CIVIL REVISION.

Before Mukherjea and Akram JJ.

1940

April 9, 12.

DHIRENDRA NATH RAY

v.

IJJET ALI MIAH.*

Procedure—*Procedure for enforcing a substantive right—Substantive right taken away by repealing Act—Saving of substantive right which accrued before the repealing Act—Procedure applicable for enforcing the right so saved—Bengal Tenancy Act (VIII of 1885) [as amended by Bengal Tenancy (Amendment) Act (Ben. IV of 1928)], ss. 26J, 188 (1)(i)—Bengal Tenancy (Amendment) Act (Ben. VI of 1938)—Bengal General Clauses Act (Ben. I of 1899), s. 8.*

Where an Act of a legislature prescribes a new procedure for enforcing a substantive right of a party, but does not affect such right itself, the new procedure will *primâ facie* apply to all proceedings relative to such right, pending as well as future.

Gardner v. *Lucas* (1) relied upon.

Where, however, an Act repeals the substantive right as well as the procedure by which it used to be enforced, but leaves unaffected such substantive right as had accrued prior to the date the repealing Act came into force, the procedure which prevailed, before the date of the repealing Act, for enforcing such right, remains unaffected also.

In re *Hale's Patent* (2) relied upon.

Before the Bengal Tenancy (Amendment) Act, 1938, came into force on August 18, 1938, by which ss. 26J and 188 (*1*) (*i*) of the Bengal Tenancy Act, 1885, were repealed, the landlord of an occupancy holding had acquired a right to claim certain fees and compensation under the s. 26J of the Act, which right he could then enforce by an application as provided by the s. 188 (*1*) (*i*) of the Act. On August 24, 1938, that is, after the amending Act of 1938, whereby the ss. 26J and 188(*1*)(*i*) were repealed, came into force, the landlord made an application to enforce his said claim under s. 26J of the Act. Upon a contention that the landlord could on that date only enforce his claim by a suit and not by an application,

held: (i) that as s. 26J of the Act which conferred upon the landlord the right to fees and compensation, and s. 188 (*1*) (*i*) which prescribed the procedure for enforcing such right were both repealed by the amending Act of 1938, and as the right, which had accrued before the amending Act of 1938 came into force, remained unaffected by virtue of cl. (*c*) of s. 8 of the Bengal General Clauses Act, 1899, the procedure for enforcing such right also remained unaffected by virtue of cl. (*c*) of the said s. 8;

*Civil Revision, No. 757 of 1939, against the order of Mohammed Sirajul Islam, Second Munsif of Jhenidah, dated March 27, 1939.

(1) (1878) 3 App. Cas. 582. (2) [1920] 2 Ch. 377.

(ii) that even after ss. 26J and 188(*1*)(*i*) of the Bengal Tenancy Act, 1885, were repealed, the landlord could maintain an application under those sections for the enforcement of the right which had accrued to him before the repeal of the said sections.

Rajendra Nath Nag v. *Asha Lata Debi* (1) followed.

CIVIL RULE obtained by a landlord of an occupancy holding.

The facts of the case appear sufficiently from the judgment of Mukherjea J.

Hemendra Chandra Sen and *Sailendra Nath Mitra* (*Jr.*) for the petitioner. The landlord had certain rights to receive fees and compensation accrued to him under s. 26J of the Bengal Tenancy Act, 1885, before the section was repealed by the Bengal Tenancy (Amendment) Act, 1938. Before the section was repealed, he could enforce his rights by means of an application as provided by s. 188 (*1*) (*i*) of the Bengal Tenancy Act of 1885. Section 188 (*1*) (*i*) of the Act of 1885 was also repealed at the same time by the same Bengal Tenancy (Amendment) Act of 1938. It is not disputed that, even after the repeal of the s. 26J, the landlord retains his rights which had accrued to him in respect of transactions completed before the repealing Act came into force. The question, however, is—how can the landlord enforce such right after s. 188 (*1*) (*i*) has been repealed? Must he bring a suit, or is he entitled to bring an application for the purpose as formerly? I submit, it is still open to the landlord to bring an application under s. 188 (*1*) (*i*) for the enforcement of his right under s. 26J of the Act. If the amending Act altered only the procedure for enforcing the substantive right under s. 26J, and left the substantive right itself unaffected, the procedure as altered would have applied to all proceedings—pending as well as future. But the amending Act not only abolished the substantive right under s. 26J but also repealed the procedure for enforcing such right. The position, therefore, is different. By s. 8, cl. (*c*) of the Bengal General Clauses Act,

(1) I. L. R. [1939] 2 Cal. 346.

