CALCUTTA HIGH COURT

Ahidhar Ghose

Vs.

Jagabandhu Roy

A.F.O.O. No. 64 of 1951

(K.C. Das Gupta and P.N. Mookerjee, JJ.)

09.05.1952

JUDGMENT

P.N. Mookerjee, J.

1. This is the judgment-debtor's appeal against an order of the learned Subordinate Judge, 3rd Court, Alipore, rejecting his objections under Section 47, Civil Procedure Code. The material facts are not in dispute but the appellant contends that the learned Subordinate Judge has erred in law in his interpretation and application of para. 4, Indian Independence (Legal Proceedings) Order, 1947, and Section 168A, Bengal Tenancy Act.

2. Under the zemindar-respondent the appellant holds a Patni in respect of lands which lie partly within the Indian Union and partly within Pakistan. The annual jama is Rs. 3760-11-0 and the Patni was created under a kabuliyat, executed on 20th chaitra 1319 B.S. and registered on 4-4-1913. There being default in the payment of the Patni rent and the usual cesses for the period 1351 B.S. to 1354 B.S., the landlord (respondent) instituted R.S. No. 22 of 1947 against the appellant in the 3rd Court of the Subordinate Judge at Alipore. The suit was instituted on 29-7-1947 and it ended in a compromise decree on 11-6-1948 for a sum of Rs. 16,183-12-4, payable in four annual kists or instalments as follows :

Chaitra 1355 B.S		Rs. 4183-12-4
Chaitra 1356 B.S		Rs. 4000- 0-0
Chaitra 1357 B.S		Rs. 4000- 0-0
Chaitra 1358 B.S		Rs. 4000- 0-0
	Total	Rs. 16,183-12-4

The decree provided inter alia that in case of default of payment of any of the above kists the entire decretal amount, then outstanding, would be realizable by the attachment and sale of the property in default. The first installment was paid and accepted by the landlord decree-holder but then a default occurred in regard to the second installment, payable in chaitra 1356 B.S., and, on 28-9-1950, the respondent landlord applied for execution of the decree and realization of his

outstanding dues, viz. Rs. 12,100 (including interest) "by sale of the property in default" or, to be precise, by the sale of that part of the said property which lay within the Indian Union - and, admittedly also, within the jurisdiction of the Alipore Court - and which was described in Schedule (Ga) of the application for execution, the Pakistan part of the defaulting Patni being described in Schedule (Kha) and the whole Patni - that is, its entire lands in the Indian Union and Pakistan - being described in Schedule (Ka). After the necessary preliminaries the decree-holder filed the concise statement under Section 163, B.T. Act on 30-11-1950 but on that day the judgment-debtor appeared and opposed the decree-holder's pRayer for execution and took time for filing objection. On a subsequent date a petition of objection was filed by the tenant-judgment-debtor objecting to the execution of the decree and the principal objections, raised therein, were (1) that, as the lands of the Patni were partly "within the Dominion of Eastern Pakistan", the Alipore Court had no jurisdiction to pass the decree (2) that, in any event, the decree was not executable in law as the property involved lay partly in Pakistan and (3) that, apart from all other objections, the decree-holder's prayer for execution against a part of the Patni tenure could not proceed in view of Section 168A, Bengal Tenancy Act. These objections did not succeed before the learned Subordinate Judge and hence the present appeal by the tenant-judgment-debtor.

3. In our opinion, the Court below was right in rejecting the tenant's objections. The suit for rent was, as already stated, filed in the Alipore Court on 29-7-1947 and it was decreed on 11-6-1948. On the appointed day, therefore, namely, the 15-8-1947 the suit was pending and the Alipore Court had clearly full jurisdiction under para. 4(1), Indian Independence (Legal Proceedings) Order, 1947 to pass a decree in that suit, no matter that, on and from 15-8-1947, a part of the suit lands became included in the new Dominion of Pakistan. The decree, therefore, that was passed on 11-6-1948 was a perfectly valid decree and the judgment-debtor's first objection, enumerated above, must fail.

4. On his second objection also, the judgment-debtor cannot succeed. The present execution being directed not against any property in Pakistan but against properties in the Indian Union and within the jurisdiction of the Alipore Court, this latter Court is quite competent and also bound - to proceed with the decree-holder's prayer for sale unless that prayer is hit by Section 168A, Bengal Tenancy Act as claimed in the judgment-debtor's third objection. This is the short answer to the appellant's second objection to the decree-holder's prayer for execution but, even if the broader aspect has to be considered, we are inclined to hold that the same result would follow. In our opinion, para. 4 (3), Indian Independence (Legal Proceedings) Order, 1947, covers the present case and entitles the decree-holder to proceed not only against the Indian Union or the 24-parganas property but also against the Pakistan part of the patni in question. Against this view the appellant urged two considerations which we shall presently discuss.

