

enjoyment of the family property. This being so, he is entitled to an account of the income of the property. In the result the appeal is dismissed with costs.

1939

HIRA
LAL
v.
PEAREY
LAL

Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai

RADHA KRISHNA BENI PRASAD (PLAINTIFF) v. KISHORE
CHAND SHIVA CHARAN LAL AND OTHERS (DEFENDANTS)*

1939
August, 3

Electricity Act (IX of 1910), sections 5, 9—Civil Procedure Code, section 60—Electrical “undertaking” belonging to a licensee—Liability to attachment and sale in execution of a decree—When saleable—Mortgages and charges attach to purchase money and do not bind the purchaser—Set off—Civil Procedure Code, section 4—Special law.

When a license is granted to a person under the Electricity Act for constructing and working an electrical undertaking, his ownership of the undertaking is subject to certain limitations contained in the Act. Ordinarily a private owner of private property has the right to assign or transfer his property, but under section 9(2) of the Electricity Act the licensee can not in any way transfer his undertaking without the previous consent of the Local Government. In case this license has been revoked certain provisions laid down by section 5 of the Act have an imperative effect, and under those provisions the licensee has the power of disposing of all lands, buildings, works, materials and plant belonging to the undertaking in any manner which he may think fit, only if clause (f) of the section applies to the case; and clause (f) is a residuary clause and comes into operation only when the provisions laid down in the preceding clauses have not come into operation. Therefore, the person whose license has been revoked will have a disposing power over the undertaking only under the provisions of clause (f) of section 5, and therefore the property is not liable to be sold in execution of a decree against him until the contingency contemplated by clause (f) of section 5 arises.

The Electricity Act is a special law and therefore, by section 4 of the Civil Procedure Code, the provisions of section 60 of the Code are subject to any conditions relating to procedure contained in the Electricity Act.

*First Appeal No. 467 of 1937, from a decree of Shiva Harakh Lal, Civil Judge of Budaun, dated the 30th of August, 1937.

1939

RADHA
KRISHNA
BENI
PRASAD
v.
KISHORE
CHAND
SHIVA
CHARAN
LAL

Messrs. *G. S. Pathak, J. P. Bhargava* and *Inam-ullah*,
for the appellants.

Messrs. *P. L. Banerji, Nanak Chand* and *B. N. Misra*,
for the respondents.

IQBAL AHMAD and BAJPAI, JJ.:—This is an appeal by the firm of Messrs. Radha Krishna Beni Prasad who were the plaintiffs in the litigation out of which this appeal has arisen. It is connected with First Appeal No. 507 of 1937 which is an appeal by the firm of Messrs. Kishore Chand Shiva Charan Lal defendant No. 1 in the litigation. Mr. *P. L. Banerji* appearing on behalf of the said defendant conceded that his appeal will be pressed only on the question of costs. As we propose to remit certain issues we have decided to leave the consideration of the question of costs when we decide the appeals finally. This is all that is necessary to be said in connection with First Appeal No. 507 of 1937 at present.

The plaintiff impleaded three defendants in the suit. Defendant No. 1 was Messrs. Kishore Chand Shiva Charan Lal of Bareilly, defendant No. 2 was the Budaun Electric Supply Company and defendant No. 3 was Messrs. P. L. Jaitly & Co. No written statement was filed by defendant No. 3 and the case proceeded *ex parte* against them. Nor was any written statement filed by defendant No. 2. To complete the array of parties before us both defendant No. 2 and defendant No. 3 have been impleaded as respondents and Pandit *Nanak Chand* on behalf of defendant No. 3 has tried to persuade us that we should send down certain issues at his instance as we are remitting certain issues at the instance of the plaintiff and defendant No. 1, but we are not prepared to give this indulgence to defendant No. 3. It will not be fair to the parties who admitted certain points in the court below that they should now be compelled to give evidence on questions on which no issue was raised in the court below by the contesting parties. We shall have to advert to the contentions of Pandit *Nanak Chand* later on.

