

The judgment of the Full Bench in the case of *Gobind Chund Koondoo v. Taruck Chunder Bose* (1), is not in point. 1886

The suit must therefore be remanded to the lower Appellate Court for trial on its merits. Costs to abide the result.

T. A. P.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Cunningham, Mr. Justice Wilson, Mr. Justice Prinsep, and Mr. Justice Trevelyan.

BHOBO SUNDARI DEBI (DEFENDANT) *v.* RAKHAL CHUNDER BOSE
(PLAINTIFF.)*

Mortgage—Foreclosure, Suit for—Mortgage by conditional sale—Regulation XVII of 1806—Transfer of Property Act (IV of 1882), s. 2 (cl. c.) s. 86—Procedure. 1886
March 23.

Where a suit is brought, after the date of the Transfer of Property Act, for the foreclosure of a mortgage dated previous to the Act, the procedure to be followed is that given by the Transfer of Property Act; the procedure of Regulation XVII of 1806 not being saved by s. 2 (cl. c.) of Act IV 1882. *Gunga Sahai v. Kishen Sahai* (2) approved.

Per WILSON, J.—It is a general rule in construing Statutes that in matters of substantive right they are not to be so read as to take away vested rights, but that in matters of procedure they are general in their operation. There is nothing in the Transfer of Property Act from which it can be beyond reasonable doubt concluded that the Legislature intended to depart from this settled principle of legislation.

Per TREVELYAN, J.—There is a clear distinction between “relief” and the mode or procedure for obtaining such relief. The “relief” remains unaffected by a change of procedure. The “rights and liabilities” of a mortgagor and mortgagee, and the “relief” in respect of such rights and liabilities, are the same under Act IV of 1882 as they were before. A different procedure for enforcing such rights and obtaining such relief has however been adopted by the Transfer of Property Act.

REFERENCE to a Full Bench made by Mr. Justice Prinsep and Mr. Justice Trevelyan. The facts were as follows:—

The plaintiff filed on the 18th December 1883 a suit on a mortgage bond, which was in form a mortgage by conditional sale,

* Full Bench Reference on Regular Appeal No. 4 of 1885, decided by the Subordinate Judge of Kulna, dated 11th September 1884.

(1) I. L. R., 3 Calc., 146.

(2) I. L. R., 6 All., 262.

1886

BHORO
SUNDARI
DEBI
v.
RAKHAL
CHUNDER
BOSE.

dated 4th September 1876, seeking for foreclosure of the defendant's interest in the property mortgaged.

No proceedings were taken under Regulation XVII of 1806, and the defendant at the hearing contended that, as the mortgage had been executed before the date on which the Transfer of Property came into force, the procedure provided by that Act was inapplicable; and that Regulation XVII of 1806, not having been repealed at the time of the execution of the mortgage, the plaintiff could only proceed in accordance with the provisions of that Regulation.

The lower Court on the authority of the case of *Ganga Sahai v. Kishen Sahai* (1) overruled this objection.

The defendant appealed to the High Court and drew the attention of the Court to the decision of *Pergash Koer v. Mohabir Pershad Narain Singh* (2). The learned Judges abovementioned, considering the question raised to be one of great importance, referred to a Full Bench the question whether the provisions contained in Regulation XVII of 1806 or the provisions contained in the Transfer of Property Act applied to the case.

Baboo *Rash Behari Ghose* (with him Baboo *Chunder Kant Sen*) for the appellant.—Section 8 of the Regulation was in force when the mortgage was executed; it was subsequently repealed by the Transfer of Property Act, but s. 2 (cl. a.) saves all rights and liabilities arising out of a legal relation constituted before Act IV of 1882 came into force. Under the Regulation the first thing to be done was to demand payment—*Gonesh Chunder Pal v. Shoda Nund Surma* (3). The Allahabad High Court says that this is a question of procedure, and that the Transfer of Property Act regulates the way in which such rights should be enforced. I submit Act IV of 1882 is a change in the substance of the law as laid down by the Regulation.

[CUNNINGHAM, J.—You might put your case as being saved by s. 2 (cl. b.) TREVELYAN, J.—The Transfer of Property Act anticipates the remedy, is that not a question of procedure? A rule of

(1) I. L. R., 6 All., 582.

(2) I. L. R., 11 Cal., 582.

(3) I. L. R., 2 Calc., 13.

the Court postponing a remedy is a question of procedure, so why not this.] Besides the demand required, the Regulation also directs that a copy of the application for foreclosure should be served on the mortgagor—*Bank of Hindustan, China, &c. v. Shoroshibala Debee* (1).

