

# CALCUTTA HIGH COURT

Naresh Chandra Bose

Vs.

Sachindra Nath Deo

A.F.O.O. No. 270 of 1953

(Guha Ray and Sen, JJ.)

19.08.1955

## JUDGMENT

### **Guha Ray, J.**

1. This is an appeal on behalf of the judgment-debtor from an order dismissing his application, under Section 47, Civil Procedure Code objecting to the execution of a decree obtained by the respondents against him as far back as 4-4-1938, for arrears of putni rent in a court of Jessore, now in East Pakistan. The decree was transmitted by the Jessore Court, to an Alipore Court on 31-10-1946, and on 1-3-1947, the decree-holders applied for execution there against certain properties of the judgment-debtor in Calcutta.

The first objection under Section 47, Civil Procedure Code was filed on 3-4-1947, and the decree-holders applied for the appointment of a receiver in respect of the properties against which they wanted to proceed in execution. On 24-5-1947, the objection of the appellant to the execution was dismissed and the petition for appointment of a receiver was allowed and the judgment-debtor himself was selected for such appointment. But as he neither took out the writ nor intimated his willingness to act as receiver, a lawyer was selected in his place for appointment as receiver on 14-7-1947. The actual order of appointment, however, on the acceptance of a security bond furnished by the Receiver as directed by the court was not issued till 16-3-1953. The objection out of which this appeal arises was filed on 18-4-1953, an objection on the same grounds had been filed earlier on 10-1-1953 and both were taken up together and dismissed by an order dated 19-6-1953. This is the order now appealed from.

2. On 3-4-1947, the judgment-debtor had filed an application under Section 47, Civil Procedure Code on the ground that the execution against properties other than the defaulting tenure was barred under Section 168A, Bengal Tenancy Act. That was dismissed up to the Supreme Court, the judgment of the Supreme Court being dated 24-4-1952.

3. The only point argued by Mr. Sen on behalf of the appellant is that the Alipore Court has no longer any jurisdiction, to proceed with the execution of a decree passed by a court which, has become a foreign court since 15-8-1947 the Indian Independence Act of 1947 and its offshoot the Indian. Independence (Legal Proceedings) Order, 1947, under which the Alipore Court acquired

jurisdiction having both ceased to be law in the India Republic, the first by reason of its repeal under Article 395 of the Constitution and the second because of a variety of reasons assigned by Mr. Sen and to be examined by me as I proceed.

4. It is contended by Mr. Sen that on the repeal of the Indian Independence Act, 1947, the Indian Independence (Legal Proceedings) Order, 1947, has automatically lapsed on the following grounds :

(i) The parent Act which was of a temporary and transitional character having been repealed, the Indian Independence (Legal Proceedings) Order, 1947, equally temporary and transitional in character, cannot continue after the repeal of the parent Act which contains no saving clause as regards the continuance of things done etc, under the Act :

(ii) Explanation III in Article 372 of the Constitution makes it clear that the Indian Independence (Legal Proceedings) Order being a temporary law is not continued by Article 372;

(iii) Explanation I in the same Article indicates that this Order is not included in the expression "law in force" in the Article, because it is not a law passed by a Legislature or other competent authority in the territory of India before the commencement of the Constitution and not previously repealed, but it was a law made by the Governor-General of British India which is not the same as the territory of India as defined in Article 1(3) and not adapted under Article 372(2);

(vi) Article 395 expressly repeals the Indian Independence Act together with all enactments amending or supplementing the Act.

5. The Indian Independence Act, 1947, though meant to bring about a transformation of British India into two Dominions and as such of a transitional nature, is not by any means a temporary statute in the sense that it was meant to be in force for a specified period or up to a specified date. The very fact that Article 395 of the Constitution had to repeal it would confirm this view which in any case follows from its own provisions. As it was not a temporary statute in the strict sense of the term, the first ground of Mr. Sen which is based on the assumption that it is a temporary statute, does not seem to be tenable; in other words, it does not necessarily follow that because the parent Act was repealed, the Orders issued under it ceased to be in force with its repeal. Whether these Orders or rather the Indian Independence (Legal Proceedings) Order 1947, with which we are concerned here, survived the repeal of the Indian Independence Act, 1947, has to be determined on different considerations and with reference to other relevant provisions.