The case of the plaintiff was that it had obtained a decree from the Calcutta High Court in its ordinary original jurisdiction in suit No. 1980 of 1932 against defendants 2 and 3, namely the Budaun Electric Supply Company and Messrs. P. L. Jaitly & Co., for a sum of Rs.54,000 and odd and that the decree was transferred to Budaun for execution. At Budaun the plaintiff proceeded to attach and sell the property detailed at the foot of the plaint alleging it to belong to defendant No. 2, but before attachment could take place defendant No. 1 intervened and the execution court allowed the objections of defendant No. 1, but the order was set aside by this Court and it was enjoined that the objections of the intervener could be decided only after attachment had taken place, and the execution case was therefore sent down to the court below. The executing court then proceeded to attach the property of defendant No. 2, and defendant No. 1 again filed objections and the objections were once more decided in favour of defendant No. 1, with the result that the plaintiff had to bring the present suit under order XXI, rule 63 of the Civil Procedure Code for a declaration that the plaintiff's property belonged to his judgment-debtor, namely defendant No. 2, and was liable to attachment and sale in execution of the plaintiff's decree No. 1980 of 1932 passed by the Calcutta High Court.

The plaintiff's case as foreshadowed in the plaint is a simple one. It is that the property in dispute belongs to the Budaun Electric Supply Company, the judgment-debtor of the plaintiff, and defendant No. 1, if he is in possession of that property, is in possession on behalf of the plaintiff's judgment-debtor and there is no bar to the property being sold. The plaintiff alleged that the objections of defendant No. 1 were based on certain allegations made by that defendant and those allegations were that a license for supplying electrical energy to the town of Budaun was obtained by defendant No. 3 from the Provincial Government

1939

RADHA
KRISHNA
BENI
PRASAD
v.
KISHORE
CHAND
SHIVA
CHARAN
LAL

1939

RADHA
KRISHNA
BENI
PRASAD
v.
KISHORE
CHAND
SHIVA
CHARAN
LAL

and then defendant No. 3 assigned that license to defendant No. 2, and defendant No. 3 became the managing agents of the Budaun Electric Supply Co. Subsequently the Government revoked the license by an order dated the 9th of June, 1932, and refused to listen to the representations of defendant No. 2 for the condonation of the delay, but while these representations were going on defendant No. 2 borrowed a certain sum of money (the exact amount of which is in dispute and is not admitted) from defendant No. 1 and debentures were granted to defendant No. 1 and Mr. Raghunath Prasad Tandon, a member of the family of defendant No. 1, was appointed an agent of defendant No. 2 in Budaun and put in charge of the business. The Government by its letter dated the 5th of March, 1934, refused to grant a fresh license to defendant No. 2 and required the said defendant to sell its entire undertaking to defendant No. 1. These allegations according to the plaint were the allegations of defendant No. 1 and on that ground it was said that defendant No. 1 was objecting to the execution of the plaintiff's decree by the sale of the property of defendant No. 2, but it was stated that these objections could not in any way stand in the way of the plaintiff and the plaintiff was entitled to obtain the declaration claimed.

It might be mentioned that the plaintiff nowhere alleged in the plaint that the allegations of defendant No. 1 were baseless and the only protest that we find entered in the plaint was that the amount of the debentures was in dispute and not admitted.

Defendant No. 1 alone filed a written statement and his case was that he was not the legal representative of defendants 2 and 3, nor was he in possession on their behalf, but that he was in possession of the property in dispute in his own right and in pursuance of the license granted to him by the Governor-in-Council for the working of the undertaking pending the completion of

