APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice Ziaul Hasan

HENRY HUNTER (DEFENDANT-APPELLANT) *v.* MUSAMMAT BASANTI DEVI (PLAINTIFF-RESPONDENT)* 1937 *February*, 16

Usurious Loans Act (U. P. Amendment Act XXIII of 1934), *section* 1(2)—*Act, if intended to apply to suits instituted after its coming into operation—Bill passed by local legislature, when becomes Act—Suit instituted before Bill receives assent of Governor and is published in* Government Gazette—*Act, if can be said to apply to the suit—United Provinces General Clauses Act (I of* 1904), *section* 5(1)—*Local Act not specifying the day when it is to come into operation—Act comes into operation when it is published in* Gazette—*Usurious Loans Act (X of* 1918)—*Defendant to show both that interest excessive and that transaction was substantially unfair.*

A Bill passed by the legislature does not becomes an Act forthwith. An Act cannot be said to be passed until the final step necessary to make an Act has been taken. Where, therefore, a suit is instituted one day before the Bill received the assent of the Governor and more than three months before it is published in the *Government Gazette,* it is hardly possible to say that the suit is instituted after the passing of the Act.

As a general rule retrospective operation ought not to be given to a statute unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language. Re *Athlumney* (1), referred to.

The language of section 1(2) of the United Provinces Act (XXIII of 1934) seems fully capable of the interpretation that the Act was intended to apply only to suits instituted after the Act came into operation. This view is further strengthened by the provisions of section 5(1) of the United Provinces General Clauses Act I of 1904.

Where a local Act does not purport in terms to express the period of time when it is to come into operation and even if it were supposed to do so it does not specify any "particular day" on which the Act is to come into operation, rather the provision seems to be intended to describe the class of suits to which the Act when it comes into operation is to be made

*First Civil Appeal No. 125 of 1935, against the decree of Pandit Pradyumna Krishna Kaul, Civil Judge of Bara Banki, dated the 15th of August, 1935.

(1) (1898) 2 Q.B., 547.

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applicable, then according to the general rule of construction laid down in section 5(1) of the United Provinces General Clauses Act, the Act must be held to come into operation only since the day when it is published in the Local Government Gazette after having received the assent of the Governor General and is inapplicable to a suit which is instituted not only before that date but also before the Bill had received the assent of the Governor.

Under the Usurious Loans Act (X of 1918) as it stood before the amendment of 1934 the defendant, in order to be entitled to relief, must show not only that the interest was excessive but also that the transaction was as between the parties thereto substantially unfair.

Messrs. *Ram Bharose Lal, Suraj Sahai* and *Murli Manohar,* for the appellant.

Messrs. *D. K. Seth, J. K. Tandon* and *Girja Saran Lal,* for the respondent.

SRIVASTAVA, C. J. and ZIAUL HASAN, J.:—This is a first appeal by the defendant arising out of a suit based on a deed of simple mortgage. It was executed on the 27th of September, 1928, by the defendant-appellant Henry Hunter in favour of Murli Dhar, the deceased husband of the plaintiff. The principal sum secured by the mortgage was Rs.30,000 and carried interest at 12 per cent. per annum payable monthly with monthly rests. The mortgaged property consisted of the buildings and machinery of the Wholemeal Atta Mill, Bara Banki. The mortgage deed also provided that the mortgagee and his agents shall have free access to the premises during the working hours to inspect them and the account books and that the mortgagor will pay an extra sum of Rs.40 per month for this purpose. The mortgagor paid the interest on the debt together with the extra sum of Rs.40 per month just mentioned regularly till the 30th of March, 1934. He, however, stopped payment since the death of the original mortgagee Murli Dhar which took place on the 28th of April, 1934. The plaintiff claiming to be the sole heir and successor of Murli Dhar claimed a decree for

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recovery of Rs.33,402-11-4 on account of principal and interest due on the mortgage by sale of the mortgaged property. A number of pleas were raised on behalf of the defendant, but it is not necessary to state them for the purpose of the appeal. It would be enough to say that the trial court held that the plaintiff was entitled to maintain the suit and that the provision for interest in the deed was not penal. It further held that the case was governed by the provisions of the United Provinces Act XXIII of 1934 which was enacted in order to amend the Usurious Loans Act (X of 1918). Applying the provisions of the amending Act to the case the learned Civil Judge held that the rate of interest was excessive. He was further of opinion that the provision for payment of Rs.40 per month was binding on the mortgagor and could not be interfered with. He also held that as the defendant had been paying interest regularly and had therefore paid nothing on account of compoud interest therefore the account need not be reopened. In result he decreed the claim with costs and ordered an account to be made out as to the amount which was due to the plaintiff under the terms of the deed of mortgage on a day six months after the decree for principal, interest (that may be in arrears and future interest for six months) at 12 per cent. per annum and costs. In addition to interest the plaintiff was allowed Rs.40 per month from the time the payment was in arrears up to the date of suit. Future interest on the decretal amount was also allowed at 4 per cent. per annum till realization.

The first question requiring consideration in the case is whether the present suit is governed by the Usurious Loans Act (X of 1918) as it stood unamended or by the United Provinces Amending Act XXIII of 1934. The question is not free from difficulty. Subsection (2) of section 1 of the Amending Act runs as follows:

> "The provisions of this Act shall apply to all suits instituted after the passing of this Act to which the Usurious

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Loans Act of 1918 hereafter referred to as the principal Act will apply."