6. The Indian Independence Act was passed by the British Parliament on 18-7-1947. The Indian Independence (Legal Proceedings) Order, 1947, is an Order under Section 9. Indian Independence Act issued on 12-8-1947, and so under Section 18(3). Indian Independence Act, 1947 it was part of the law of British India existing before the appointed day, that is, 15-8-1947 and continued as part of the law of the Indian Dominion even after the appointed day. It was thus part, of the "existing law" as denned in Article 366(10) of the Constitution. The fourth ground of Mr. Sen that Article 395 repealed the Indian Independence Act together with all the enactments amending or supplementing it is evidently based on a misreading of the Article. Article 395 repealed the Indian Independence Act, 1947, and the Government of India Act, 1935,

and though in the case of the latter Act it is expressly mentioned that it is repealed together with all enactments amending or supplementing it except the Abolition of Privy Council Jurisdiction Act, 1949, in the case of the former, there is no mention of the Indian Independence Act also being repealed along with enactments supplementing it is the different Orders issued under its provisions being evidently enactments to supplement the Act. On the maxim, therefore, *expressio unius, exclusio alterius* one is entitled to infer that if it were the intention of the Legislature to repeal as in the case of the Government of India Act, 1935, enactments supplementing the Indian Independence Act, 1947, there is no reason at all why it should have been silent about enactments supplementing that Act while it took care to mention I such enactments in the case of the Government of India Act, 1935, in other words, it follows from Article 395 itself that though the Indian Independence Act, 1947, was repealed, the Indian Independence (Legal Proceedings) Order, 1947, was not repealed. This view seems to me to be further strengthened by the fact that Article 395 itself provides For the repeal of certain Orders passed under the Indian Independence Act for adaptation of the Government of India Act 1935. There are the Indian Provisional Constitution Order, 1947, the Indian Provisional Constitution (Amendment) Order, 1947 the Indian Provincial Legislatures Order, 1947, the Indian Provisional Constitution and Provincial Legislatures (Amendment) Order, 1947, and the Indian Provisional Constitution (Second Amendment) Order, 1947. The first is an Order under Section 8(2), Indian Independence Act, 1947, and is dated 14-8-1947. It makes applicable the Government of India Act, 1935 to the Dominion of India subject to certain modifications, with effect from 15-8-1947. The second is an Order dated 14-8-1947, under Section 9, Indian. Independence Act, 1847, applying, subject to certain modifications, certain Orders under the Government of India Act to the Indian Dominion. The other Orders also were made under Section 9, Indian Independence Act, 1947, subsequently amending the different principal Orders issued before 15-8-1947. As these Orders were Orders amending or supplementing the Government of India Act, 1935, though passed tunder the Indian Independence Act, 1947, these were expressly included in the laws repealed by Article 395. By implication, therefore, the rest of the orders passed under the Indian Independence Act, 1947, appear to have been saved from repeal.

7. Article 372 has now to be examined. Clause (1) opens with the phrase "Notwithstanding any repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution". When Mr. Sen was asked what significance attached to these opening phrase he could only say that this had no special significance and the meaning of the Article would not have been affected if it had been left out. It is a canon of construction that effect must be given to every word in a statute if possible and it is only where the whole thing becomes meaning, less if this is done, that courts are entitled to eliminate words which if given effect to, would make the whole prevision senseless. The opening phrase of Article 372 not merely does not make the first clause of the Article meaningless but seems to me to emphasize what an examination of Article 395 suggested; in other words, if the different Orders issued, under the provisions of the Indian Independence Act, 1947, had been intended to be repealed by Article 395, there would really be no sense in using this phrase; on the other hand, if those Orders are not included in the enactments repealed by Article 395, the use of this phrase can be fully explained as one designed to stress the fact of the subsidiary legislation being still alive while the parent. Act stands repealed.

8. Explanations I and III in Article 372 have now to be scrutinized. In reading Explanation I one has to remember the definition of "existing laws" in Article 366(10) and to take special note of

the fact that while Article 366(10) makes use of the word "means", Explan. I in Article 372 uses the word "includes" the obvious implication being that in the first the definition is exhaustive, while in the second it is merely illustrative.