1886

 BHONO
 SUNDARI
 DEBI
 v.
 RAKHAL
 CHUNDER
 BOSE.

[WILSON, J.—The Act speaks of something more than a “right or liability;” it speaks of “relief.” Now is not the relief affected if one year is not given to the mortgagor in which to redeem? Yes that is strongly in my favor, see the remarks made by Mitter, J., in *Pergash Koer v. Mahabir Pershad Narain Singh* (2).

[WILSON, J.—The judgment in *Ganga Sahai v. Kishen Sahai* (3) seem to be a discussion as to what would be the effect if s. 2 were not in the Act, rather than a construction of the section. The effect of that case seems to be that cl. c. of s. 2 is struck out of the Act altogether]. Tyrrell, J., when quoting the case of *Republic of Costa Rica v. Erlanger* (4) leaves out the proviso “as to no injustice being done,” which is to be found in the report itself. The effect of s. 6 of the General Clauses Act is to save all rights of procedure existing before the repealing Act came into force. The case of *Pergash Koer v. Mahabir Pershad Narain Singh* (2) shows the difficulty of engrafting into the Transfer of Property Act the procedure of the Regulation.

[MITTER, J.—The mortgagor cannot be deprived of any right he had under the Regulation; the Transfer of Property Act does not enact that any notice should be served on the mortgagor, nor is the period of demand under the Act the same as is given by the Regulation; is the mortgagor to be deprived of these rights? I submit that the procedure of the Regulation cannot be engrafted on to the Act; as to the question whether or no an Act has a retrospective effect, see in the matter of *Ratansi Kalianji Kimbray v. Draper* (5). The Transfer of Property Act was not intended to be retrospective.

Baboo *Karuna Sindhu Mukerjee* for the respondent.—The provisions of Regulation XVII of 1806 are mere rules of

(1) I. L. R., 2 Calc., 311 (320)

(3) I. L. R., 6 All., 262.

(2) I. L. R., 11 Calc., 582.

(4) L. R., 3 Ch. D. 69.

(5) I. L. R., 2 Bom., 148, and L. R., 3 Q. B., 160.

1886

BHONO
SUNDARI
DEBI
v.
RAKHAI
CHUNDER
BOSE.

procedure framed for the purpose of giving the respective rights to which a mortgagor and mortgagee are entitled.

[GARTH, C.J.—If you refer to s. 60 of the Act you will see an illustration of one of the rights referred to in s. 2 (cl. e). The right to redeem, s. 2 (cl. e) was not intended to include rights depending upon the procedure of Courts; for example, the right to serve a notice, or to serve it in a particular way. The Allahabad case supports me in my view. CUNNINGHAM, J.—In the Allahabad case Oldfield, J., does not put his decision on the right being a right arising between the mortgagor and mortgagee, but that it is a right arising out of legislative enactment].

The question is whether s. 2 of the Act is a qualification of the Act or of the section only, so as to give concurrent jurisdiction in the same case. *Pergash Koer v. Malabir Pershad Narain Singh* (1) merely qualifies the Allahabad case.

The following opinions were delivered by the Full Bench:—

GARTH, C.J.—I confess I entertain considerable doubt whether, as a matter of strict law, the decision of the Allahabad Court was right.

I cannot help thinking that sub-section (e) of s. 2 of the Transfer of Property Act was intended to apply to such cases as that with which we are now dealing. But as the majority of the Court think differently, and as the balance of convenience would seem to be in favor of that view, I am not disposed to dissent from their decision.

WILSON, J.—The words with which we have to deal are these:—“Nothing herein contained shall be deemed to affect any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability.” I am unable to agree with my learned colleagues in thinking that there is anything clear about this language. To me it appears so vague and indefinite that I cannot pretend to put any construction upon it with confidence. But on the whole I agree in the conclusion arrived at, and mainly for the following reasons. It is a general rule in construing Statutes that in matters of substantive right they are not to be so read as to take away vested rights, but that in matters of procedure they are

(1) I. L. R., 6 All., 262.

general in their operation. I do not think we ought to conclude that the Legislature in the Transfer of Property Act meant to depart from the settled principle of legislation, unless that intention is shown beyond reasonable doubt. No such intention is in my judgment so shown.

Again, a Full Bench of the Allahabad Court has placed a construction upon the words in question, and I should not feel justified in differing from that decision unless I had a decided opinion adverse to it.

