(1895) 04 CAL CK 0003

Calcutta High Court

Case No: None

Jogodanund Singh		APPELLANT
	Vs	
Amrita Lal Sircar and Others		RESPONDENT

Date of Decision: April 30, 1895

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 174

Citation: (1895) ILR (Cal) 767

Hon'ble Judges: W. Comer Petheram, C.J; Stevens, J; Sale, J; Prinsep, J; Pigot, J; Norris, J; Macpherson, J; Hill, J; Gordon, J; Ghose, J; Beverley, J; Banerjee, J

Bench: Full Bench

Judgement

Banerjee, J.
The questions which have been referred to the Full Court for decision in this case are:

First.-Whether the case of Girish Chundra Basu v. Apurba Krishna Vass ILR Cal. 940 was rightly decided?

Second.-Whether the cases of Lal Mohun Mukcrjee v. Jogendra Chunder Boy ILR Cal. 636 and Uzir Ali v. Ram Komal Shaha ILR Cal. 383 were rightly decided?

2. In the case of Lal Mohun Mukerjee v. Jogendra Chunder Boy ILR Cal. 636, the earliest of the three cases referred to above, the question was whether Section 174 of the Bengal Tenancy Act was applicable to a sale hold after that Act had come into operation, when the execution had been applied for, and sale proclamation issued, under Bengal Act VIII of 1869. The Full Bench answered the question in the negative, holding that Section 174 of the Bengal Tenancy Act could not have any retrospective operation, as it conferred upon judgment-debtors a new right which they did not possess under the old Act, and as the proceedings had commenced before the new Act came into force.

3. In the next case in order of time, Uzir Ali v. Ram Komal Shaha ILR Cal. 383, the question was whether Section 174 of the Bengal Tenancy Act applied to a sale held under an execution applied for after that Act had come into operation, when the decree was patted under the old Act. The Full Bench answered the question in the negative, holding that the case was not distinguishable in principle from that of Lal Mohun Mukerjee v. Jogendra Chunder Roy ILR Cal. 636.

4. In Girish Chunra Basu v. Apurba Krishna Dass ILR Cal. 940, the last of the three cases referred to above, the question was whether Section 310 A of the Code of Civil Procedure, which was added to the Code by Act V of 1894, was applicable to a sale held after the date on which that Act came into operation, when the execution had been applied for, and sale proclamation issued, before that date. The majority of the Bench which heard the case answered the question in the negative, following the two earlier cases relating to Section 174 of the Bengal Tenancy Act and holding that Section 310A of the Civil Procedure Code, like Section 174 of the Tenancy Act, was a provision conferring a right and not relating merely to procedure.

5. These decisions, no doubt, are all based upon the general ground that a provision of law like that contained in Section 174 of the Bengal Tenancy Act, or Section 310A of the Civil Procedure Code, confers a new right on judgment-debtors, and should not, therefore, be held applicable to any case in which the decree was passed before such provision came into force; but as the three cases differ from one another in certain points, and as it remains to be seen whether, even if the general ground mentioned above be not a sound one, those points of difference may not afford ground for justifying the decision in one case, though not in another, it is convenient to consider the cases separately.

6. I shall consider first the case of Lal Mohun Mukerjee v. Jogendra Chunder Boy ILR Cal. 636 as being the earliest of the three cases and the strongest one for the decree-holder and the auction-purchaser in whose favour the decision was given. In this case MITTER, J., who delivered the judgment of the Full Bench, said: "We are of opinion that an application u/s 174 of the Bengal Tenancy Act cannot be entertained in respect of sales held in execution of decrees made before the date when that Act came into operation, the execution of the decree having been applied for before the aforesaid date. Section 174 of the Bengal Tenancy Act confers upon the debtors a new right which they did not possess under the old Act. Therefore the presumption is (in the absence of express legislation or direct implication to the contrary) that its operation is not intended to be retrospective its provisions cannot, therefore, be applied to proceedings commenced before the Act came into operation." The reasoning in this judgment consists of two distinct and independent parts.