The parties are agreed before us that the amending Bill which resulted in the United Provinces Amending Act XIII of 1934 was passed by the provincial legislature on 15th November, 1934, and that it received the assent of His Excellency the Governor of the United Provinces on 15th January, 1935 and that of His Excellency the Governor General on 10th April, 1935. The amending Act was published in the *United Provinces Gazette* of 27th April, 1935. The present suit was instituted on the 14th of January, 1935. It was argued on behalf of the defendant that the words "passing of this Act" used in sub-section 2 quoted above should be constructed as synonymous with "passing of the Bill" and that the suit having been instituted after the Bill was passed by the legislature, though before it received the assent either of the Governor or of the Governor General and before it was published in the *Gazette*, the provisions of the Amending Act must be held applicable to it. Section 81(3) of the Government of India Act provides that when a Bill has been passed by a local legislative council it should receive the assent of the Governor of the Province and the latter shall after declaring his assent thereto "send an authentic copy of the Act to the Governor General, and the Act shall not have validity until the Governor General has assented thereto and that assent has been signified by the Governor General to and published by the Governor . . ." This shows clearly that a Bill passed by the legislature does not become an Act forthwith. In fact sub-section 2 of section 81 of the Government of India Act distinctly provides that "if the Governor . . . withholds his assent from any such Bill the Bill shall not become an Act". We are of opinion that an Act cannot be said to be passed until the final step necessary to make an Act has been taken. The present suit was instituted one day before the Bill

received the assent of the Governor and more than three months before it was published in the *United Provinces Gazette*. In the circumstaces it seems to us hardly possible to say that the present suit was instituted after the passing of the Act. If the interpretation sought to be placed on behalf of the defendant is to be accepted the effect of it would be to make the Act applicable to suits instituted before the law contained in the Bill had acquired the force of an Act or in other words would result in giving the Act retrospective effect. As a general principle retrospective operation ought not to be given to a statute unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language. In *re Athlumney* (1) WRIGHT, J. observed as follows.

> "No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

In the present case the Amending Act affects the substantive rights of the parties as regards interest, and the language of section 1(2) seems fully capable of the interpretation that the Act was intended to apply only to suits instituted after the Act came into operation. This view is further strengthened by the provisions of section 5(1) of the United Provinces General Clauses Act I of 1904, which is as follows:

> "Where any United Provinces Act is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it is first published in the *Gazette* after having received the assent of the Governor General."

This is one of the general rules of construction applicable to all United Provinces Acts and the legis-

(1) (1898) 2 Q.B., 547(551).

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lature must be deemed to have been fully aware of it. Can it be said that under the provisions of section 1(2) of the Amending Act the Act is expressed to come into operation on a *particular day*? We are clearly of opinion that the answer to this must be in the negative. In the first place the provision in question does not purport in terms to express the period of time when the Act is to come into operation. In the second place even if it were supposed to do so it does not specify any "particular day" on which the Act is to come into operation. Rather the provision seems to us to be intended to describe the class of suits to which the Act when it comes into operation is to be made applicable. We are, therefore, of opinion that according to the general rule of construction laid down in section 5(1) of the United Provinces General Clauses Act the Amending Act must be held to come into operation only since the 27th of April, 1935 when it was published in the *United Provinces Gazette* after having received the assent of the Governor General and is inapplicable to the present suit which is instituted not only before that date but also before the Bill had received the assent of the Governor. The decision of the present suit must therefore be based on the provisions of the principal Act as it stood unamended. Under the unamended Act the defendant in order to be entitled to relief must show not only that the interest was excessive but also that the transaction was as between the parties thereto substantially unfair. Mr. Ram Bharose Lal, the learned counsel for the defendant-appellant, has frankly conceded that he is not in a position to allege that the transaction was as between the parties substantially unfair and that in the circumstances he cannot claim any relief under the provisions of the principal Act.

This being the position it is unnesessary for us to enter into the question whether the lower court has wrongly refused to reopen the accounts and to give the

defendant relief in respect of the monthly payment of Rs.40 and in respect of the rate of interest.

The result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

RADHEY SHIAM (PLAINTIFF-APPELLANT) *v.* MOHAMMAD NASIR KHAN AND ANOTHER (DEFENDANTS-RESPONDENTS)*

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Civil Procedure Code (Act V of 1908), section 11, Explanation 4 and order XXIII, rule 1—Res Judicata—*Suit for possession—Set off claimed by defendant for certain constructions and repairs—Claim for set off subsequently withdrawn—Second suit for mesne profits—Claim for set off in second suit, if barred by* res judicata—*Order XXIII, rule 1, Civil Procedure Code, if applies to set off claimed in defence—Limitation Act (IX of 1908), Articles 61 and 120—Limitation applicable to claim for set off—Improvements made by co-sharer—Right of co-sharer to be reimbersed for costs of improvements.*

In a suit for possession it is not incumbent on the defendant to raise a plea of set off in respect of an amount spent by him on constructions and repairs of the property in suit or in other words it cannot be said that it was a defence that he ought to have raised in such a case within the meaning of Explanation 4 to section 11 of the Code of Civil Procedure. Where, therefore, a defendant raises such a plea of set off in a suit for possession but withdraws it in the end saying that he would bring a separate suit in respect of the amount due to him and the suit is decreed, then the defendant is not barred by Explanation 4 to section 11 of the Code of Civil Procedure from raising the claim of set off again in a subsequent suit for mesne profits from the date of delivery of possession in pursuance of the former decree up to the date of the subsequent suit. *Nawbut Pattak* v. *Mahesh Narayan Lal* (1), and *Fateh Singh* v. *Jagannath Bakhsh Singh* (2), distinguished.

*Second Civil Appeal No. 204 of 1935, against the decree of Babu Bhagwati Prasad, Civil Judge of Lucknow, dated the 7th of March, 1935, confirming the decree of Babu Girish Chandra, Munsif of Havali, Lucknow, dated the 31st of July, 1934.

(1) (1905) I.J R., 32 Cal., 654. (2) (1925) L.R., 52 I.A., 100.