CALCUTTA HIGH COURT

Satish Chandra Hui

Vs

Sudhir Krishna Ghosh

(B.K. Mukherjea, J.)

27.02.1942

JUDGMENT

B.K. Mukherjea, J.

1. The questions involved in this appeal relate to the newly enacted Section 168A, Ben. Ten. Act, inserted by the Bengal Council Act 18 of 1940 (The Bengal Tenancy (Amendment) Act, 1940), which came into force on 9th January 1914. The decree in question is for arrears of rent due in respect of a patni tenure held under tauzi No. 2409 of the Midnapur Collectorate. The entire patni was sold away by the defendant patnidars in 1938 (1344-45 B.S.) in fractional portions. The suit for the arrears of rent due for the period from 1342 B.S. to Falgoon 1345 B.S. was instituted by the decree-holders against the present defendants on 26th March 1939. In this suit the transferees of the patni were not made parties. The tauzi was sold away for arrears of revenue on 24th June 1939. In the rent suit the defendants inter alia took the plea, that as the patni has been sold away by them they were no longer liable for the arrears. This defence was overruled and the suit was decreed on 14th May 1940. The present application for execution of this decree was made on 21st June 1940. The relief that was prayed for in this application was the realization of the decretal amount by attachment and sale of certain immovable properties belonging to the judgment-debtors 6 to 9. These are properties other than the tenure in arrears. The attachment was effected by 21st December 1940. On 16th January 1941 the judgment-debtors 6 to 9 filed their present objections objecting to the attachment and sale of the properties in view of the new Section 168A, Ben. Ten. Act. The learned, Subordinate Judge by his order dated 15th January 1941 overruled these objections. The present appeal is by defendants 6 to 9 and is directed against this order.

2. Before the learned Subordinate Judge, the decree-holders contended: (1) That the new Section 168A, Ben. Ten. Act, was ultra vires of the Bengal Legislature; (2) That the section was not applicable to putni tenures; (3) That the provisions of Clause (a) of Section 168A (1) were not

applicable as the putni tenure was no longer available for the realisation of the decretal dues (a) it having been sold away by the putnidars; (b) it having been annulled under Section 37 of the Revenue Sale Law by the purchaser of the tauzi at the revenue sale. The learned Subordinate Judge overruled the first two contentions of the decree-holders, but upheld the third one and on this ground-overruled the objection of the judgment-debtors. Mr. Sen appearing in support of the appeal contends: that on a proper construction of the new Section 168A, Ben. Ten. Act, execution of the decree by the attachment and sale of the disputed properties is prohibited by Clause (a) of its Sub-section (1) and that the present case is not covered by the excepting proviso to this clause. According to Mr. Sen, Section 168A(1)(a), Ben. Ten. Act, apart from the "proviso", contains a prohibition for the execution by attachment and sale proceeding against any moveable or immovable property other than the tenure or holding in default; that the proviso to Clause (a) is an excepting one and is limited in the operation only to tenancies for a term of fixed periods; that in any case the exception in the proviso applies only when the tenancy itself is extinguished in" any manner other than by surrender; that in the particular case the sale of the tauzi having been Under Section 13 of the Revenue Sale Law, the tenure did not become liable to annulment, and, consequently, as it still subsists, the prohibition contained in Clause (a) of Section 168A shall apply.

3. Mr. Gupta appearing for the respondent on the other hand contends: (i) that Section 168A(1), Ben. Ten. Act, standing by itself and apart from the qualifying proviso, prohibits execution by attachment and sale of any moveable or immovable property other than the defaulting tenure or holding only when the defaulting tenure or holding is still available for the execution of the decree; (ii) that in any case the proviso withdraws the prohibition enacted in Clause (a) as soon as the judgment-debtor's interest in the tenancy ceases to exist; (iii) that in any case the entire tauzi having been sold under the Revenue Sale Law the purchaser thereof became entitled to annul the tenure under Section 37 of the Revenue Sale Law and as a matter of fact did annul the same; consequently the tenure itself has expired. Mr. Gupta further seeks to support the final order of the Court below on the grounds: (1) that the new Section 168A, Ben. Ten. Act, is void under Section 107(1), Government of India Act, being repugnant to the provisions of the existing Indian law, namely (a) Section 51, Civil P.C., (b) Sections 2 and 3 of the Putni Regulation (2) that at any rate the section is controlled by Section 195 (e), Ben. Ten. Act, and consequently cannot affect the putni tenures.