7. The first part is to the effect that, since a law which creates a new right ought not to have retrospective effect, and since Section 174 of the Bengal Tenancy Act creates a new right in favour of judgment-debtors, therefore Section 174 ought not to have retrospective effect, that is, effect in cases in which the decree by which the

applicant became a judgment-debtor was made before that section became law.

8. And the second part is to the effect that, since proceedings commenced under any law ought not to be affected by any change in that law, and since the proceedings in this case were commenced under the old rent-law, therefore they ought not to be affected by Section 174.

9. These two branches of the reasoning require separate examination.

10. I must respectfully dissent from the conclusion in the first part of the above reasoning, as 1 am unable to accept the premises upon which it is based as correct.

11. In the first place, to my mind, the broad general proposition, which this reasoning adopts as its major premise, namely, that a law creating a new right ought not to have retrospective effect, is not universally true. Ordinarily, no doubt, a new law should affect only future transactions and not past ones: Urquhart v. Urquhart 1 Macq. H.L.C. 662. But the rule against retrospective operation is intended to apply not so much to a law creating a new right as to a law creating a new obligation or interfering with vested rights : See Reid v. Reid IL.R. Ch. D. 408, Gardner v. Lucas IL.R. App. Cas. 582. This is how the rule has generally been understood and laid down in text-books. Maxwell in his treatise on the interpretation of statutes says: "It is chiefly when the enactment would prejudicially affect vested rights, or the legal character of past transactions, that the rule in question operates. Every statute, as has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already 778] passed, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation" (2nd edition, p. 257). [See also Wilberforce on Statute Law, page 157; Sedgwick on Statutory Law, 2nd edition, 160.]

12. As the creation of a new right in one class of persons is generally attended with the imposition of new obligations on, or the interference with vested rights of, other classes, a law creating a new right would, in general, be subject to the rule against retrospective operation. But where, as in this case, the new right (conceding for the moment that it is a new substantive right) is created expressly under conditions which prevent its imposing any new obligation on, or its interfering with any vested right in, others, the reason for the rule ceases to exist, and the rule must, therefore, cease to be operative. The only persons who can possibly be affected by a provision like that contained in Sub-sections 1 and 2 of Section 174 of the Bengal Tenancy Act, in favour of the judgment-debtor, are the decree-holder and the auction-purchaser; and the section expressly provides that the judgment-debtor is entitled to have the sale set aside only upon payment, not merely of compensation to the purchaser, but also of the whole amount due under the decree with costs to the decree-holder. Thus the vested right of the decree-holder, which is to obtain satisfaction of his decree, is left unaffected by this provision, except so far as it is to his advantage; for

the sale may not always pay him in full, but the application of Section 174 in every case will. As regards the auction-purchaser, five per con turn on the purchase-money, though ordinarily a sufficient compensation, may not be so when he makes a vary favourable bargain; but as the sale took place after the new law came into operation, and he must be taken to have made his bid with full knowledge of the law, it cannot be said that any vested right of his is affected by it.

13. Then, in the second place, I do not think that Section 174 creates any new substantive right in the judgment-debtor. It embodies in substance a rule of procedure, which provides that, after a sale in execution of a decree has taken place and before it is confirmed, if the judgment-debtor deposits a certain sum in Court, the decree-holder shall realize his dues out of the amount so deposited, and not out of the sale proceeds, and the auction-purchaser, whose right does not become perfect until the sale is confirmed by the Court, shall not be entitled to have the sale confirmed, but shall receive back the purchase-money with a certain compensation out of the money deposited. It being thus really a matter of procedure, there can be no objection to its having effect immediately, even though it should affect past transactions and the mode of enforcement of vested rights, [see Gardner v. Lucas IL.R. App. Cas. 603], "provided, of course," as Mellish, L.J., said in the case of the Republic of Costa Rica v. Erlanger IL.R. Ch. D. 69, "that no injustice is done." And I have shown above that this condition is here fully satisfied.

14. Then, again, it is assumed, in the above reasoning, that the operation which the applicant u/s 174 of the Bengal Tenancy Act sought to give to that section was retrospective in its nature, and it is further assumed that there is nothing implied in the scope and purposes of the section to shew that it was intended to have any retrospective effect: assumptions the correctness of which I am by no means prepared to admit.