Even so, as is evident from a comparison of the terms of Article 366(10) and Art, 372(1), while 'existing law' as defined in Article 366(10) is limited to statute law or law embodied in ordinances, orders, bye-laws, rules and regulations, "all the law in force" in Article 372(1) is not so limited and extends even to customary law, personal law like the Hindu and Mahommedan law, being thus much more comprehensive than 'existing law' as denned in Article 366(10). It follows from this that 'existing law' as defined there is a part of 'all the law in force' in Article 372(1) and Explan. I of Article 372 by using the word includes in defining it extends rather than restricts its meaning. Assuming, therefore, For the sake of argument that Explanation I does not include laws passed by the Governor-General of British India because it refers in so many words to laws passed by a competent authority in the territory of India which must be taken to mean only that part of British India which is covered by Article 1(3), it does not at once follow that laws passed by the Governor-General of British India which were in force in the territory of India before the commencement of the Constitution would be excluded from the expression "all the law in force" in Article 372(1). Mr. Sen argued that such laws only if they were adapted under Section 18(8), Indian Independence Act, 1947 would be "law in force" under Article 372(1) and not otherwise; and Central Acts like the Penal' Code, Criminal Procedure Code were instances of such law. Section, 18(3) uses the words "so far as applicable and with the necessary adaptations". It is obvious from these words that such Acts would be in force only to the extent of their applicability in the territory of India and with such adaptations as might be called for in order to make them applicable in other words, the adaptations were not intended to give legal validity to the Acts in their application in the territory of India but merely to change them in such a way as to make them applicable here. While such adaptations might be called for in most of the Central Acts or in most of the Acts of the Punjab and Bengal, each of which was cut into two by the Indian Independence Act, 1947, most of the Acts of the other provinces would hardly call for any adaptation in order to make them applicable there. That being so, the process of adaptation cannot be said to be one without which Acts of the Governor-General of British India would cease to be in force in the territory of India, though they were existing laws within the meaning of the expression as defined in Article 366(10).

9. Explanation III of Article 372, as is abundantly clear from the phrases "beyond the date fixed for its expiration" and "the date on which it would have expired if this Constitution had not come into force", covers only temporary laws which the a natural death simply by efflux of time and do not call for any repeal by a subsequent Act. The Indian Independence Act 1947, was not, as already pointed out, a temporary Act in this sense, though undoubtedly it was a transitional' measure which was repealed with effect from 26-1-1950, when the Constitution came into force. The decisions, therefore, which lay down the proposition that in the absence of a saving clause, temporary Act when they expire, expire with their entire progeny are not applicable to the Indian Independence Act, 1947, nor is Explanation III.

10. In the result I am of opinion that though Article 395 repealed the Indian Independence Act, 1947, Article 372(1) preserved the Indian Independence (Legal Proceedings) Orders 1947, which is still part of the law in force in the territory of India as it has not been repealed. That this is so would be further clear from the provisions of Act 9 of 1952, namely, The Indian Independence Pakistan Courts (Pending Proceedings) Act. Section 2 of this Act is as follows :

"In this Act, the expression the decree to which this Act applies' means any such judgment, decree or order as is referred to in (i) of Clause 3 of Article 4, Indian Independence (Legal Proceedings) Order, 1947, or (ii) para. (5) or para (6) of Article 13 of the High Courts (Bengal) Order, 1947, or (iii) para (4) or para (6), High Courts (Punjab) Order, 1947, which has been or may be hereafter passed by a Court in Pakistan and which imposes any liability or obligation on a Government in India."

The whole or this Act is evidently based on the assumption that the Indian Independence (Legal Proceedings) Order, 1947, and the other Orders all of which were made under different provisions of the Indian Independence Act, 1947, except those which amended or supplemented the Government of India Act, 1935, subsisted at the date when this Act came into force i.e. on 23-2-1952, and would be still in force after that date unless they are repealed. Mr. Sen rightly contends that this evidences nothing more than an assumption on the part of the Legislature and such an assumption is by no means conclusive. This assumption, however, is confirmed by the conclusion I have already arrived at independently of it.

11. If the Indian Independence (Legal Proceedings) Order, 1947, is still a part of the law in force in India, as I think it is, it ensures between the originating Court, that is, the Court which passed the decree and then transmitted it with a certificate of non-satisfaction to another Court under Section 39, Civil Procedure Code and the Court to which the decree is thus transmitted, though the two Courts are now in two independent States, that contact which alone could enable the transferee Court to certify to the transferring Court under Section 41, Civil Procedure Code the fact of the execution or non-execution of the decree in question. Mr. Sen frankly concedes that if the Indian Independence (Legal Proceedings) Order, 1947, has survived the repeal of the Indian Independence Act, 1947, this is undoubtedly so.

12. As I am clearly of opinion that the Indian Independence (Legal Proceedings) Order, 1947, is still part of the law in force in India, the execution can proceed and the objection, therefore, of the appellant-judgment-debtor was rightly disallowed.

13. The appeal must accordingly be dismissed with costs - the hearing fee being assessed at five gold mohurs.

**Sen, J.**

14. I agree with the order passed by my learned brother. In view of the importance of the subject-matter I would like to add a few words.

