FEDERAL HIGH COURT

Shyamakant Lal

Vs

Rambhajan Singh

(Gwyer C.J. and Varadachariar, J.)

11.05.1939

JUDGMENT

Gwyer C.J. and Varadachariar, J.

1. The judgment which I am about to read is that of my brother Varadachariar and myself. In this appeal from the High Court at Patna, the question which this Court was originally asked to determine was whether Section 16, Bihar Moneylenders Act, 1938 (No. 3 of 1938), was void as being repugnant to a provision of an "existing Indian law1' within the meaning of Section 107 of the Constitution Act. The Bihar Act, which received the assent of His Excellency the Governor of Bihar on 6th July 1938, came into force on 15th July provided by Section 16 that when an application was made for the execution of a decree passed in respect of a loan or the interest on a loan by the sale of the judgment debtor's property, the Court executing the decree should, after hearing the parties, estimate the value of the property and of that portion of the property which, if sold, would in its opinion be sufficient to satisfy the decree. Section 17 of the Act then provided (a) that the proclamation of the intended sale in such a case should include only so much of the property of the judgment debtor as would in the opinion of the Court produce sufficient to satisfy the decree; and (b) that that property should not be sold at a lower price than the price specified in the proclamation. There are provisos to the Section to which it is not for the moment necessary to refer.

2. The existing Indian law" to which these provisions were said to be repugnant is a proviso which the Patna High Court, under its rule making power, had added to Order 21, Rule 66, Civil P. C. This was to the effect that no estimate of the value of the property should be inserted in the sale proclamation other than estimates, if any, made by the decree holder and judgment-debtor respectively, accompanied by a statement that the Court did not vouch for the accuracy of either. The proviso had come into force on 1st March 1936.

3. The appellant, against whom a mortgage decree for more than a lakh of rupees had been passed, applied on 15th August 1938 for an order under Sections 16 and 17, Bihar Act, for the purpose of restricting the execution sale to such portion of the mortgaged property as might be considered by the Court sufficient to satisfy the decree. The Court dismissed the application on the ground that the questions sought to be raised thereby had been disposed of by earlier orders passed before the Act had come into force. On appeal against this order the judgment-debtor contended that the enactment of Section 16 of the Act enabled him to present a fresh application

for the relief for which he asked; and it was by way of answer to this contention that it seems to have been urged for the first time on behalf of the decree holder that Sections 16 and 17 of the Act were void for repugnancy under Section 107, Constitution Act. A Division Bench of the Patna High Court upheld this contention of the decree-holder and dismissed the appeal. The reasons for their decision have been set out in another judgment of the same Bench, Misc. Appeal No. 1, *Vishwanath Narayan Singh v. Harihar Gir, Reported in*[1] which they purported to follow in the ease under appeal; and it appears from that judgment that the learned: Judges held Section 16 of the Act to be void: because when read with Section 17 it was in their opinion repugnant to the proviso which the High Court had added to Order 21, Rule 66, Civil P. C.

4. When the appeal before this Court was opened, it was brought to our notice that, since the above decision of the High Court, the Bihar Legislature had repealed certain provisions of the Act of 1938 (including Sections 16 and 17) and had substantially re-enacted them in the Bihar Moneylenders (Regulation of Transactions) Act, 1939 (No. 7 of 1939); that this Act had been reserved for the consideration of His Excellency the Governor-General; and that it had received His Excellency's assent on 15th April 1939, and had come into force on 3rd May last. By reason of the provisions of Section 107 (2) of the Constitution Act, it follows that no part of the new Act can now be challenged on the ground only of its repugnancy to an existing Indian law; and it was therefore contended that, as the Sections (Sections 13 and 14)' of the new Act, which in substance re-enact Sections 16 and 17 of the Act of 1938, are by clear implication retrospective in effect, the appellant was entitled to take advantage of the provisions of the new Act, and that a discussion of the validity of Sections 16 and 17 of the earlier Act could be no more than academic. We entertain no doubt that Sections 13 and 14 of the new Bihar Act are retrospective in the sense that they apply to proceedings pending at the time when the Act came into force, for they refer to applications made and decrees passed "before or after the commencement of this Act."

5. Counsel for the respondent did not and could not contend otherwise; but he made a half-hearted attempt to argue that the Act was not beyond challenge, because while it purported to be made in the exercise of the powers conferred on the Provincial: Legislature by the Provincial Legislative List in Schedule. 7 of the Constitution Act, it travelled nevertheless into subjects falling within the Concurrent Legislative List in that Schedule. There appears to us to be no substance in this contention. Altheugh the Act purports to regulate the transactions of money-lenders, it does not in terms profess to exercise powers only belonging to the Provincial Legislature under the Provincial Legislative List. In these circumstances, the new Act could only 'be challenged on the ground that it is repugnant to an existing Indian law; and, as we have pointed out above, the reservation of the Act for the consideration of the Governor-General and His Excellency's subsequent assent to it make such a challenge now impossible.