4. In our opinion the learned Subordinate Judge fell into an error as to the effect of the revenue sale of the tauzi held in this case. We have examined all the relevant documents relating to this sale and in our opinion it was a sale of the shares of the tauzi under Section 13 of the Revenue Sale Law and consequently by it under Section 54 of the Revenue Sale Law the purchaser failed

to acquire any rights which were not possessed by the previous owners of the tauzi. Such a purchaser did not acquire any right to annul the tenure. In our opinion there is also no substance in the contention raised by Mr. Gupta that the operation of the section is withdrawn from the putni tenures by reason of Section 195(e), Ben. Ten. Act. The relevant portion of Section 195, Ben. Ten. Act, runs as follows: Nothing in this Act shall affect * * * *

(e) any enactment relating to patni-tenures in so far as it relates to those tenures....

5. Section 168A(1) makes its provisions applicable: "Notwithstanding anything contained elsewhere in this Act, or in any other law, or in any contract." Two questions will arise as to the relative operation of these two sections, namely, (1) whether there is anything in Section 168A which can be said to affect any enactment relating to putni tenures (say, the Putni Regulation of 1819); (2) if so, which of the two sections will be the controlling one.

6. In our opinion there is nothing in Section 168A which can be said to affect the Putni Regulation itself. No doubt it affects the putni-tenures. But as there is nothing in the Putni Regulation relating to the execution of any decree for arrears of rent due in res-peat of the putni and as Section 168A only gives certain special provisions relating to such execution, the provisions contained in the Putni Regulation are not affected by Section 168A, Ben. Ten. Act. In this view the second question on the point, namely whether or not Section 168A will be controlled by Section 195(e) does not fall to be examined at all in this case. The substantial questions to be decided in this case therefore are: (1) the meaning and scope of the new Section 168A, Ben. Ten. Act, and (2) whether it is void to any extent under Section 107(1), Government of India Act, 1935. As to the scope and meaning of Clause (a) of Section 168A, apart from the qualifying proviso we are inclined to the view contended for by Mr. Sen. The relevant portion of the clause runs as follows: "a decree for arrears of rent due in respect of a tenure or holding...shall not be executed by the attachment and sale of any moveable or immovable pro-property other than the entire tenure or holding to which the decree...relates." As the clause stands, execution by the attachment and sale of 'any...property' other than the defaulting tenure is prohibited. No other property moveable or immovable, other titan the defaulting tenure, can be taken in execution by the attachment and sale. The language in this part of the section seems to bear no other meaning and in our opinion it is not open to us to strain this language so as to fit in with any supposed intention of the Legislature. It is true that the doctrine of judicial interpretation of a statute will be pushed to an unreasonable extreme if we follow the doctrine of the strictest literal interpretation--if we accept the maxim, 'Ita Scriptum est,' in its unqualified and rigid meaning. No language is so perfect, and perhaps no legislation is so skilful that this mode of interpretation may not often lead to absurdities and thus defeat the true purpose of the Legislature. At the same time, we must also avoid the opposite extreme of disregarding the letter

of the law in order to seek elsewhere a rule that may appear to us more consonant with the supposed justice or the supposed intention of the Legislature.