1939

 RADHA
 KRISHNA
 BENI
 PRASAD
 v.
 KISHORE
 CHAND
 SHIVA
 CHARAN
 LAL

the sale and therefore the property in dispute was not liable to attachment and sale in execution of any decree passed in favour of the plaintiff against defendants 2 and 3. Section 5 of the Electricity Act was pleaded as a bar and it was said that defendant No. 1 was the sole debenture holder of defendant No. 2 to the amount of Rs.2 lakhs and the said debentures were the first charge on the assets and property of defendant No. 2 and in no event could the property of defendant No. 2 be sold without the payment of the entire debenture money with interest. It was said that the license of defendant No. 2 having been revoked and the said defendant having been ordered by the Government to execute a sale deed in favour of defendant No. 1, he had no interest in the property in suit and neither defendant No. 2 nor defendant No. 3 had any right in or disposing power over the property in dispute or its revenues or profits. Certain other pleas based on the Indian Electricity Act were advanced and it was said that under section 28(1) of the Indian Electricity Act no one could run the electrical undertaking of Budaun who had not been granted a license by the Government and that the order of attachment passed by the execution court was in contravention of section 5(e) (i) of the Indian Electricity Act. It was also pointed out that this order of attachment would prevent defendants 2 and 3 from completing the sale in favour of defendant No. 1 although the Governor-in-Council had asked defendants 2 and 3 to execute such a sale deed. The provisions of the Indian Electricity Act, it was submitted, prevailed over the general law contained in the Code of Civil Procedure.

No oral evidence was produced in the case but certain statements under order X, rule 1 were made by the counsel for the parties. It was admitted by the plaintiff's counsel that the Government had revoked the license held by defendant No. 2. As regards the position of defendant No. 1 the plaintiff's counsel

1939

RADHA
KRISHNA
BENI
PRASAD
v.
KISHORE
CHAND
SHIVA
CHARAN
LAL

stated that he did not know that the Government had granted a new license to defendant No. 1 and his case was that defendant No. 1 was in possession on behalf of defendant No. 2. The defendant's counsel stated that the Government had ordered defendant No. 2, the former licensee, to make a sale of the entire electrical undertaking at Budaun in favour of defendant No. 1, and defendant No. 1 never came to work the undertaking through Raghunath Prasad Tandon as agent of defendant No. 2. He said that by means of a letter dated the 5th of March, 1934, the Government authorised defendant No. 1 under section 5(g) of the Electricity Act and that was tantamount to the grant of a license. After all these statements had been made and issues had been framed the plaintiff said by means of his application No. 72C that the only point of contest between the parties to the suit was whether the sale deed of the entire concern and the disputed property had been executed in favour of the answering defendant or not.

The court below had struck three issues in the case:

"(1) Whether defendant No. 2 is the owner of the property specified in the list annexed to the plaint?

"(2) Whether the property in question is legally liable to attachment?

"(3) Whether the property in question is saleable?"

It was held that defendant No. 2 was the owner of the property detailed in the list annexed to the plaint and the property in question was legally liable to attachment and a declaration to that effect was given in the operative portion of the order passed by the court below. But it was held that the property was not liable to be sold in execution of the decree until the contingency contemplated by clause (f) of section 5 of the Indian Electricity Act arose. Certain other observations were made and we shall refer to them in the course of our judgment. It is against this decree

that the parties have filed cross appeals referred to above and it is contended on behalf of the plaintiff appellant that the property in suit was saleable without being subject to any condition. The amount and the validity and the payment of the debentures are also contested in the appeal. A certain file was sent for from the Local Government but as privilege was claimed and allowed by the court below it is contended before us that the court below erred in this respect.

No pleas having been advanced by defendants 2 and 3 and certain admissions having been made by the contending parties the matter in controversy is confined within a narrow compass. A license is granted under the Indian Electricity Act for the supply of energy to a licensee principally on public grounds for the benefit of the public and it is only natural that the license should be hedged in by certain conditions and the licensee who constructs a building and gets materials and machinery for the working of the license has to comply with the conditions of the license and has to run the undertaking according to the provisions of the Indian Electricity Act. His ownership of the undertaking (we are using the term used in the Indian Electricity Act) is subject to certain limitations contained in the Act. Ordinarily a private owner of private property has the right to assign or transfer his property, but under section 9, sub-clause (2) of the Indian Electricity Act "The licensee shall not at any time assign his license or transfer his undertaking, or any part thereof, by sale, mortgage, lease, exchange or otherwise without the previous consent in writing of the Local Government." When we have to consider the question whether under the provisions of section 60 of the Civil Procedure Code the property of the judgment-debtor is or is not liable to attachment and sale in execution of a decree we have to bear in mind the words of section 4 of the Civil Procedure Code which says that "nothing in this Code shall be

1930

RADHA
KRISHNA
BENI
PRASAD
v.
KISHORE
CHAND
SHIVA
CHARAN
LAL

1939

RADHA
KRISHNA
BENT
PRASAD
v.
KISHORE
CHAND
SHIVA
CHABAN
LAL

deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force." The Indian Electricity Act is a special law and it is obvious that the provisions under the Civil Procedure Code are subject to any condition regulating that procedure by the provisions of the Indian Electricity Act.