6. Accordingly, it only remains to consider whether this Court in the exercise of its appellate jurisdiction can remit the case to the High Court with a declaration that there shall be substituted for the judgment, decree or order of the High Court a judgment, decree or order which recognizes the state of the law as it now exists without discussing the law as it existed at the time when the High Court had session of the leaser. We are of opinion that Sections 205 and 209 (1) of the Constitution Act give us this power. There is no doubt that a High Court possesses such a power in dealing with appeals from Courts subordinate to itself: see Section 107 and Order 41, Rule 33, Civil Procedure Codeand we think that, in the absence of any evidence of a contrary

intention, it is to be assumed that the powers of this Court as a Court of Appeal are not less wide. The English case in (1882) 9 Q B D 6722 was cited to us, but it is not conclusive, for under Order 58, Rule 1 of the Rules of the Supreme Court appeals to the Court of Appeal are by way of rehearing, and Jessel M.R. in that case said:

> On an appeal strictly so called such a judgment can only be given as ought to have been given at the original hearing; but, on a re-hearing such a judgment may be given as ought to be given if the case came at that time before the Court of first instance.

7. See also *Attorney-General v. Birmingham, etc. District Drainage Board*[2] The order does not however apply in the case of appeals to the Judicial Committee; but nevertheless the Committee in *Mukerjee v. Mt. Ram Ratan Kuer*[3] where an Act passed while the appeal was pending deprived the appellant of the right which he had sought to enforce by bringing the appeal, found no difficulty in dismissing the appeal on that ground. The very general terms of Sections 205 and 209 (1), Constitution Act, justify us in holding that this Court has, in a ease like the present, powers no less wide than These exercised in their own spheres by the Court of Appeal in England and by the Judicial Committee. We may add that there is no substance in another contention of counsel for the respondents that litigants can only avail themselves of the rights given by Section 13 of the new Act in cases where a proclamation of sale has not been issued before 3rd May 1939, the day on which the Act came into Force. On the natural construction of Section 13 of the Act the judgment-debtor can, if he so desires, file an application today for an order under that Section; and, that being the legal position, there is still less reason for declining to take the Section into account in dealing with the present appeal. We are of opinion therefore that the passing of the new Act has made it unnecessary to consider any of the questions discussed by the High Court, and that our judgment must be in the appellant's favour for the reasons which we have given.

8. Our brother Sulaiman, Though otherwise in agreement with us, holds that no appeal lies to this Court in the present case. We are unable to concur in that opinion. We think that the order of the High Court in this case must be treated as a final order for the purposes of Section 205, Constitution Act. If the appellant's application related only to the settlement of the proclamation it is true that an order dealing with that application could not be regarded as determining the rights of the parties in any measure so as to make it a final order. A question of this kind must be determined with reference to the substance of the dispute between the parties and not merely in the light of the fact that the application is one made to the Court before whom an application to execute a decree is pending. The appellant's petition to the Court of first instance was presented under Sections 16 and 17, Bihar Act of 1938, and Though one of the matters to be dealt with on such an application relates to entries to be made in the proclamation of sale, the Sections confer on the judgment-debtor a valuable substantive right, namely the right to insist not only that so much alone of the attached or the mortgaged property as the Court considers sufficient to satisfy the decree should be brought to sale, but also that that property should not be allowed to be sold for less than the price fixed by the Court. This provision is very different from what is known as fixing the upset price in ordinary court sales. In the latter case, it is open to the Court or to the selling officer to reduce the upset price from time to time, if there are no bidders willing to bid at that price. But in cases falling under Sections 16 and 17, Bihar Act, we find no warrant for the assumption that for want of bidders at the price fixed by the Court under Section 16 (or on appeal) the price can be reduced on the ground of want of bidders. On the other hand, Proviso 2

to Section 17 indicates that the property may be sold for a lower price, only if the decree holder consents in writing to forgo so much of the amount decreed as is equal to the difference between the highest amount bid and the price specified for the property in the sale proclamation. The Act contains no provision as to what is to happen if the decree holder is not prepared to adopt this course. But such as they are, there can be no doubt that Sections 16 and 17 taken together secure a substantial benefit to the judgment-debtor, namely that he shall not by reason of any forced sale in a court auction be deprived of his property for less than its fair value. The dismissal of the appeal in this case by the High Court has had the effect of finally denying to the appellant this advantage, and the order of the High Court must to this extent be treated as determining a question of rights between the parties and not merely a question of procedure. The right which the appellant has thus lost is different from what is available to him under Order 21, Rule 90, Civil Procedure Codebecause under the latter provision he cannot claim relief merely on the ground of inadequacy of price, but only by proving that serious inadequacy of price has resulted from fraud or material irregularity in publishing or conducting the sale.

9. The case will be remitted to the High Court with a direction to discharge their order of 22nd September 1938, and the lower Court's order of 22nd August 1938, and to give liberty to the appellant to file an application under Section 13, Bihar Moneylenders (Regulation of Transactions) Act, 1939. There will be no order as to costs.