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1899, the substantive right under s. 26J of the Bengal Tenancy Act, in respect of transactions completed before the date of the repeal of the section, is saved. And if such substantive right is saved, the procedure, which prevailed for enforcing such right prior to the repeal, is saved also under s. 8, cl. (*e*) of the Bengal General Clauses Act, 1899. The landlord, therefore, is still entitled to seek his remedy by means of an application: *Rajendra Nath Nag* v. *Asha Lata Debi* (1).

Syed Farhat Ali for the opposite party. If the petitioner has the right to recover fees and compensation under s. 26J of the Bengal Tenancy Act, 1885, his remedy, after s. 188 (*1*) (*i*) was repealed, is by way of suit and not by an application. There cannot be any vested right in procedure. An enactment dealing with procedure applies, unless a contrary intention appears, not only in cases of rights which have accrued since such enactment but also in cases of rights which had accrued prior to such enactment. Since the date of the repeal of s. 188 (*1*) (*i*), no application can be maintained for enforcement of a right under s. 26J. The petitioner must proceed, if at all, as in a case where no special procedure is prescribed—that is, by a suit.

Clause (*e*) of s. 8 of the Bengal General Clauses Act, 1899, and the subsequent provision of the s. 8 were not intended to apply to proceedings which were started after s. 26J of the Bengal Tenancy Act was repealed. They apply only to pending litigations. Any other interpretation would offend against the well-known principle of interpretation of statues, *viz.*, that there can be no vested right in any particular form of procedure.

Sen, in reply.

Cur adv. vult.

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MUKHERJEA J. This Rule is directed against an order of the Second Munsif of Jhenidah in the district of Jessore, made in a proceeding under s. 26J of the Bengal Tenancy Act, 1885.

The petitioner before us is the landlord. There was an occupancy holding owned by the opposite parties, Nos. 2 to 7, who held the same as tenants under the petitioner. A two-thirds share of this holding was put up to sale in execution of a money-decree obtained by a creditor against the tenants and it was purchased by opposite party No. 1. In the sale certificate the holding was incorrectly described as *mokarrâri*, and on that footing the purchaser deposited only Re. 1 as the landlord's fee. Notice of the sale was served upon the petitioner under s. 26E of the Bengal Tenancy Act on January 12, 1937. On August 24, 1938, the petitioner applied to the Second Munsif of Jhenidah for recovery of the balance of landlord's fees together with compensation under s. 26J of the Bengal Tenancy Act, as it stood prior to its being repealed by the Bengal Tenancy (Amendment) Act of 1938. The amending Act came into force on August 18, 1938, just six days before the application was presented.

The Munsif was of opinion that the petitioner had the right to recover the balance of landlord's fees, but his remedy lay in a suit, and not by an application under s. 26J of the Bengal Tenancy Act, which was repealed by the Ben. Act VI of 1938, and was not in existence at the date when the application was made. It is against this order that the present Rule has been obtained.

It is not seriously disputed before us that the petitioner acquired the right under s. 26J of the old Act to recover the balance of landlord's fees and compensation from the opposite party No. 1, as soon as the holding was sold with an erroneous description that it was a *mokarrâri* tenancy, and a corresponding liability was imposed upon the purchaser at the same

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time to pay the money. Section 26J stood repealed on and from August 18, 1938, but there is nothing in the repealing Act which would show that the legislature intended to take away or impair any vested right that had already accrued under the repealed section. The question that has been pressed for our consideration is, whether the remedy by way of an application was still open to the landlord, or was he bound to enforce his right by means of a regular suit?