5. It was first submitted that para. 4 (3) deals merely with the effectiveness of a decree, validly passed by a Court in either Dominion under para. 4 (1), in the other Dominion but it does not authorize a Court in one Dominion to execute or proceed with the execution of such a decree, passed by it, in the other Dominion or against properties, situate therein, - in other words, the argument is that, while para. 4 (1) retains to a Court in either Dominion all its pro-partition jurisdiction to pass decrees in proceedings, pending before it on the appointed day, para 4 (3) merely enacts that such a decree would have effect in either Dominion as a valid decree not of a Court of the other Dominion but of its own. According to the appellant, therefore para 4 (1)

merely prevents objections to the jurisdiction of a Court in either Dominion to pass a decree in such pending proceedings and merely gives to such a decree the same effect or validity as any other decree passed by that Court with jurisdiction. The decree, so passed, would, however, still be, according to the appellant, a 'foreign decree' in the other Dominion but for the provisions of para. 4 (3) and these latter provisions merely have the effect of making that decree a 'domestic decree' in that other Dominion too, so as to be executable by the Courts of that Dominion on that footing, - they do not, however, vest a Court, in either Dominion with any authority to execute it in the other Dominion. We would not say that there is no force in the appellant's contention but, though plausible and attractive at first sight, it is not, in our opinion, acceptable as a proper reading of para. 4 (3). Under that paragraph, namely, para 4 (3), "within the territories of either of the two Dominions" effect is to be given to a decree, made under para. 4 (1), as if it had been passed by a Court of competent jurisdiction within that Dominion." That paragraph, in other words, only makes the decree in question - though passed by a Court of one Dominion - the decree of 'a' competent Court or, to use the language of the said paragraph, the decree of "a Court of competent jurisdiction", of or in the other Dominion. It does not, however, make it the decree of any particular Court of the 'other Dominion' nor does it make it the decree of any and every Court thereof. In which Court then of this 'other Dominion' is the decree-holder to apply for execution? No provision is to be found - the enactment in question not providing that the decree can be executed by any or any particular Court of this 'other Dominion'. In the above context and in view of the circumstances under which and the purpose for which the Indian Independence (Legal Proceedings) Order, 1947, alike the other transitional provisions - was enacted it seems to us that the Court which passed the decree in question under para. 4 (1) is to be deemed under para 4 (3) to be a competent Court, - that is, "a Court of competent jurisdiction," - of the 'other Dominion' not only for the purpose of passing the decree but also for its enforcement. That, according to us, is the proper interpretation and true effect of para. 4 (3), Indian Independence (Legal Proceedings) Order, 1947. True, this interpretation would be somewhat inconsistent with principles of international law but it is now well settled that, in the enactments which were found necessary on account of the partition and which were made to provide for adjustment of legal relations or rights and obligations - both private and public - of the people of the two new Dominions and also the new Dominions inter se and vis-a-vis the people, certain established principles of international law were abrogated or departed from to the extent necessary to meet the new situation. The circumstances were abnormal and unprecedented and it must not be forgotten that the division of India and the creation of the two new Dominions of India and Pakistan gave rise to new problems which could not be solved under the existing principles of law - private or international. These problems were sought to be solved and the attending difficulties were sought to be resolved by the transitional enactments and, in our view, therefore, the proper construction of these enactments would be to give them as comprehensive a scope as their language permits.

The appellant's argument, if accepted, would create a much greater void and would leave a much larger number of these new problems or unprecedented cases unprovided for and we would, therefore, prefer to interpret para. 4 (3) in the way, we have indicated above, to give it the maximum effect and apply it usefully to solve, along with the other provisions of the Indian Independence (Legal Proceedings) Order, 1947, as many of these new problems as possible, arising in connection with legal proceedings, pending on the appointed day. This view is quite in accord with the decision of this Court in the case of *Protap Kumar v. Nagendra Nath*[1], with which decision we respectfully agree.

[1]55 Cal WN 624

It is only necessary to point out that nothing that we have said above is in any way really opposed to either the decision or any observation in the cases of *Dominion of India v. Hiralal*[2], and *Sushama Roy v. A.S.M. Osman*[3], which are both clearly distinguishable as explained in Protap Kumar's case, 55 Cal WN 624, cited above, and as to the decision of this Court in the case of the Province of *East Bengal v. State of Tripura*[4], it is enough to say that, apart from the fact that it involved other and different considerations, that decision was eventually set aside on appeal by the Supreme Court in the case of *State of Tripura v. Province of East Bengal*[5], where the wider view of the scope and effect of the transitional enactments - and necessarily also of their binding character on either of the two new Dominions - was expressly affirmed and the very relevant observations of the Federal Court in the case of *Midnapore Zemindary Co. Ltd. v. Province of Bengal*[6], at p. 146, were approvingly referred to and the underlying principle authoritatively re-stated. We may add also that, in our opinion, even the High Court decision in the Tripura case, 53 Cal WN 368, above cited, does not really affect or differ from the view, we are taking, of the scope and effect of para. 4, Indian Independence (Legal Proceedings) Order, 1947, - that decision turning ultimately on an interpretation of the several articles of the Indian Independence (Rights, Property and Liabilities) Order, 1947, discussed in that case.