Sulaiman J.

10. The application made to the Subordinate Judge under Sections 16 and 17, Bihar Moneylenders Act (No. 3 of 1938) had prayed for making an estimate of the revalue of the mortgaged property and of suoh portion of it as might by its sale be sufficient to satisfy the decree and to order only that portion to ha included in the sale proclamation.

11. The learned Subordinate Judge also took the application to be one ' praying for fixing a valuation of the property in execution and for issue of sale proclamation in respect of a portion of the property that the Court might think sufficient to satisfy the decree.

12. He however declined to fix any valuation and rejected the application on the sole ground that similar objections had been previously decided against the judgment-debtors, and they could not raise them over again on account of the coming into force of the new Act.

13. The applicants filed a miscellaneous appeal in the Patna High Court purporting to be both under Section 47, Civil Procedure Code and the Moneylenders Act, Section 16 (2) of which provided for a special appeal from an order under Section 16. No appeal was provided for from an order under Section 17. Indeed the stage contemplated by Section 17 had not arrived till then. In a previous Misc. Appeal No. 254 of 1938,1 decided on 20th September 1938, the High Court had come to the conclusion that both the Sections were repugnant to Order 21, Rule 66, as amended by the Patna High Court, and had upheld the order of the lower Court 'refusing to fix the value of the property to be sold.' In the present case, the High Court after remarking that "the question involved in this appear is whether the learned Subordinate Judge who is executing a mortgage decree ought to have fixed, under Section 16, Bihar Moneylenders Act, the value of the mortgaged property and such portion thereof as is sufficient for the satisfaction of the decree" held that for the reasons given in their previous judgment Section 16 was void and dismissed the appeal. It was not said in express terms in this case that Section 17 also was void, Theugh that

was implied. No other point appears to have been argued or considered. From the High Court's order, one of the judgment-debtors has appealed to this Court. I intimated be the appellant's counsel that in my view no appeal lies. Now an appeal would lie to the Federal Court only if the order of the High Court dismissing the appeal were either a judgment or a decree or a final order within the meaning of Section 205 (1), Government of India Act, 1935. The certificate given by the High Court cannot be conclusive on this point.

14. The meaning of the word 'judgment' was discussed in *Hori Ram Singh v. Emperor*[4] In that case the Chief Justice held that the words 'judgment, decree or final order' ought to receive no narrow interpretation, and accepted the maintainability of the appeal. Varadachariar J. held that the word 'judgment' is comprehensive enough to include a criminal judgment, and proceeded to deal with the case on the assumption that the appeal was competent. On the other hand, I had occasion to refer at some length to the meaning of the word 'judgment' as used in the Indian Code of Civil Procedure, in the Letters Patent and also as used in England, and referred to several Full Bench decisions of the Indian High Courts and some decisions of their Lordships of the Privy Council. I pointed out that in England the term 'judgment' in the Queen's Bench Division was equivalent to "decree" in Equity practice, and 'a judgment is a decision obtained in an action and any other decision is an order'. "Now, in legal language, and in Acts of Parliament, as well as with regard to the right of the parties, there is a well known distinction between a 'judgment' and an 'order'. No doubt the orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment, but still judgments and orders are kept entirely distinct. It is not said that the word 'judgment' shall in other Acts of Parliament include an 'order' ": per Cotton L J in 6. Ex parte Ohinery (1884) 12 Q B D 342 Judgment is regarded as a determination by a Court of law, as the result of an action or proceeding upon the matters submitted for decision, that a legal duty or liability does or does not exist. That the word 'judgment' does not include every order is also apparent from the observation of Sir John Edge in A I R 1925 P C 1557: The term judgment in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense.

15. I emphasized in Hori Ram Singh's case 5 that:

> In Section 205(1) of the Act, the word' judgment' does not occur by itself, but is used in conjunction with "final order'. When both the terms judgment and final order are used together in one expression, they undoubtedly connote different and distinct meanings, and judgment cannot be interpreted as embracing even interlocutory orders, which would make the category 'final order' wholly superfluous and unnecessary.

16. Final Order:

> In Hori Ram Singh's case 5 I also discussed in some detail the meaning of the expression 'final order' and' referred to cases decided by their Lordships of the Privy Council, particularly *Abdul Bahman v. D. K. Cassim and Sons*[5] s where Sir George Lowndes had pointed out that in Ram. chand Manjimal's case *Ramchand Manjimal v. Goverdhandas Vishan das Batanchand, Reported in*[6] the Appellate Court in India was of the opinion. that the order had gone to the root of the suit, namely the jurisdiction of the Court to entertaner it and it was for this reason that the order was Thought to be final.