As we said before, it is admitted by the plaintiff and by defendant No. 1 that the license granted to defendant No. 2 has been revoked. When this license has been revoked certain provisions laid down by section 5 of the Indian Electricity Act have an imperative effect and under those provisions the licensee has the option of disposing of all lands, buildings, works, materials and plant belonging to the undertaking in such manner as he may think fit under clause (f) only. That clause is more or less a residuary clause and it comes into operation only when the preceding provisions laid down in the earlier clauses have not come into operation.

It was submitted on behalf of the plaintiff appellant that clauses (a), (b), (c), (d) and (e) of section 5 have not been complied with and that there is no evidence on the record to show that they had been complied with, and therefore there is no bar to the plaintiff obtaining the declaration which he seeks. Pandit *Nanak Chand* on behalf of defendant No. 3 also raised the same plea before us, but we find that defendant No. 3 was absent in the court below and has been impleaded here, as we said before, only to complete the array of parties, and the plaintiff, while it said what the case of defendant No. 1 was, did not anywhere suggest that clauses (a) to (e) of section 5 of the Electricity Act had not come into operation and we find it extremely difficult to hold that as there is no evidence on the record on these points the procedure

laid down by those clauses was not followed by the Provincial Government. In any event, this is not a matter which ought to trouble us very much. Defendant No. 2 will have a disposing power over its undertaking only under the provisions of clause (f) of section 5 and all that the court below has done is to say that the property is not liable to be sold in execution of the plaintiff's decree until the contingency contemplated by clause (f) of section 5 of the Indian Electricity Act arises. It is open to the plaintiff to say before an executing court that such a contingency has arisen and that the property of defendant No. 2, namely the plaint property, ought to be sold.

In this view of the matter it is not necessary for us to consider the plea raised by the plaintiff appellant that the court below "ought to have ordered the file regarding the sale summoned from the Local Government to be opened in court and admitted in evidence", because that file if brought on the record would only have shown what procedure the Government adopted under section 5 of the Indian Electricity Act, and as we said before, the plaintiff never whispered in the court below that there was any irregularity on that point.

We might at this stage dispose of the contention of Pandit *Nanak Chand* appearing on behalf of defendant No. 3 that the license has not been revoked. He advanced an impassioned argument before us and said that he should be permitted to raise this plea and to have a decision on it by the remission of an issue. The decree of the court below was more or less *ex parte* against him and if we were to concede to his prayer prejudice would be caused to the main contending parties and we are not prepared to grant any indulgence to him. It is of course always open to him to take such steps as the law gives him for the vindication of his grievances, if any. He also, like the plaintiff, said that the procedure enjoined by section 5 of the Indian

1939

RADHA
KRISHNA
BENI
PRASAD
v.
KISHORE
CHAND
SHIVA
CHARAN
LAL

1939

RADHA
KRISHNA
BENI
PRASAD
v.
KISHORE
CHAND
SHIVA
CHARAN
LAL

Electricity Act was not complied with and what we have said in connection with the argument of the plaintiff applies equally to him.

The court below in the operative portion of its order went on to make certain observations regarding the debentures. No issue was struck on the question of the validity or otherwise of the debentures and the court below assuming that the debentures were valid said: "In case the defendant No. 1 succeeds in effecting the purchase as ordered by the Government, the attachment shall enure on the purchase money in substitution for the attachment of the undertaking, but as the debentures of the defendant No. 1 are secured under the undertaking while the plaintiff's money is unsecured, the defendant No. 1 shall be entitled to set off his debenture against the purchase money in case he happens to effect the sale in his favour, and out of the balance of the purchase money the plaintiff shall have priority as attaching creditor over other unsecured creditors." These observations presumably have been made in view of what is said in section 5, clause (e) of the Indian Electricity Act. It says that "Where a purchase has been effected under any of the preceding clauses.—(i) the undertaking shall vest in the purchasers free from any debts, mortgages or similar obligations of the licensee or attaching to the undertaking: Provided that any such debts, mortgages or similar obligations shall attach to the purchase money in substitution for the undertaking."