Section 26J, as it stood before the Ben. Act VI of 1938 was passed, simply defined the rights of the landlord to recover the balance of landlord's fees and compensation in cases where an occupancy holding was sold with a false description that it was a permanent tenure or a holding at fixed rates. The section itself did not indicate as to how the right was to be enforced and, if the matter stood there, in my opinion the conclusion would have been irresistible that the remedy lay in an ordinary suit instituted under the provisions of the Code of Civil Procedure, 1908. The legislature, however, while enumerating in s. 188 of the Bengal Tenancy Act the acts which the law authorises co-sharer landlords to do, either acting together or by an agent, in sub-s. (*1*) (*i*) of s. 188 definitely spoke of an application under s. 26J of the Bengal Tenancy Act. This provided or rather implied that the remedy of the landlord lay in an application and it has been held in several decisions of this Court that the recovery of the balance of transfer fees by the landlord must be by an application and not by a suit: *Aghorechandra Jalui* v. *Rajnandinee Debee* (1); *Muhammad Ismail* v. *Lal Mia* (2); *Maha Luxmi Bank, Ltd.* v. *Abdul Khaleque* (3). These decisions, I think, could be supported on principle. It was the amending Act IV of 1928, which for the first time created the right in favour of the landlord, and if the Act itself provided as to

(1) (1932) I. L. R. 60 Cal. 289. (2) (1933) 37 C. W. N. 917.
(3) (1939) 43 C. W. N. 1046.

how the right could be enforced, the remedy should be deemed to be exclusive, and the ordinary right of suit must be held to be barred. As Lord Tenterden C. J. observed in *Doe dem. Murray* v. *Bridges* (1):—

> Where an Act creates an obligation, and enforces the performance in a specific manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case.

The same principle was enunciated by Willes J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (2), which was followed by the Judicial Committee in *Attorney-General of Trinidad and Tobago* v. *Gordon Grant and Company, Limited* (3).

Now both s. 26J as well as s. 188 (*1*) (*i*) have been repealed by the amending Act VI of 1938, and if the right which had already arisen under the old law is not affected by the repealing statute, the question arises as to how the right could be enforced, after the repealing enactment came into force. Mr. Sen argues that the remedy provided by the old Act was still applicable under s. 8 of the Bengal General Clauses Act, 1899, and in support of his contention he relies upon a decision of S .K. Ghose J. in *Rajendra Nath Nag* v. *Asha Lata Debi* (4).

Section 8 of the Bengal General Clauses Act, 1899, runs as follows:—

> Where this Act, or any Bengal Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or
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> (*d*) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
>
> (*e*) affect any investigation, legal proceeding or remedy, in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

(1) (1831) 1 B. & Ad. 847 (859); 109 E. R. 1001 (1006).
(2) (1859) 6 C. B. (N. S.) 336; 141 E. R. 486.
(3) [1935] A. C. 532.
(4) I. L. R. [1939] 2 Cal. 346.

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and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

Mr. Sen argues that as the right which arose under s. 26J of the Bengal Tenancy Act as amended by the Act of 1928 is not affected by the repealing Act of 1938, any legal proceeding or any remedy in respect of such right is also not affected, and under the provisions of cl. (*e*) of s. 8 of the Bengal General Clauses Act, 1899, any such legal proceeding may be instituted, as if the old law was still in force. It has been argued, on the other hand, by Mr. Farhat Ali, who appears for the opposite party, that cl. (*e*) as well as the subsequent provision in s. 8 cannot apply to suits or proceedings which were started after s. 26J of the Bengal Tenancy Act was repealed. They refer only to pending litigations. He invites us to hold that the expressions "instituted, continued, or "enforced" occurring after cl. (*e*) of the section are to be taken distributively and should be predicated respectively of the words "investigation, legal "proceeding, or remedy" mentioned in cl. (*e*) of the section; and they should not be read with each of the preceding words. Any other construction, it is said, would offend against the well-known principle of law that nobody has a vested right in any particular form of procedure. This contention, though seemingly plausible, does not appear to me to be sound. The effect of this construction would be to limit the section unduly, which is not warranted by the express language used by the legislature. Clause (*e*) of s. 8 relates to investigation, legal proceeding, or remedy in respect of a right which is preserved under cl. (*c*), and cl. (*d*) refers to any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed. Clause (*e*) relates to matters mentioned in both clauses (*c*) and (*d*), and from the distribution of verbs, as has been made by the legislature itself, it would appear that whereas investigation, legal proceeding, or remedy could be instituted, continued or enforced, the