17. But his Lordship held that this was not sufficient. The finality must be finality in relation to the suit. If after the order, the suit is still a live suit, in which the rights have still to be determined, no appeal lies.It was emphasized that if the effect of the order from which it is sought to appeal' is not to dispose finally of the rights of the parties, then even Though it decides and important and even a vital issue in the case, it leaves the suit alive and provides? for its trial in the ordinary way.

> 17. Decree: As pointed out by me in Hori Ram Singh's case6 the term 'judgment' in England includes decree, and decree must therefore involve a determination of the? rights of the parties. Even in India decree is defined in Section 2 (2), Civil Procedure Codeas:
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> The formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

18. The determination of any matter within; Section 47, Civil Procedure Codeis no doubt included in that term, but Section 47 deals with the determination of questions arising between the parties relating to the execution, discharge or satisfaction of the decree, and not to the particular mode of executing the decree which may be ordered. That is dealt with in the Rules contained in 21. Rule 66 of that Order does not in so many terms refer to the determination of any question arising between the parties to the proceedings but lays down how the Court is to cause a proclamation of the intended sale to be made where any property is ordered to be sold by public auction, and Sub-section (2) provides what particulars should be specified in the proclamation of sale, and these include everything which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

19. The directions issued by the Court under Order 21, Rule 66, Civil Procedure Code as originally enacted requiring the specifications to be made in the proclamation of sale cannot be regarded as judicial adjudication of the rights of the decree holder or of the judgment-debtor. They appear to possess the characteristics of an administrative order directing how the proclamation of sale should be drawn up before the auction sale is actually held, because it cannot be suggested that by These directions the Court determines the exact value of the property so as to be finally binding on any party. At best it can arrive only at an approximate estimate of the value. Some Courts have actually gone as far as to say that an order under Order 21, Rule 66, is not a judicial order but merely an administrative one. It would be quite sufficient to say that the order is not a judicial adjudication of any question arising between the parties to the execution, but merely the issuing of directions as to the mode of proclamation of sale. It is really difficult to see how the approximate estimation of the value of the property can ever be regarded as a determination of any question arising between the decree-holder and the judgment debtor within the meaning of Section 47, Civil Procedure CodeIndeed, as was laid down by their Lordships in *Saadatmand Khan v. Phul Kuar*[7] a remedy is provided (under Section 311 corresponding to Order 21, Rule 90), for the judgment-debtor to question the valuation and have the sale set aside if the gross under valuation amounts to a material irregularity and he sustains substantial injury thereby. The drawing up of the proclamation and the entering of the required specifications as fairly and accurately as possible are not matters relating to the execution of the decree itself so much as relating to the method of proclamation of sale.

20. There seems to be a perfect unanimity among all the Indian High Courts that the fixing of the value of the property under this rule is by no means an adjudication within the meaning of Section 47, Civil Procedure Codeand such an order is not appealable as a decree. The leading case is a Full Bench case of the Madras High Court, *Sivagami Achi v. Subrahmania Ayyar*[8] of course followed in subsequent Madras cases, *Kaviribai Ammal v. B. Mehta and Sons*[9] *Avudainayanappa Pillai v. Sundaranandam Pillai*[10] and *Meenakahisundaram Pillai v. Chokkalinga Pathan*[11] In the second case it was laid down that an order fixing a price to be entered in the proclamation of sale is not a judgment within the meaning of Clause 15 of the Letters Patent. The same view has prevailed in Allahabad: *Meenakahisundaram Pillai v. Chokkalinga Pathan* [12]*Hira Lal v. Tikam Singh*[13] *Muhammad Zakaria v. Kishun Narain*[14] *Qaiser Beg v. Sheo Shanker Das*[15] *Nathu Lal v. Yashoda Devi* [16]and *Ram Oharan Sahu v. Jumna Prasad Sahu*[17] In this last case it was held that an order fixing the valuation for the purposes of the sale proclamation is not a decree within the meaning of Section 47, Civil Procedure CodeA similar view has been expressed in other High Courts: *Krishnarao Ambadas v. Krishnarao Raghunath*[18] *Devendra Nath v. Kailash Chandra*[19] *Basanta Kumar v. Baikunta Nath*[20] *Gayan Nath v. Malhjyi Vaidya*[21] and *Kaghunath Singh v. Hazari Sahu*[22] It was obviously on account of this consensus of opinion as to an order passed under Order 21, Rule 66 relating to valuation not being appealable that the Patna Legislature Theught it fit to add a Sub-section (2) to Section 16, Bihar Money lenders Act, making an order under that Section an appealable order; nonetheless the order cannot be regarded as a decree.