6. The appellant's other submission on this part of the case was that, whatever might have been the position under the Indian Independence (Legal Proceedings) Order, 1947, there had been a change by its repeal by the Constitution and the support, if any, under the said order to the respondent's prayer for execution was not available to him when he did not apply for such execution before the repeal. This submission also is, in our opinion, clearly unacceptable. If we are right in holding that the Alipore Court had jurisdiction to execute the decree in question even as regards the Pakistan properties, the respondent acquired, once the decree had been passed validly under para. 4 (1), the right to have the Pakistan properties also sold by the Alipore Court. This right, conferred by para. 4 (3), in the circumstances in which and having regard to the purpose for which the said provision was enacted, cannot be said to be a merely procedural right and it would thus survive the repeal of the enactment in question under the General Clauses Act, 1897, which applies to the repealing enactment, viz. the Constitution, by virtue of Article 367 (1). We are supported in this view by the decision of this Court in the case of *Protap Kumar v. Nagendra Nath*[8], which we have already cited above and which has our full and respectful concurrence.

7. The appellant's submissions on this part of the case must also, therefore, fail and his second objection to the decree-holder's pRayer for execution must be overruled.

8. The third objection raises the bar of Section 168-A, Bengal Tenancy Act. It is said that the respondent's prayer for sale not of the entire patni tenure in default but only of a part thereof, viz., the part, situate within the Indian Union, is hit by the said section. Prima facie, - that is, on first impression, - the language of the statute appears to support the appellant but, on closer scrutiny, that impression sheds its lustre and the statute reveals a different picture Section 168-A was an encroachment upon the landlord's "vested right" to proceed against the tenant's properties for realization of his rental dues. It must, therefore,

[2] 53 Cal WN 817 [5] 3 Cal WN 368 [7] AIR 1949 FC 143
[3] 54 Cal WN 491 [6] AIR 1951 SC 23 [8] 55 Cal WN 624

be strictly construed so as to interfere as little as possible - consistently, of course, with its language and not making it nugatory - with that right. There is little doubt that Section 168-A

was enacted for the tenant's benefit but, in consonance with the principle of construction, just above alluded to, that benefit should not be extended beyond limiting the landlord's remedy of "attachment and sale" to the defaulting tenure. The words 'entire tenure' in Section 168-A (1) should, in our opinion, be construed as indicating the maximum extent of the tenant's property, normally available for the landlord's dues for rent, they should not be held to have the effect of preventing the landlord from putting to sale a part of the defaulting tenure for the said dues. The tentative observations of Chakravartti, J., to the contrary - we say 'tentative' because Chakravartti, J., himself did, in terms, confine his actual decision within limits which are not attracted here - in the case of *Uday Chand Mahatab v. Rammoy Hazra*[9], at p. 276-7, do not appear to us to be correct and we would prefer the interpretation, put upon the words 'entire tenure' in the reported cases of *Abdur Rasheed v. Srish Chandra*[10], and *Ramdas Mukhopadhya v. Uday Chand Mahatab*[11], and also in the unreported decisions in the cases of *Culhame v. Kalyani Prosad*[12], and *Md. Sadaque v. Uday Chand*[13], decided respectively by Henderson, J., on 12-3-1942 and G. N. Das, J., on 1-7-1947, namely, that the said words 'entire tenure' merely indicate the limit to which the landlord decree-holder can go in executing a decree for rent by "attachment and sale" and do not prevent him from proceeding against a part of the defaulting tenure in such execution. This interpretation well and sufficiently accords with both the underlying theory of tenant's benefit and the principle of statutory construction, above referred to, and we accept and adopt the same. In this view of the matter, we would hold that the respondent's application for execution does not contravene the provisions of Section 168-A, Bengal Tenancy Act, and cannot be thrown out on a plea of any such defect. The third objection of the appellant was also, therefore, rightly rejected by the Court below.

9. In the result, therefore, we affirm the order of the learned Subordinate Judge and dismiss this appeal with costs.

Das Gupta, J.

10. I agree.

Appeal dismissed.

[9] 56 Cal WN 272

[10] 48 Cal WN 172

[11] AIR 1949 Cal 228

[12] S. M. A. No. 119 of 41 (Cal)

[13] S. M. A. No. 211 of 46 (Cal)