7. If the words of the law can be given an unnatural meaning, if words can be read into a statute which are not expressed therein, or disregarded as inoperative although they appear therein, if the Courts are at liberty to adopt as law that which the Legislature is supposed to have meant rather than that which it has actually said, there are few statutes which would be proof against the dissolving influences of this form of interpretation and the Courts instead of being bound by fixed rules of law made for them would in effect be at liberty to legislate for themselves and to substitute, under the guise of interpretation, the 'arbitrium judicis' for the 'lex 'scripta.' It is not the business of the Courts to be wiser than the laws and to mould them into conformity with their views of what is just or unjust. As the section stands, it cannot be made to mean "shall not be executed by the attachment and sale of any moveable or immovable property so long as the tenure or holding is still available for execution." It plainly and clearly prohibits execution by the attachment and sale of any moveable or immovable property other than the entire tenure or holding to which the decree relates. Execution by the attachment and sale of any moveable or immovable property other than the tenure or holding is prohibited in an unqualified manner, and apart from the qualification enacted by the proviso, the prohibition applies, whether or not the tenure or holding is still in existence or is still available for execution. It is the proviso to the section which brings in the question of qualification of the wide provision of Clause (a).The proviso runs as follows: Provided that the provisions of this clause shall not apply if, in any manner other than by surrender of the tenure or holding, the term of the tenancy expires before an application is made for the execution of such a decree or certificate.

8. This is an excepting or qualifying proviso, and, is to except out of the preceding portion of the enactment or to qualify something enacted therein, which but for the proviso would be within it. The expressions used in this proviso are not quite happy and the meaning of the proviso can not be said to be plain. Mr. Sen contends that the word 'term,' which means 'the fixed period for which a right is to be enjoyed,' confines the operation of this proviso only to the cases where the tenancy in question was for a certain term of period and that period has expired. But then, in that case the words, 'in any manner other than by surrender, etc' will have no meaning. Here is a case where the 'litera legis' is defective--the language used is ambiguous. The word 'term' means 'boundary' 'limit' especially of time; the word 'expire' means 'die out,' 'become extinct' 'come to an end.' If the word 'term' used in the expression 'the term of the tenancy' be taken to mean and refer to the limit of time in respect of the tenancy and thus to mean only "the fixed period for which the tenancy right is to be enjoyed," then the word 'expire can only apply when that period is over. The 'term' in this sense cannot 'expire' in any other manner. It does not 'expire' by 'surrender.' Of

course a tenancy including a tenancy for a term, may come to an end by surrender and in many other manners. If, therefore, we take the words 'the term of the tenancy' to mean the tenancy in the tenure or holding, then none of the words appearing in the proviso will have to be disregarded. This meaning will not render the word 'term' also a surplus age. Its use will be pertinent to mean and refer to the tenancy itself as distinguished from any particular tenant's interest in it. Evidently the word 'expire' taken along with the words 'in any manner other than by surrender' was intended to bear the meaning of 'extinguishment.' Even in the ease of a tenancy for a certain fixed period, though the term does not expire by surrender, the tenancy may come to an end by such surrender. Such a tenancy also may come to an end in some other manner. In our opinion, therefore, reading the entire proviso together, the words 'the term of the tenancy expires' do not limit the operation of the proviso only to tenancies for a certain period. These words apply to all the tenures and holdings contemplated by Clause (a), but, in our opinion, mean and refer to the extinction of the tenancy itself and not merely of the judgment-debtors' interest in the same. Reading Clause (b) and Sub-section (3) of Section 168A it seems amply clear that the Legislature intended, that the execution should proceed primarily against ' the defaulting tenure or holding, and in our opinion the proviso to Clause (a) was enacted to withdraw the prohibition contained in clause (a) only when this primary source of realisation of the decretal amount was no longer in existence. It may be remembered that so long as the tenancy is not extinct, it can, ordinarily be made available for the realisation of its arrears by the landlord. In our opinion, therefore, (i) the proviso is not limited in its operation: only to the cases where the defaulting tenancy is one for a fixed period, but extends to all classes of tenures or holdings; (ii) the words 'term of the tenancy expires' mean and refer to the extinction or cessation of the tenancy itself and not merely, of the interest of the judgment-debtor in the tenancy. In the facts of the present case the term of the tenancy in question has not expired within the meaning of the proviso and consequently the prohibition enacted in Clause (a) of Section 168A(1), Ben. Ten. Act, shall apply to this case unless it is void under Section 107(1), Government of India Act, as contended for by Mr. Gupta. The relevant portion of Section 107(1); Government of India Act, 1935, runs as follows: If any provision of a Provincial law is repugnant...to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to this-provisions of this section... the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy be void.