21. No Appeal: The main question in the present case was as to the estimation of the value of the mortgaged property and a sufficient portion thereof, and at a later stage its entry in the proclamation of sale for the benefit of intending purchasers. Section 16 (1) merely makes it obligatory on the execution Court to estimate the value of the property and of that portion of such property the proceeds of the sale of which it considers will be sufficient to satisfy the decree. The proviso reserves the power to the Court to order the whole of the property to be sold if it is satisfied that by reason of the nature of such property or any other special circumstances such property cannot reasonably or conveniently be sold in part. The estimate of the value is obviously only an approximate one and not by any means exact. The property can certainly be sold for a higher price; and of course it is also possible that there may be no bidders willing to offer bids up to the estimated price. If there is any surplus it will go to the judgment-debtor. Such an estimation cannot therefore be considered as a determination of any rights or liabilities so as to constitute a judgment or decree; nor can it even be regarded as a final order because it determines nothing finally, nor even puts an end to the proceedings. It is merely ancillary and subsidiary, and is nothing more than a mere step of preparation for the sale being effected. It follows that the order passed by the High Court dismissing the appeal possesses the same characteristics and is in essence of the same nature. That too neither determines the rights or the liabilities of the parties, nor even decides any question arising between the parties relating to the execution, discharge or satisfaction of the decree. It merely affirms the order refusing to estimate such value, and therefore relates to the mode of sale only, and is interlocutory in character. There is no final decision yet, as even after the disposal of the case by the High Court, the proceeding is still a live proceeding and will continue.

22. Even if the stage contemplated by Section 17 had been reached, the proclamation of sale would have included only so much of the property of the judgment-debtor the proceeds of the sale of which the Court considered would be sufficient to satisfy the decree. The further

provision that such property shall not be sold at a price lower than the price specified in the sale, proclamation would be a direction to the sale officer not to accept any bid which is lower 1939 F C lla/4 than the price specified. This at best is fixing a minimum price which the sale officer should accept. It does not prevent the acceptance of a higher offer; nor does it expressly prevent the Court from revaluing the property in case no bids up to the minimum are received. The two provisos added to the Section refer to matters relating to the portion of the property to be sold, with which we are not concerned in this appeal. The mere inclusion of the whole or a part of the property in the proclamation of sale would also not be regarded as any final adjudication of any rights or liabilities so as to become a judgment, decree or final order. Not even a special appeal is provided for from such an order. All that has happened is that the execution Court has failed to estimate the value of the property, and the proclamation of sale would when issued contain two estimates as given by the decree-holders and the judgment-debtors and would include the entire mortgaged property. That, in my view, does not amount to any final disposal of the rights of the parties at all. In my opinion the order of the High Court dismissing the appeal from the Subordinate Judge's order refusing to fix the valuation or to specify a portion of the mortgaged property in the proclamation of sale is neither a judgment, decree nor final order within the meaning of Section 205 (1) of the Act. No appeal therefore lies to the Federal Court.

23. Even if no appeal lies at this stage, it cannot be suggested that no other remedy whatsoever would be open to the judgment-debtors. If the provisions of the Sections were obligatory on the execution Court a non-compliance with them would certainly be a material irregularity, if not also an illegality, and the sale itself could be challenged on such a ground under Order 21, Rule 90, Civil Procedure Codeif substantial injury is caused by the omission. The order of the High Court in appeal may then possibly be a final order subject to an appeal to the Federal Court. As in the opinion of the majority the appeal lies, I must proceed to consider it on the merits.

24. Patna Rule: Under Order 21, Rule 66 (1) (e), Civil Procedure Codeas enacted, the proclamation was to specify as fairly and accurately as possible several enumerated particulars, and "every other thing which the Court considers it material for the purchaser to know in order to judge of the nature and value of the property". There was some difference of opinion as to the proper inference to be drawn from the observation of Lord Hobhouse in 10. *Saadatmand Khan v. Phul Kuar*[23] which had been decided under the corresponding Section 287 of Act 14 of 1882. Contrary to what was held at Madras, but in partial conformity with the opinions expressed at Calcutta and Allahabad, the Patna High Court considered that it was the duty of the Courts to settle the value, even if the judgment-debtor was absent, and that any valuation other than that fixed by the Court is calculated to mislead possible bidders and would be wrong, and the Court should not insert in a sale proclamation the valuation assessed by the decree-holder or the judgment-debtor: *Kaghunath Singh v. Hazari Sahu (1917) 4 A I R Pat 381(Supra)*, *Beni Prasad v. Edal Singh*[24], and *Damrupat v. Rameshar*[25], Later the Patna High Court changed its policy, and by an amendment of the rule, which came into force on 1st March 1936, provided that :

> No estimate of the value of the property, other than These, if any, made by the decree-holder and judgment-debtor respectively together with a statement that the Court does not vouch for the acouracy of either shall be inserted in the sale proclamation.

25. The prohibition is obviously deliberate and it casts an obligation on an execution Court to see that no other estimate, nor even that made by itself, is inserted in the sale proclamation, and

enjoins upon the Court to notify therein that the Court does not vouch for the accuracy of either estimate.