TREVELYAN, J. (PRINSEP, J., concurring).—The question which has been referred to us is one of importance, and it is not in our opinion free from difficulty.

A Full Bench of the Allahabad High Court has considered it in *Gunga Sahai v. Kishen Sahai* (1), and in at least one case before a Division Bench of this Court—*Pergash Koer v. Mohabir Pershad Narain Singh* (2)—this express question has been raised and decided. After hearing this case argued, I do not think that the decision in the case of *Pergash Koer v. Mohabir Pershad Narain Singh* is correct.

In my opinion we must select either the Regulation or the Act as having application to this case. The procedure in the one and in the other must be respectively taken in its entirety. If the repeal of the Regulation and the introduction of the new procedure in its place can be deemed to affect the right or liability of the mortgagor, or the relief in respect of such right or liability, the Regulation still applies, and the procedure provided by it must be followed. On the other hand, if such right, liability or relief be not affected, the Transfer of Property Act applies. The question in this case depends upon the construction to be placed upon the terms of the second section of the Transfer of Property Act. After repealing, amongst other enactments, Regulation XVII of 1806, it runs as follows: "But nothing herein contained shall be deemed to affect—

(a) The provisions of any enactment not hereby expressly repealed:

(b) Any terms or incidents of any contract or constitution

(1) I. L. R., 6 All., 262.,

(2) I. L. R., 11 Calc., 582.

1836

BHOBO
SUNDARI
DEBI
v.
RAKHAL
CHUNDER
BOSE.

1886
 BHOB
 SUNDARI
 DEBI
 v.
 RAKHAL
 CHUNDER
 BOSE.

of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force :

(c) Any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability."

* * * * *

Section (c) is the only portion of this section which has any application to the present case.

It is contended before us that, inasmuch as under the Regulation no foreclosure can be complete until the expiration of a year from the date of the notice, and as under the Transfer of Property Act, ss. 86 and 88, it is competent to the mortgagor to redeem only within six months from the date of declaration by a Court of the amount due, the right of the mortgagor, or at any rate the relief in respect of such right, is affected by the change in the law.

I am unable to give effect to this contention.

It is impossible to say whether a mortgagor will have a longer or a shorter time for redemption under the Regulation than he has under the Act. He has, of course, as of right, the time given to him by the mortgage deed. The time that the Regulation gave him beyond the time given to him by the mortgage depended in reality upon the action of the mortgagee, who could at his pleasure postpone the giving of the notice. Under the Act the further time given to the mortgagor depends partly upon the pleasure of the mortgagee, who has the whole period of 60 years within which to bring a suit, and partly upon the accidents of litigation which may shorten or prolong the period of the pendency of the suit.

There is in reality no comparison between the time during which the mortgagor can redeem under the provisions of the Regulation and that given to him by the Act.

In my opinion the provisions both of the Regulation and of the Act are provisions of procedure. The question is whether the provisions of the Regulation are saved by the Act? This question depends entirely upon the construction to be placed

upon the words "right," "liability," and "relief" in the second section of the Transfer of Property Act, and it is necessary to ascertain what, in strictness of language, is the right of the mortgagor—what is his liability, and what is the relief in respect of such right or liability.

1886

BROBO
SUNDARI
DEBI
v.
RAKHAL
CHUNDER
BOSE.

The right of the mortgagor is to have back his property on payment of the mortgage debt. The liability of the mortgagor is to have his property sold or foreclosed. The relief in respect of the mortgagor's right is the re-conveyance or giving back of his property to him. The relief in respect of the mortgagee's right (which is equivalent to the mortgagor's liability) is the payment of the mortgage money, or, in case of non-payment, the foreclosure of the mortgagor's equity of redemption. There is, I think, a clear distinction between relief and the mode or procedure for obtaining such relief. The relief remains unaffected by the change of the procedure. The rights and liabilities of the mortgagor and mortgagee, and the relief in respect of such rights and liabilities, are the same under the Transfer of Property Act as they were before. A different procedure for enforcing such rights and obtaining such relief has, however, been adopted. The procedure for enforcing a right is no portion of that right, nor does it alter or affect it.

I agree with the decision of the majority of the Full Bench of the Allahabad Court, and especially approve of the remarks of Mr. Justice Oldfield with reference to the inconvenience which must result from any other decision.

In answer to the question put to us, I am of opinion that the provisions contained in the Transfer of Property Act apply to this case.

T. A. P.