15. The question whether the execution proceedings in respect of a decree passed by a court which is now in East Pakistan could proceed in an Indian Court after the Indian Constitution has come into force was considered by this Court in the case of - '*Protap Kumar v. Nagendra Nath*'<sup>1</sup> In that case a certificate of non-satisfaction issued by the Subordinate Judge, Jessore, on 18-8-49 was received by the District Judge 24 Parganas in West Bengal in respect of a decree obtained in a suit pending on the appointed day in Jessore and decreed after the appointed day. It was held that the execution could proceed even after the Constitution had come into force. It appears that it

was argued before their Lordships, as it has been argued before us, that under Article 395 of the Constitution the Indian Independence Act had been repealed and that this would mean that all the orders passed by the Governor-General under Section 9 of the said Act would automatically become inoperative. Their Lordships did not deal with this argument but observed that even if it be assumed that the Legal Proceedings Order, 1947, was no longer surviving, the proceeding would be saved under Section 6, General Clauses Act which would be attracted by Article 367 of the Constitution. The reasoning of their Lordships in this case can no longer be regarded as valid, after the decision of the Supreme Court in the case of - '*The State of Uttar Pradesh v. Seth Jagamander Das*<sup>2</sup>', In that case it was laid down that Section 6, General Clauses Act had no application to the repeal of a statute made by the Parliament in England the repeal of which; had been brought about by the Constitution of India, and that it was for this reason that Article 372 of the Constitution provides For the continuance in force in the territory of India, notwithstanding the repeal of the enactments referred to in Article 395 of the Constitution, of laws in force immediately before the commencement of the Constitution until altered, amended or repealed by competent legislature or authority. The decision, however, in the case of - ' AIR 1951 Calcutta 511', may still be supported by holding that the Indian Independence (Legal Proceedings) Order, 1947, has not been automatically repealed along with the repeal of the Indian Independence Act but is still valid and that is the view that we are taking in the present case.

16. As regards the argument of Mr. Sen that the general rule is that when a parent Act goes, all the orders made under the Act go also in the absence of a saving clause, such general rule does not apply to the facts of the present case. In the present case the Indian Independence Act, 1947, gave a special power of enactment to the Governor-General.

The laws made by the Governor-General under the special power conferred on him by the Indian Independence Act, 1947, must be regarded as surviving even when the special power given to the Governor-General is abolished by the repeal of the Indian Independence Act, 1947. Section 9(4), Indian Independence Act express provides that any order made under the section whether before or after the appointed day shall have effect as a law of the legislature of the Dominion or Dominions concerned would have on or after the appointed day, but shall in the case of each of the Dominions be subject to the same laws of repeal and amendment as the laws of the Legislature of that Dominion.

It is clear, therefore, that orders passed under Section 9, Indian Independence Act by the Governor-General have the same force as laws made by the Legislature of the Dominion

<sup>1</sup> AIR 1951 Cal 511

<sup>2</sup> AIR 1954 SC 683

and the provision referred to contemplates the independent repeal or amendment of such laws just like any other law passed by the Legislature of the Dominion. From this it would follow that such laws, namely, the orders passed by the Governor-General of India under Section 9, Indian Independence Act, would not be automatically repealed by the repeal of the Indian Independence Act, 1947. Mr. Sen relied upon Article 395 of the Constitution. As already pointed out by my learned brother, that Article while it repeals the Indian Independence Act and the Government of India Act, repeals the enactments amending or supplementing the Government of India Act and not the enactments amending or supplementing the Indian Independence Act. Therefore, such orders passed under the Indian Independence Act as have nothing to do with the amendment of the provisions of the Government of India Act, 1935, must be regarded as not repealed by Article 395, and they are therefore, expressly saved by clause (1) of Article 372. It is clear that Explan. (I) and Explan. (III) of Article 372 have no application to such an Order as the

Indian Independence (Legal Proceedings) Order, 1947. In Expln. (I) the emphasis is on laws duly passed by a Legislature in India but not yet brought into force. Explanation (I) provides that even though it has not been brought into force in any part of India or any particular area of India it shall still be regarded as law in force if passed by a Legislature or other competent authority in the territory of India. This Explanation only contemplates a particular class of Acts and does not seek to restrict the scope of the term "law in force" as used in clause (1) of Article 372. Explanation (III) refers to temporary laws which have expired by the efflux of time before the constitution had come into force or which would have expired by the efflux of time if the Constitution had not come into force. The Indian Independence Act and the Orders made thereunder would not expire by the efflux of time if the Constitution had not come into force. It is, therefore, clear that neither of the Explanations relied upon by Mr. Sen has any application to the present case. The Orders under the Indian Independence Act such as the Indian Independence (Legal Proceedings) Order, 1947, have the force of law made by a Legislature of the Indian Dominion before the Constitution had come into force and they are continuing in force by Clause (1) of Article 372.

17. I agree, therefore, that the Indian Independence (Legal Proceedings) Order, 1947, is still a surviving law and that being so the pending execution proceeding must be regarded as validly and legally pending and cannot be dismissed as void in law.

Appeal dismissed.