26. The Moneylenders Act: With the professed object of regulating money lending transactions and granting relief to debtors, the Bihar Legislature intervened and attempted to make it obligatory on an execution Court to determine the value and enter the same in the proclamation of sale, so that the property is not to be sold for less than the specified value. Section 16, Bihar Act 3 of 1938, compelled an execution Court, "notwithstanding anything to the contrary contained in any other law or in anything having the force of law" to "hear" the parties to the decree and estimate the value of such property and of that portion of such property the proceeds of the sale of which it considers will be sufficient to satisfy the decree.

27. Section 17 enjoined that the proclamation of sale shall include only so much of the property of tha judgment-debtor the proceeds of the sale of which the Court considers will be sufficient to satisfy the decree and such property shall not be sold at a price lower than the prioe specified in the said proclamation.

28. The two Provisos dealt with the portions that are to be ordered to be sold. Thus there was a direct conflict between the amended Order 21, Rule 66 enjoining that the Court should not enter its own valuation in the proclamation of sale, and Section 17 which necessitated a price being specified in it.

29. High Court's View: In the earlier case the High Court had taken the view that Sections 16 and 17 must be read together, and that it is Section 17 which specified the purpose of ascertaining the value of the property, providing among others that the property should not be sold for a price lower than that specified in the sale proclamation. According to their view Section 16, read with Section 17, enjoined the Court to estimate the value and mention it in the sale proclamation, that is to say, the Court was to vouch for the absolute correctness of the value as fixed by it. As to the contention that See 16 itself was not repugnant to the rule they had remarked :

> This argument would have been of some force If Section 16 would have stood by itself and would have been self contained which it is not. It is followed by Section 17 without which it would have been an absolutely useless piece of legislation. They had further held that:
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> Sections 16 and 17 ordered the Courts to fix the value very carefully, make their orders appealable to higher tribunals, and by necessary implication compel them to put the value fixed by them in the sale proclamation, and to sell the property only if the price fetched is according to the value fixed by them, unless some other considerations arise.

30. They accordingly remarked that they were "clearly of opinion that Section 16 which must be read with Section 17, was repugnant to Order 21, Rule 66, Civil Procedure Code"Following their previous ruling they held in the present case also that Section 16 of the Act was on account of its repugnancy, void.

31. The New Act: The Bihar Act of 1938 had been passed with the assent of the Governor of the Province only. The Bihar Legislature has passed a fresh Moneylenders' Act (Act No. 7 of 1939),

which was reserved for the assent of the Governor-General, and it came into force on 3rd May 1939 during the tendency of this appeal. The provisions of old Sections 16 and 17 have been reproduced verbatim in Sections 13 and 14 with a few additions, mainly to make the Sections retrospective. I prefer to base my opinion that the High Court's view cannot be accepted on a two fold ground (1) because the provisions of the old Section 16 corresponding to the new Section 13 are not in fact repugnant to Order 21, Rule 66, Civil Procedure Codeas amended by the Patna High Court and (2) because the old Section has now been replaced by the new Section, which as a result of the assent of the Governor-General must in any case prevail.

32. Section 107, Government of India Act. Under Section 107 (1) of the Act if any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then subject to the provisions of this Section, the Federal law, whether passed before or after the Provincial law or, as the case may be, the existing Indian law shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

33. During the transitional period the Federal laws under Section 316 of the Act mean the laws of the Indian Legislature, passed in the exercise of the powers conferred by the provisions of the Act after the commencement of Part III. Under Section 311 (2) "existing Indian law" means, inter alia, any law or rule.... passed or made before the commencement of Part III of this Act by any authority...eing an authority...having power to make such law or rule.

34. It has not been suggested that the provisions of the Bihar Act are repugnant to any laws of the Indian Legislature passed after the coming into force of the new Government of India Act. The only suggestion is that they are repugnant to an existing Indian law. Now Section 107 (1) does not mean that a Provincial law must yield if it is repugnant to any existing Indian law whatsoever. It will give way (to the extent of the repugnancy) only if it is repugnant to an existing Indian law "with respect to one of the matters enumerated in the Concurrent Legislative List," unless the assent of the Governor-General or of His Majesty has been obtained as is referred to in Sub-section (2). If it is with respect to a matter falling within the Provincial Legislative List and not the Concurrent Legislative List, then it would prevail even as against an existing Indian law. On the other hand, the provisions of Section 100 mase it clear that if the matter falls within the federal Legislative List, then the Provincial Legislation is altogether ultra vires, even Though it may also fall under the Provincial or the Concurrent List.

35. Principles of Construction: When the question is whether a Provincial legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other; and care should be taken to see whether the two do not really operate in different fields without encroachment. Further repugnancy must exist in fact, and not depend merely on a possibility :

> Their Lordships one discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the Province of Ontario where the prohibitions of the Canadian Act are not and may never be in force: Att.-Gen. for *Ontario*

v. Att.-Gen. for the Dominion of Canada[26]

36. It is a well established principle that if the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseverably connected with it, then only such part is invalid, unless, of course, the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the Act can be ultra vires in the former, while intra vires in the latter :

> The test is said to be whether a statute with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remained from what it would be with the omitted portions forming part of it.