15. When the sale which was sought to be set aside in this case was held after the new Act had come into operation (and I may add that the same was the state of facts in the other two cases and also in the case which has given rise to this reference), the assumption that the application of the Act to such a sale would be to give it retrospective effect is, in my opinion, not a correct assumption. In setting aside, u/s 174, a sale held after that section had become law, the direct effect of the section would be prospective only, though the sale might depend upon a decree and execution-proceedings of dates antecedent to that of its becoming law. This distinction is well pointed out by Lord Den-man in Queen v. The Inhabitants of St. Mary Whitechapel 12 Q.B. 127, in which his Lordship, speaking of a statute which is in its direct operation prospective, said: "It is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing;" and this observation applies with peculiar force to a case like the one now under consideration, where the facts antecedent to the passing of the new law go so little to determine the person who is really affected by the application of the

new law, I mean the purchaser.

16. Then, as regards the second assumption, no doubt it is true that the Bengal Tenancy Act contains no express words to indicate that Section 174 is to have any retrospective effect. But though there may not be any express words to that effect, still it may be shown by the general scope and purpose of the enactment that it is intended to have retrospective effect. See Pardo v. Bingham IL.R. Ch. App. 740. And if we look to these, there can remain very little doubt as to what the Legislature intended in the present instance. Under the old law, if a tenure or holding was sold in execution of a decree for rent, and the sale was for inadequate value, the tenant could get the sale set aside only if he could prove that the inadequacy of price was due to some irregularity in publishing or conducting the sale; and, if there was no such irregularity, but the sale nevertheless resulted in loss, however great the loss might be, the tenant was obliged to bear it as a necessary evil. It was this evil which Section 174 of the Bengal Tenancy Act was intended to remedy, and it is difficult to imagine that the Legislature intended to limit the remedy to those cases in which the sales were held in execution of decrees made subsequently to the passing of the Act, and to allow the evil to continue for years to come, during which decrees made under the old Act might go on being enforced by the sale of tenures or holdings, when the application of the new law to sales in execution of decrees passed under the old law could not possibly have resulted in any hardship or injustice. As a remedial provision, it ought to be liberally construed so as to apply to every sale of a tenure or holding in execution of a decree for arrears of rent, held after the passing of the Act, irrespective of the date of the decree.

17. The second branch of the reasoning in Lal Mohun Mukerjee''s case ILR Cal. 636 requires separate examination. The sale was held in the course of execution-proceedings instituted under the old Act (Bengal Act VIII of 1869), which was repealed by the Bengal Tenancy Act. Now, Section 6 of the General Clauses Act I of 1868 provides that the repeal of any Act shall not affect any proceeding commenced before the repealing Act shall have come into operation, and whatever doubt there may be as to whether a proceeding in execution is a proceeding in a suit [as to which point see Deb Narain Dutt v. Narendro Krishna ILR Cal. 267, and Code of Civil Procedure, Section 647, Explanation], there can be no room for doubt that the execution-proceeding in this case was a proceeding "commenced before the repealing Act came into operation." It might be said, therefore, that the execution-proceeding in this case was unaffected by the repeal of Bengal Act VIII of 1869, and, therefore, unaffected by the provisions of Section 174 of the repealing Act. No doubt the operation of Section 6 of Act I of 1868, in making pending proceedings continue to be regulated by the old procedure, is limited to cases in which the change in the law is the result of repeal of the old enactment, and does not extend where it is due merely to an addition to it. But it may not be clear that Section 174 of the Bengal Tenancy Act is purely a provision of this latter description. It is one of a group of provisions in an enactment which repeals the old law and

takes its place. If the matter had been unaffected by the provisions of Section 6 of the General Clauses Act, I should have felt little hesitation in saying that this part of the decision in Lal Mohun Mukerjee''s case ILR Cal. 636 was also incorrect. As it is, and as this point was not discussed in the argument before us, and does not affect the decision of the case which has given rise to this reference, I do not think it desirable to pronounce any decided opinion upon it; though I may add that the object of Section 6 of the General Clauses Act may be simply to leave proceedings commenced under the old Act unaffected by the repealing Act, only so far as they have proceeded, leaving their further progress to be regulated by the procedure in force after the repeal; upon which view the second branch of the reasoning will not have any greater force than the first,

18. In my opinion, therefore, the decision in Lal Mohun Mukerjee''s case ILR Cal. 636, so far as it holds that Section 174 of the Bengal Tenancy Act creates a new right in a judgment-debtor, and is, therefore, inapplicable to a case in which the decree was passed before that Act became law, is wrong; but I abstain from pronouncing any opinion upon the correctness of the other ground of the decision, namely, that the section was inapplicable to the case by reason of its being a pending proceeding instituted under the old law.