9. Sub-section (2) of the section lays down how; with the assent of the Governor-General or of His Majesty, such repugnant Provincial law shall prevail in the Province. Section 168A, Ben. Ten, Act, has been inserted in the Act by Section 5, Ben. Ten. (Amendment) Act, 1940 (Bengal Council Act 18 of 1910). This Act was enacted by the Provincial Legislature of Bengal and no assent of the Governor-General or of His Majesty was received as contemplated by Section

107(2), Government of India Act. 'Provincial law' is defined in Section 31X, Government of India Act, 1935, to mean "an Act passed or law made by a Provincial Legislature established under this Act." 'Existing Indian law' is defined by the same section to mean any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part III of this Act by any Legislature, authority or person in any territories for the time being comprised in British India, being a Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation.

10. Section 168A, Ben. Ten. Act is a 'Provincial law' within the meaning of the above definition, Mr. Gupta contends: (1) that its provisions are repugnant (a) to the provisions contained in Section 51, Civil P. 0., as also (b) to the provisions contained in Sections 2 and 3 of the Putni Regulation; (2) that the provisions contained in Section 51, Civil P.C., as also those contained in Sections 2 and 3 of the Putni Regulations are provisions of existing Indian laws: (3)(a) that the provision in Section 51, Civil P.C., is with respect to one of the matters enumerated in the Concurrent Legislative List, namely its items 4 and 15; (b) that the provisions in Sections 2 and 3 of the Putni Regulation are also with respect to one of the matters enumerated in the Concurrent Legislative List, namely its item 10.

11. Consequently according to Mr. Gupta, as the assent contemplated by Sub-section (2) of Section 107, Government of India Act, has not been obtained, Section 168A, Ben. Ten. Act is altogether void under Section 107(1), Government of India Act, 1935. Mr. Sen on the other hand contends that the provisions in Section 168A, Bengal Tenancy Act, Section 51, Civil P.C., so far as it is applicable to decrees for arrears of rent of land tenures, and Sections 2 and 3 of the Putni Regulations are all with respect to land tenures and consequently with respect to item 21 of the matters enumerated in the Provincial Legislative List, and not with respect to any of the matters enumerated in the Concurrent Legislative List at all. According to Mr. Sen therefore Section 168A, Bengal Tenancy Act, is not at all hit by Section 107(1), Government of India Act, 1935. His further contentions are (1) that Section 51, Civil P.C., itself being subject to the saving provisions contained in Section 4 (1), Civil P. C, the provisions in a special or Local law could not be repugnant to its provisions; and (2) that the existing Indian law for the present purposes was not Section 51, Civil P.C., but Section 51, Civil P.C., as adapted by Section 143(1), Bengal Tenancy Act. The relevant portion of item 4 of the matters enumerated in the Concurrent Legislative List is given thus: Civil Procedure, including the Law of Limitation and all matters included in the Civil Procedure Code at the date of the passing of this Act....

12. The description of the matter in this item is very general and the entire Civil Procedure Code as it stood in 1935 would be with respect to this matter. Item 15 of the matters enumerated in the Concurrent Legislative List is given in the following terms: Jurisdiction and powers of all Courts

except the Federal Court, with respect to any of the matters in this list.

13. Item 10 of that List is given thug: Contracts, including partnership, agency, contracts of carriage, and other special forms of contract, but not including contracts relating to agricultural land.

