by implication alters the general law. Again, a bye-law is repugnant if it adds something inconsistent with the provisions of a statute creating the same offence; but if it adds something not inconsistent, that is not sufficient to make the bye-law bad as repugnant.

14. All these propositions are really reducible to the single test of the 'occupied field,' for in the first and the last illustrations, the ground not being covered by the general law, there is no

repugnancy and in the others, the ground is already covered, so that the bye-law is repugnant. In *Strickland v. Hayes*⁹ a bye-law which provided that no person shall use profane language in any street was held to be bad, because the general law, namely the Town Police Clauses Act, 1847, dealing with precisely the same subject, required that annoyance should be caused by the language used in order that there might be an offence. In *Thomas v. Sutters*¹⁰ a bye-law that no person shall frequent or use any street for the purposes of betting was held to be good and not repugnant to the general law, the Metropolitan Streets Act, 1867, Section 23 of which provided that any three or more persons assembled together in any part of a street for the purpose of betting shall be liable to a penalty. The ground of the decision was in effect that the general law in this case did not occupy the same field as the bye-law; the one was concerned with the subject of street obstruction and the other with that of betting. In *Gentel v. Rapps*¹¹ a bye-law providing that no person shall use offensive language in a tramcar was held to be consistent with the Town Police Clauses Act, 1847, which punished any person who in any street used offensive language to the annoyance of the residents or passengers, because the latter law (relating, as it did, to nuisances in streets) did not intend to deal with or affect the power to make bye-laws under special circumstances and dealing with particular places (namely bye-laws relating to nuisances in tramcars. The principle deducible from the English cases, as from the Canadian cases, seems therefore to be the same as that enunciated by Isaacs J. in the Australian 44 hour case *Clyde Engineering Co. v. Cowburn*¹² if the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and therefore inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law. Content of the entry relating to "Civil Procedure" in the Concurrent Legislative List. - The first part of the fourth entry in the Concurrent Legislative List in Schedule 7, Government of India Act, 1935, reads:

Civil Procedure, including the law of Limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act....

15. Some difficulty is created by the last part of this item:" all matters included in the Code of Civil Procedure, etc." It so happens that the Code contains certain provisions relating to the jurisdiction and powers of Courts, e.g. see Part 1 of the Code. Sections 9-25 dealing with "jurisdiction and res judicata," Section 42 dealing with the powers of

⁹(1896) 1 Q.B. 290

¹¹(1902) 1 K.B 160

¹⁰(1900) 1 Ch. D. 10

¹²37 C.L.R. 466

Courts in executing transferred decrees, Section 75 dealing with the power of Courts to issue commissions, and so on. But merely because of this, it does not follow that "Civil Procedure" in the Concurrent Legislative List includes everything relating to the jurisdiction and powers of Courts. So to hold would be completely to wipe out the second entry in the Provincial Legislative List "jurisdiction and powers of all Courts except the Federal Court with respect to any of the matters in this list." It is true that where a subject might fall either in the Concurrent Legislative List or in the Provincial Legislative List, Section 100 makes the former the dominant list; but this principle cannot apply where the result would be to rob the Provincial entry of all its content. In Canada, for example, "Marriage and Divorce" is in what we may call the Federal List, which by virtue of Section 91, British North America Act, is the dominant list, but "the solemnization of marriage in the Province" is in the Provincial List. If the Federal entry were held to include every thing appertaining to marriage or divorce, the Provincial entry would be reduced to a cipher. Accordingly it was held in *In re Marriage Reference*¹³ that the entry in the Federal List relating to

marriage and divorce must be held to exclude matters relating to the solemnization of marriage in each Province. The position is similar here. "Civil Procedure" in the Concurrent Legislative List must be held to exclude matters relating to jurisdiction and powers of Courts, since special provision is made for these matters elsewhere in the lists. The provisions of the Civil Procedure Code itself, whether they are "Civil Procedure" in this limited sense or not, are of course specifically included in the fourth entry of the Concurrent Legislative List. But we consider that there is, no warrant for including in that entry any provisions which are not in the Code and which do not appertain to "Civil Procedure" in the limited sense explained above.