37. See (1890) HOLE 130 at page 22. A particular Section of an Act however may not be an isolated and independent clause, and may form part of one connected indissoluble scheme for the attainment of a definite object; in which case it would have to be considered as an inseparable part of the whole. A law which is ultra vires in part only may thereby become ultra vires in whole if the object of the Act cannot at all be attained by excluding the bad part. If the offending provisions are so interwoven into the scheme of the Act that they are not severable, then the whole Act is invalid: *In re Initiative and Referendum Act* [27]For instance, the whole texture of the Act was found inextricably interwoven in Att.-Gen. for *British Columbia v. Att.-Gen. for Canada*[28]

38. The words "to the extent of the repugnancy" occurring in Section 107 indicate that it is not essential that the whole Act nor even a whole Section must be declared invalid, but that it is necessary to ascertain exactly how much of it is void on account of repugnancy. In India a clear distinction exists between a provision being ultra vires by virtue of Section 100 on account of overlapping and its being void under Section 107 (1) owing to repugnancy to the extent of such repugnancy. Unlike the former, there is competency to enact in the latter case, but the legislation is invalid to a limited extent on account of a conflict.

39. Repugnancy: The conditions required for a repeal by implication are naturally stringent. The rule laid down in *Kutner v. Phillips*[29] was:

> A repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provision of an earlier one that the two cannot stand together. Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied; or unless there is a necessary inconsistency in the two Acts standing together.

40. The question has been discussed in two Australian cases more recently. In Att.-Gen. for *Queensland v. Att.-Gen. for Commonwealth, 20 C L R 148. at pp. 167-168* (Supra)Higgins J. said :

> What does 'repugnant' mean ? I am strongly inclined to think that no colonial Act can be repugnant to an Act of the Parliament of Great Britain unless it involves, either directly or ultimately, a contradictory proposition probably, contradictory duties or contradictory

rights.

41. Again, *Clyde Engineering Co. Ltd. v. Cowburn, 37 C L R 466.*(Supra) When is a law 'inconsistent' with another law ? Etymologically, I presume that things are inconsistent when they cannot stand together at the same time; and one law is inconsistent with another law when the command or power or other provision in one law conflicts directly with the command or power or provision in the other. Where two Legislatures operate over the same territory and come into collision, it is necessary that one should prevail; but the necessity is confined to actual collision, as when one Legislature says 'do' and the other says 'don't': page 503.

Griffith C.J. remarked:

> The test of inconsistency is, of course, whether"" proposed act is consistent with obedience to both directions: page 504.

42. The opinion of the majority (Knox C. J. and Gavan Duffy J. with the concurrence of Isaacs J.) was that:

> Two enactments may be inconsistent although" obedience to each of them may be possible without disobeying the other. Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even Though the right be one which might be waived or abandoned without disobeying the statute which conferred it: page 478.

43. In this view, it may be humanly possible to obey both, simply by not doing what is declared by either to be unlawful, Though permitted by the other, and yet there may be palpable inconsistency. It may be conceded that the test of a possible obedience to both is not absolute. But as between, the new Section 13 (old Section 16) and Order 21, Rule 66 as in force in Bihar there is not even a question of a right conferred by one being taken away by the other, much less do the words of their Lordships in Att.-Gen. for *Ontario v. Att.-Gen. for the Dominion of Canada (1896) A.C. 348 at pp. 368 and 369(Supra)* "it is obvious that their provisions could not be in force within the same district or Province at one and the same time" apply to them.

44. Impugned Section: The existing Section 13 (as did the repealed Section 16) merely enjoins the estimation of the value of the property and that of a sufficient part thereof, and does not itself deal with the entry of the same in the proclamation of sale. It is therefore not in conflict with Order 21, Rule 66. Nor is there anything in the Proviso permitting the Court to order the whole property to be sold which clashes with the Rule. Unless the value is in some way estimated, it is impossible for the Court to ascertain what portion of the property would be sufficient to satisfy the decree* which consideration is enjoined upon the Court under the terms of the mortgage decree itself passed under Order 34, Rule 5 (3), and 3?orm No. 6 of Appendix D. There is an analogous provision in Order 21, Rule 64 which applies to attached properties. The ascertainment of the value would also enable the Court to fix the order of the sale of the various items so as to adjust equities. The estimation can be made known in ways other than by merely entering if in the proclamation of sale. The High Court has not taken away the discretion of the Courts to divide the property into lots under Order 21, Rule 67 (3) or of the sale officers under Rule 69 to adjourn the sale on the ground of gross inadequacy of the bids, if the estimation of the

value is brought to their notice otherwise (E.g., by production of a certified copy of the order). It would be of help later to the Court itself in deciding whether there has been any substantial injury caused in case any material irregularity or fraud was com minted in publishing or conducting the sale. It follows that although the new Section 14 may, to some extent, be dependent on the new Section 13, as the price can be entered in the sale proclamation only after it has been 'ascertained by the Court, Section 13 in itself is by no means inseparably connected with Section 14, and can indeed stand alone by itself. The estimation of the price is one thing, and its entry in the proclamation of sale is quite another thing. The two are distinct and can be easily separated, as in their true import they are severable. As the former is easily separable and enacts different and distinct provisions and is not in reality dependent on the latter, there is no reason why the former should not stand merely because the latter may be repugnant. Repugnancy should not be extended to a Section by implication if it does not in fact exist. In my opinion there is no repugnancy between the new Section 13 (old 8. 16) and the amended Order 21, Rule 66.