14. The relevant portion of item 21 of the matters enumerated in the Provincial Legislative List is described as follows: Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant and the collection of rents, transfer, alienation, and devolution of agricultural land.

15. Item 2 of the matters enumerated in the Provincial Legislative List is given thus: Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List; Procedure in Rent and Revenue Courts.

16. The power of legislation with respect to land, land-tenure, the relation of landlord and tenant and the collection of rents, would mean and include the power of legislation with respect to the rights, privileges, obligations and liabilities relating to them, any relief or remedy in respect of any such right, liability, etc., and the mode of realization of such relief or remedy, or the procedure for obtaining that relief. The words "with respect to" mean "on the subject of." We have to determine in each case what is the subject of the legislation, and not what things or operations it may indirectly affect. Of course the Legislature cannot enlarge the scope of its powers beyond the limits expressed in the constitution by reference to the words "with respect to." The true position seems to be when the Legislature is given power to legislate "with respect to" certain subjects, it may exercise all necessary and incidental powers, including the power of passing ancillary provisions which may not be strictly and directly referable to the actual heading under which the power is granted.

17. The whole question really turns upon the construction of Section 107 (1), Government of India Act, 1935, and of Section 4(1), Civil P.C. It cannot be disputed that the Bengal Council Act 18 of 1940 which enacted the new Section 168A, Bengal Tenancy Act, is a Provincial law as defined by Section 311, Government of India Act, 1935. Section 168A, Bengal Tenancy Act, therefore, is "a provision of Provincial law" within the meaning of Section 107(1), Government of India Act, 1935. It cannot also be disputed (1) that the Civil Procedure Code is "an existing Indian law" as defined by the same Section 311, Government of India Act, and (2) that this existing Indian law, (namely the Civil Procedure Code of 1908) is with respect to one of the matters enumerated in the Concurrent Legislative List, (viz., item 4 of the List).

18. The question, therefore, is whether the provision in Section 168A, Ben. Ten. Act, is

repugnant, either wholly or in part, to any provision of the Civil Procedure Code. If not, then there is no difficulty and the provision in Section 168A, Ben. Ten. Act, shall stand as valid law. If repugnant, then the provision in Section 168A, Ben. Ten. Act, shall be void to the extent of the repugnancy. In arriving at the above conclusion we have taken the words "with respect to one-of the matters enumerated in the Concurrent Legislative List" in Section 107(1), Government of India Act, 1935, as qualifying "existing Indian law." The position will not, in the least, be different in the present case whether we take these words as qualifying (1) "any provision" in "any provision of an existing Indian law" or (2) "an existing Indian aw." It cannot be disputed that the provisions in Sections 51 and 60, Civil P.C. are also with respect to one of the matters enumerated in the Concurrent Legislative List, (namely Item 4 of List III.) Sulaiman J, in Subrahmanyan Chettiar v. Muthuswami Goundan took the view that the words "with respect to one of the matters enumerated in the Concurrent Legislative List" qualify only the words "an existing Indian law" in Section 107(1), Government of India Act, 1935. Remembering the definitions of 'Provincial law' and 'existing Indian law' as given in Section 311 of the Act, Section 107(1) may be paraphrased in the line indicated by Sulaiman J. thus: If any provision of the law made by a Provincial Legislature established under this Act is repugnant...to any provision of the law...passed or made before the commencement of Part III of this Act by any Legislature...with respect to one of the matters enumerated in the Concurrent Legislative List, then...the existing Indian law shall prevail and the Provincial law shall to the extent of the repugnancy be void.