penalty, forfeiture or punishment could be "*imposed*" as if the repealing Act had not been passed. In my opinion, the words "instituted, continued or "enforced" are to be taken with each of the words "investigation, legal proceeding or remedy" so far as they seem to be appropriate. If the strict interpretation suggested by the learned advocate for the opposite party is accepted, the result would be that, whereas a suit could only be continued and not instituted after the repealing Act is passed, an investigation on the other hand could be started, but not continued after the old law has been repealed. I am also not impressed by the argument that the word "investigation" here refers to a proceeding which is not judicial in its character. It is strenuously argued on behalf of the opposite party that if under s. 8 of the Bengal General Clauses Act a suit is allowed to be instituted as provided for under the old law, even after that law is repealed, it would amount to giving a litigant a vested right in the procedure also; whereas it is an established principle that all changes in the procedure are normally retrospective. This contention, in my opinion, seems to be entirely misconceived. Where an enactment merely alters the procedure, without altering the substantive rights of the parties, the new procedure would be retrospective in its operation, and would extend to rights which had accrued before the changes were made. As was observed by Lord Blackurn in *Gardner* v. *Lucas* (1):—

> It is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alternations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.

In other words, if a statute deals merely with the procedure in an action, and does not affect the rights of the parties, the new procedure will *primâ facie* apply to all proceedings, pending as well as future: Craies on Statute Law (4th ed.), p. 337. Section 8

(1) (1878) 3 App. Cas. 582, 603.

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of the Bengal General Clauses Act, in my opinion, does not contemplate a case where the procedure only is changed leaving the rights of the parties intact. Clauses (*c*) and (*e*) of the section go together. Clause (*e*) refers only to the remedial rights which arise in connection with substantive rights which are repealed by the new enactment, but are saved under clause (*c*). In other words, s. 8 contemplates a case where the repealing enactment repeals a substantive right as well as the procedure by which it was enforced, and in such cases if the rights are saved in respect of transactions completed prior to the repealing of the statute, the remedies in respect of such rights as laid down in the repealed statute are also saved, and the litigant can institute or continue proceedings in the same way for the enforcement of his rights as if the repealing Act had not come into force. This, I believe, is the true interpretation to be put upon the provision of s. 8 of the Bengal General Clauses Act. This section is almost a reproduction of s. 38 of the (English) Interpretation Act of 1889, and the principle embodied in the last clause is quite in accordance with what has been laid down in well-known English cases.

In the case In re *Hale's Patent* (1) there was a dispute regarding compensation to be paid for the use of a certain patent by the Government Department. Under the Patents and Designs Act of 1907 such a dispute was to be settled by the Treasury. By the Act of 1919 "the Court" was substituted for "the "Treasury" for the purpose of determining and settling such disputes. Hale, the appellant in the case, made the application before the Court after the new Act was passed, but it was held that the applicant's proper remedy lay in presenting his application to the Treasury, as was provided in the Act of 1907. Sargant J. observed as follows :—

> No doubt the general law is that, while rights are not statutorily altered retrospectively, procedure is, apart from indications to the contrary, altered retrospectively; but where rights and procedure are dealt with together

(1) [1920] 2 Ch. 377, 386.

in the way in which s. 8 of the Act of 1919 deals with them, the intention of the Legislature would seem fairly clear—namely, that the old rights are still to be determined by the old tribunal under the Act of 1907, and that only the new rights under the substituted section are to be dealt with by the tribunal thereby substituted for the Treasury.

In the present case, the rights of the petitioner in the matter of recovery of landlord's fees, when the holding was sold under a false description, as well as the procedure for enforcing such rights, were dealt with together in the old Act, and as they have both been repealed, and as the right is saved in respect of antecedent transactions under cl. (*c*) of s. 8 of the General Clauses Act, the remedy, in my opinion, is also saved under cl. (*e*); and as the landlord had the right of presenting the application under s. 26J of the old Act read with s. 188 (*1*) (*i*), I hold that the same remedy is still open to the landlord even after the passing of the amending Act of 1938. In my opinion, the decision of S. K. Ghose J. in *Rajendra Nath Nag* v. *Asha Lata Debi* (1) is correct. The decision in *Prafulla Chandra Gangopadhya* v. *Raj Mohan Das* (2) which has been relied on by the opposite party refers to a proceeding under s. 26F of the Bengal Tenancy Act, and is not directly in point.

The result, therefore, is that this Rule is made absolute. The order of the Munsif, Second Court, Jhenidah, is set aside and the case is sent back to him in order that the application may be heard and decided on points other than those dealt with in his order.

As the petitioner was guilty of inordinate delay in making the application, I make no order as to costs in this Court.

AKRAM J. I agree.

Rule absolute.

P. K. D.

(1) I. L. R. [1939] 2 Cal. 346. (2) (1939) 43 C. W. N. 1172.