16. We can now proceed to deal with the question of repugnancy raised in this appeal. So far as the new Section 10-C, Court of Wards Act, is said to be repugnant to the old Section 10-C of the same Act, the answer is obvious. The old Section 10-C dealt with a discretionary power of the Civil Courts to stay certain proceedings on the application of the Court of Wards. Clearly, this is a matter relating to the power of Courts in respect of a Provincial subject, namely the Court of Wards. Therefore it falls in entry 2 of the Provincial Legislative List read with entry 21 of the same list. It is not "Civil Procedure" in the limited sense which we have said must be given to that term, and it is not a provision occurring in the Code of Civil Procedure. We have therefore here a matter which does not fall at all in the fourth entry of the Concurrent Legislative List but which falls entirely in the Provincial Legislative List, entries 2 and 21. Consequently Section 107, Government of India Act, 1935, has no application so far as this particular repugnancy is concerned.

17. We have now to consider whether the impugned Section is repugnant to Section 51 or Order 21, Rule 24 or, indeed, any other provision of the Civil Procedure Code. For this purpose, we have to inquire whether these provisions of the Civil Procedure Code were intended to be exhaustive and to lay down the whole of the law on the subject with which they deal. Section 4 of the Code leaves no doubt on this point. Far from intending to be the whole law on the subject, the Code says in Section 4 that in the absence of any specific provision to the contrary, nothing in the Code shall be deemed to limit or otherwise affect any special or local law in force at the date of the commencement of the Code or any special jurisdiction or power conferred or any special form of procedure

¹³(1912) A.C. 880

prescribed by or under any other law for the time being in force. We have already pointed out that the impugned Section 10-C, Court of Wards Act, is one of a group of Sections which may be said to confer a special jurisdiction or power upon the Court of Wards to ascertain and provide for the repayment of debts due from an estate under the Court of Wards. The conferring of any special jurisdiction or power necessarily includes the taking away of the ordinary jurisdiction or power belonging to the ordinary tribunals, in order that it may not hamper the exercise of the special jurisdiction or power. The new Section 10-C takes away for a certain limited period the ordinary power, which until then the Civil Courts had, to execute decrees against the person or property of wards of Court. It seems to us therefore that this Section far from being repugnant to the Code, does something which is plainly permitted by Section 4 of the Code itself. We are therefore of opinion that there is no repugnancy here.

18. It appears to have been argued in the lower Court that the new Section was also repugnant to certain provisions of the Transfer of Property Act, particularly Sections 58(b) and 67. These Sections do not seem to us to have anything to do with the execution stage of a mortgage decree

and in fact this point has been abandoned in the course of the hearing of the appeal. The point was also taken both in the Subordinate Judge's Court and before us that para. 2 of Sub-section 1 of the new Section 10-C, which provides that in calculating the period of limitation applicable to an application for execution of a decree or an order, the time during which the execution of such decree or order is barred under the subsection shall be excluded, is repugnant to the Limitation Act, 1908. We are, however, not concerned with this paragraph in the present case. Even assuming that it is repugnant and inoperative, it still leaves para. 1, which is clearly severable and with which alone we are concerned in the present appeal. We do not, therefore, think that the question of repugnancy so far as the Limitation Act is concerned arises at all in the present appeal.

19. In the result we hold that the impugned Section 10-C inserted in the Court of Wards Act, in force in Assam by the Assam Court of "Wards (Amendment) Act, 1937, is not void by reason of anything contained in Section 107, Government of India Act, 1935. We accordingly allow this appeal, set aside the Subordinate Judge's order of 31st January 1939, and restore his order of 16th November 1938. In all the circumstances of the case we direct that the parties bear their own costs of this appeal.

20. Appeal No. 92 of 1939 (F.M.A.) - As we have allowed appeal No. 91 of 1939 (P.M.A.) and restored the Subordinate Judge's order of 16th November 1938, it follows that the execution proceedings started by the respondent in July 1938 cannot go on. Therefore no question of appointing a Receiver arises. The Subordinate Judge's order of 31st January 1939, which is the subject-matter of this appeal, must therefore be necessarily set aside, except in so far as it relates to the discharge of the then Receiver, We make no order as to costs.

21. Appeal No. 226 of 1938. - This appeal raises the same questions as Appeal No. 91 of 1939 (F.M.A.), although the parties are different and the judgment appealed from is in different terms. We dismiss the appeal but make no order as to costs. In all these three appeals, substantial questions of law as to the interpretation of the Government of India Act, 1935, are involved and we accordingly grant certificates in terms of Section 205(1) of that Act.

R.C. Mitter, J.

22. I agree.