19. The Code of Civil Procedure is an existing Indian law and the whole Code is with respect to Item 4 of the matters enumerated in the concurrent Legislative List (List III). Sections 51 and 60 are the relevant provisions of this law and these are also with respect to one of the matters enumerated in the Concurrent Legislative List, (namely Item 4 of List III). The Bengal Council Act 18 of 1940 is a Provincial law--is a law made by a Provincial Legislature established under the Government of India Act, 1935. Section 5 of this Provincial law inserts the new Section 168A in the Bengal Tenancy Act, 1885. This enactment in pith and substance is one with respect to 'land-tenure' and consequently with respect to Item 21 of the matters enumerated in the Provincial Legislative List. Assuming that this enactment is with respect to one of the matters enumerated in the Concurrent Legislative List it is nonetheless a provision in a Provincial law within the meaning of Section 107(1), Government of India Act, 1935 and the question is whether this enactment is repugnant to any provision of the Code of Civil Procedure. As has been pointed out above the relevant provisions of the Code of Civil Procedure are its Sections 51 and 60. Section 1(3) of the Code extends its operation to the whole of British India, except the Scheduled Districts. Mr. Sen contends that the provisions contained in the new Section 168A, Ben. Ten. Act, cannot be repugnant to any provision of the Code of Civil Procedure because of the saving provision of its Section 4(1). Section 4(1) runs as follows: In the absence of any

specific provision to the contrary nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed, by or under any other law for the time being in force.

20. The section makes a clear distinction between "special or local law now in force" and "any other law for the time being in force." As regards the special or local law now in force the saving provision is that "nothing in this Code shall be deemed to limit or otherwise affect" them. The Bengal Council Act 18 of 1940 does not come within this class. It was not-in force when the Code of Civil (Procedure was enacted. It comes within the class "any other law for the time being in force." For this class the savings provision is "nothing in this Code shall be deemed to limit or otherwise affect (1) any special jurisdiction or power conferred or (2) any special form of procedure prescribed, by or under" such law. The question, therefore, reduces to this: whether the new Section 168A Ben. Ten. Act (1) confers only a special jurisdiction or power or (2) prescribes only a special form of procedure. If co, nothing in the Civil Procedure Code shall be deemed to limit or otherwise affect such provisions and consequently the new provision cannot possibly be repugnant to any provision of the Code of Civil Procedure.

21. In our opinion, Section 51, Civil P.C., gives only the procedure ,in execution and enacts the powers of Court to enforce execution. That it does not purport to give anything else, becomes obvious from its Clause (b) read with Section 60, Civil P.C. Clause (b) says that the Court may order execution of the decree by attachment and sale or by sale without attachment of any property. But certainly this does not mean that the decree-holder has right to have his decree realised from any property of the judgment-debtor. What property is and what is not liable to attachment are given in Section 60, Civil P.C. Even that section simply says which properties are liable to attachment and which not and does not make it obligatory on the part of the Court to attach and sell them. Section 51, Civil P.C., gives the powers of the Court to enforce the decree in general and the new Section 168A only limits that power for the special cases contemplated by it. In our opinion therefore Section 4, Civil P.C., withdraws the operation of the relevant provisions of the Code from the field covered by the new provision of the Bengal Tenancy Act to the extent to which the latter covers that field, and thus saves the latter from being repugnant to the former. The one cannot thus be contrary to or inconsistent with the other. The provisions of the Civil Procedure Code thus avoid the clash and automatically make room for the new power or the new procedure.

22. As regards the other existing Indian law, namely, the Putni Regulation of 1819, its provisions do not fulfil the requirements of Section 107(1), Government of India Act, at all. A putni tenure is certainly a land tenure and the regulation in 'pith and substance is one with respect to such land-tenures. This is not one of the matters enumerated in the Concurrent Legislative List at all

and consequently any repugnancy to its provisions is not made by Section 107(1) a vitiating cause affecting the provision of a Provincial law. In our opinion therefore the provisions contained in Section 168A(1) are not rendered void to any extent by Section 107(1), Government of India Act 1935. In the result, this appeal is allowed with costs. The judgment and order of the Court below are set aside and the objection of the judgment-debtors to the execution of the decree by the sale and attachment of the properties attached is allowed. The execution petition is dismissed. The hearing fee in this appeal is assessed at three gold mohurs.