Learned counsel for the plaintiff appellant contends that there is no provision for a set off such as the court below has made in clause (e) of section 5 and that the amount of debentures is not known, nor has their validity been determined, and the court below was therefore in error in adding this rider to the operative portion of the final order. To a certain extent his contention may be sound but the validity of the debentures was not impugned in express terms in the

plaint and all that was said was that the amount of the debentures was not admitted, but in order to prevent future litigation we have thought it fit to obtain a finding from the court below on the question of the validity of the debentures. This is possible only if we give an indulgence to the plaintiff. When Mr. *Pathak* on behalf of the plaintiff was advancing his arguments in connection with the debentures Mr. *Banerji* on behalf of defendant No. 1 said that he had no objection to the deletion of that portion of the order passed by the court below which related to debentures, but after having heard Mr. *Pathak* we have come to the conclusion that in the interests of justice it would be better if we have a finding on that issue. Mr. *Banerji* then contended that the decree passed in favour of the plaintiff against defendants 2 and 3 by the Calcutta High Court was a collusive decree and as we were granting an indulgence to the plaintiff we should grant an indulgence to defendant No. 1 as well and permit him to raise an issue on the question of the nature of the plaintiff's decree. We have come to the conclusion, and we think that the plaintiff should not grudge this concession in his own interests and for the honour of his firm, that an issue should be sent down to the court below regarding the validity of the decree passed in favour of the plaintiff.

1939

RADHA
KRISHNA
BENI
PRASAD
v.
KISHORE
CHAND
SHIVA
CHARAN
LAL

For the reasons given above we remit the following issues to the court below:

1. Whether the decree in suit No. 1980 of 1932 passed by the Calcutta High Court in its ordinary original jurisdiction in favour of the plaintiff against defendants 2 and 3 was collusive and fraudulent and not binding on defendant No. 1?

2. Are the debentures held by defendant No. 1 valid or not?

Parties will be at liberty to adduce additional evidence relevant to the above two issues. The court below is expected to return its findings within six

1939

RADHA
KRISHNA
BENI
PRASAD
P.
KISHORE
CHAND
SHIVA
CHARAN
LAL

months. Mr. *Pathak* says that on the return of the findings he should be permitted to take the plea, if necessary, that "the debentures even if valid will not prevail against the plaintiff decree-holder because they have not matured and crystallised." This permission is given to him. It is expected that the particulars of fraud or collusion will be supplied by defendant No. 1 to the plaintiff and the plaintiff will indicate the grounds on which the validity of the debentures is questioned.

Before Justice Sir Edward Bennet and Mr. Justice Verma

1939
August, 9

JANAK DULARI (PLAINTIFF) *v.* SRI GOPAL AND OTHERS
(DEFENDANTS)*

Government of India Act, 1935, section 317; schedule IX—Continuance of powers of Indian legislature notwithstanding repeal of the former Act—Hindu Women's Right to Property Act (XVIII of 1937)—Validity—Bill passed by legislature before 1st April, 1937, and assent of Governor-General given after that date—Government of India Act, 1919, section 68—"Bill"—"Act".

Section 317 and the ninth schedule of the Government of India Act, 1935, provide that the provisions of part VI of the Government of India Act of 1919 in regard to the Indian legislature should continue to have effect notwithstanding the repeal of that Act by the Government of India Act of 1935. The provisions in regard to Federal legislature, contained in part II of the Government of India Act of 1935, have not yet been brought into force by proclamation under section 320; and the provision made in section 317 and the ninth schedule of the Act is intended to continue the validity of the functions of the existing Indian legislature until the bringing into operation of part II of the Act.

So, the Hindu Women's Right to Property Act, XVIII of 1937, which was passed as a bill by the Indian legislature before 1st April, 1937, and to which the assent of the Governor-General was given after that date, which was the date on which part III of the Government of India Act of 1935 came into force, is a perfectly valid Act.

*First Appeal No. 255 of 1938, from a decree of B. N. Tankha, Civil Judge of Bareilly, dated the 19th of August, 1938.