45. The second ground is that we can in appeal take into account the imperative provisions of the new Money Lenders Act which has already come into force, and which automatically repeals the old Act. Of course, we are not bound to do so, as the appellant can move the Execution Court afresh to act under the new Act and indeed it is the duty of that Court so to act even without an application. But in *Quilter v. Mapleson (1882) 9 Q B D 672(Suupra)*, it was held that an Appellate Court could grant relief according to the new law which had come into force in the meantime even Though the judgment of the Court below had been correct according to the law as it then stood. It may however be pointed out that under the English Order 58, Rule 2 appeals were by way of "re-hearing" and the Appellate Court had power not only to make any order which ought to have been made by the Court below, but also to make such further or other order as the case may require. The last words occur in the Indian Code of Civil Procedure Order 41, Rule 33 also, but that has not been made applicable to the federal Court.

46. Under Section 205 (2) the Federal Court has power to grant leave to appeal on any ground other than what had been raised in the Court below. Again under Section 209 (1) the Federal Court where it allows an appeal can give a declaration as to the judgment, decree or order which is "to be substituted" for the judgment, decree or order appealed against, and not merely a declaration as to the judgment, decree or order which ought to have been passed by the High Court. No doubt in (1905) A.C. 38336 at p. 388 their Lordships applied Section 545 of the Ceylon Code, without taking into account in favour of the appellant a new ordinance adding a Proviso to that Section that a suit should not fail for want of letters of administration, and remarked that "their Lordships have only to say whether that judgment was right when it was given." But their Lordships took care to observe at p. 391 that the objection of want of administration is one of substance and the appellant's case did not fail by reason only that letters of administration to the intestate's estate have not been granted.

47. Their Lordships of the Privy Council in a recent case in 15 Pat 268 did take into consideration against the appellant a new Act which was passed during the tendency of the Privy Council appeal, by which the appellant's rights had been taken away. Their Lordships on the basis of the new enactment dismissed the appeal. Although that was a converse case, the principle undoubtedly applies. Accordingly there seems to be no good ground why the Federal Court may not, if it so thinks fit, dispose of the appeal on the basis of the new enactment. As the Patna Rule came into force in 1936 and therefore did not exist at the time of the passing of the

Act, it cannot be regarded as having been included in the Code of Civil Procedure existing at the time (Entry 4 of List 3). But the amendment of Order 21, Rule 66 was certainly a matter of civil procedure. The rule made by the High Court, under the powers conferred upon it by Sections 122 and 124, Civil Procedure Codewas therefore an existing Indian law with respect to a matter enumerated in List 3. Sections 13 and 14, Money Lenders Act of 1939 even if repugnant to the Rule must prevail under Section 107 (2), Government of India Act, because the assent of the Governor-General has been obtained. Accordingly if an appeal were to lie, I would allow the appeal and remit the case to the High Court with the declaration that the following order be substituted for the High Court's order :

48. The appeal is allowed, the order of the Subordinate Judge set aside and the case remanded to him for disposal according to the provisions of Sections 13 and 14, Bihar Money Lenders Act (Act No. 7 of 1939). In the circumstances, all parties should bear their own costs.

Cases Referred.

1(1939) 26 A I R Pat 90
2(1912) A.C. 788
3(1936) 23 A I R P C 49
4decided on 12th April 1939
5(1933) 20 A I R P C 58
6(1920) 7 A I R P C 86
7(1898) 25 I.A. 146
8(1904) 27 Mad 259
9(1924) HAIR Mad 234
10(1924) HAIR Mad 767
11(1929) 16 A I R Mad 506
12(1929) 16 A I R Mad 506
13(1926) 13 A I R All 401
14(1926) 13 A I R All 268
15(1932) 19 AIB All 85
16(1932) 19 A I R All 136
17(1932) 19 A I R All 696
18(1928) 15 A I R Bom 245
19(1925) 12 A I R Oal 318
20(1926) 13 A I R Cal 610
21(1925) 12 A I R Pat 588
22(1917) 4 A I R Pat 381
23(1898) 25 I.A. R 146
24(1919) 6 A I R Pat 373
25(1923) 10 A I R Pat 445
26(1896) A.C. 348, at pages 369-70
27(1919) 6 A I R P C 145 at p. 944
28(1937) 24AIEPO 93, at page 388
29(1891) 2 Q B 267)