19. The case of Uzir Ali v. Bam Komal Shaha ILR Cal. 383 need not detain me long. It is based wholly upon the first of the two grounds upon which the decision in Lal Mohun Mukerjee''s case ILR Cal. 636 is based, namely, that Section 174 creates a new right in favour of the judgment-debtor; and, as I have shown above that that ground is not sound, I must say that this case was incorrectly decided.

20. It remains now to examine the case of Girish Chundra Basu v. Apurba Krishna Dass ILR Cal. 940. The majority of the learned Judges, who decided that case, were of opinion that it was governed by the principle laid down by the Full Bench decisions in the cases of Lal Mohun Mukerjee ILR Cal. 636 and Uzir Ali ILR Cal. 383. But as I have, for the reasons given above, said that the principle laid down in those cases that a provision like that in Section 174 of the Bengal Tenancy Act creates a new right, is not a correct one, I must say that the case of Girish Chundra Basu v. Apurba Krishna Dass ILR Cal. 940 was incorrectly decided. Though here the execution-proceedings were instituted under the old law, [the case is unaffected by Section 6 of the General Clauses Act, as the change in the law was brought about, not by the repeal of the old Act, but by the addition to it of a new section, namely, Section 310A. And all that, I have said above with reference to Lal Mohun Mukerjee''s case ILR Cal. 636 excepting so much as relates to the effect of Section 6 of Act I of 1868, applies with full force to this case.

21. It was argued for the auction-purchaser that Section 310A of the CPC differs from Section 174 of the Bengal Tenancy Act, in being less favourable to the decree-holder than the latter provision, as it does not provide for the immediate payment by the judgment-debtor of the costs and interest accruing after the issue

of the sale proclamation, and not entered in it. I do not consider this a material point of distinction at all, as the decree-holder''s right to realize these costs and interest remains unaffected by Section 310A.

22. I would, therefore, answer the questions referred to us as follows:

1. The case of Girish Chundra Basu v. Apurba Krishna Dass ILR Cal. 940, was not rightly decided.

2. The case of Uzir Ali v. Ram Komal Shaha ILR Cal. 383, was not rightly decided; nor was the case of Lal Mohun Mukerjee v. Jogendra Chunder Roy ILR Cal. 636 rightly decided, so far as it laid down the principle that Section 174 of the Bengal Tenancy Act created a new right in judgment-debtors, and was, therefore, inapplicable to a case in which the decree was passed before that Act came into operation.

23. But upon the question whether the order made in the last-mentioned case was right u/s 6 of General Clauses Act, by reason of the execution-proceeding having been commenced under Bengal Act VIII of 1869, I pronounce no opinion.

24. It was contended on behalf of the auction-purchaser that whatever may be the decision of the Court upon the questions referred to it, it could not interfere, u/s 622 of the Code of Civil Procedure, with the order complained of in the case which has given rise to this reference. But if I am right in the view I take of Section 310A of the Civil Procedure Code, the Court below was bound, upon the application of the judgment-debtor in this case, to set aside the sale under that section, and, not having done so, it has "failed to exercise a jurisdiction vested in it by law," within the meaning of Section 622, so as to make its order open to revision by this Court.

25. I would, therefore, make the Rule absolute.

Beverley, J.

26. I concur in the able judgment of Mr. Justice Banerjee, with this reservation, that it does not appear to me from the report of the case of Lal Mohun Mukerjee v. Jogendra Chunder Boy ILR Cal. 636, that the learned Judges who decided that case intended to base their judgment in any way on Section 6 of the General Clauses Act I of 1868.