has been relied on by the appellant, their Lordships referred to *Bhup Singh* v. *Chedda Singh*(1) and quoted an observation made in that case in the following terms: "It is immaterial whether the partition was made by the revenue authorities, or by the Civil Court, or by arbitration or by private arrangement, and it is not necessary that the mortgagee should have been a party to the partition. It is one of the incidents of a mortgage of an undivided share that the mortgagee cannot follow his security into the hands of a co-sharer of the mortgagor who has obtained the mortgaged share upon partition. *Of course, if the partition is tainted with fraud or if in making the partition the encumbrance was taken into account and the partition was made subject to the encumbrance, the result will be different*".

In the present case the settlement was taken into account and the partition was made subject to it.

I would dismiss the appeal with costs.

AGARWALA, J.—I agree.

S. A. K. *Appeal dismissed.*

APPELLATE CIVIL.

Before Agarwala and Meredith, JJ.

1939.

October, 9, 10. *November*, 1.

BIGAN SINGH

v.

SYED SHAH ZAFFAR HUSSAIN.*

Bihar Tenancy Act, 1885 (*Act VIII of* 1885), *sections* 158*B*(2), 163(5) *and* 163*A*—*Bihar Tenancy* (*Amendment*) *Act*, 1938 (*Bihar Act XI of* 1938)—*amendment, object of—provisions, whether remedial—retrospective operation—pending*

*Appeal from Appellate Order no. 95 of 1939, from an order of Maulavi S. M. Ibrahim, Subordinate Judge of Gaya, dated the 16th December, 1938, confirming an order of Maulavi M. A. Samad, Munsif of Aurangabad, dated the 17th May, 1938.

(1) (1920) I. L. R. 42 All. 596.

1939.

BIGAN SINGH v. SYED SHAH ZAFFAR HUSSAIN.

execution—sections, applicability of—Court, duty of, to value the holding.

An amending Act does not affect rights which have vested or obligations which have been defined before the amending Act comes into operation, but no person has a vested right in the procedure of a Court. Consequently, an Act, which merely regulates procedure, governs all proceedings that are pending at the time when the Act comes into operation, provided that existing orders are not deprived of their finality, and the application of the provisions of the Act does not work injustice.

Republic of Costa Rica v. *Erlanger*(1), *Wright* v. *Hale*(2) and *Delhi Cloth and General Mills Co.* v. *Income-tax Commissioner of Delhi*(3), followed.

The object of the Bihar Tenancy (Amendment) Act of 1938 which introduced sections 158B(2), 163(5) and 163A into the Bihar Tenancy Act, 1885, was to remedy a defect which frequently resulted in the sale of agricultural holdings and tenures below their market price. The amending statute being a remedial one, should be construed as widely as possible to give effect to the intention of the legislature in as many cases as possible in so far as this can be done without injustice to the parties.

Jogodanund Singh v. *Amrita Sircar*(4), followed.

Lal Mohun Mukherjee v. *Jogendra Chunder Roy*(5) referred to.

Although section 158B(2) of the Bihar Tenancy Act, 1885, contemplates that notice of the date on which the sale proclamation is to be drawn up should be given when the application for execution is made, the remedial provisions of the amending Act should be applied even in cases where the application for execution is made before the amending Act came into operation and is still pending on that date.

Section 158B(2) is merely one of a group of sections which the legislature has sought to remedy an evil and it must

(1) (1876) 3 Ch. Div. 62.
(2) (1860) 6 H. & N. 227.
(3) (1927) L. R. 54 Ind. App. 421.
(4) (1895) I. L. R. 22 Cal. 767, F. B.
(5) (1887) I. L. R. 14 Cal. 636, F. B.

be construed in relation to the other sections in the group including section 163A which expressly prohibits the sale of a holding for a price lower than that specified in the sale proclamation.

Section 163A must also be read with the group of sections of which it is a part and which includes sections 158B (2) and 163 (5) which require the Court to hear the parties in the matter of the value of the property to be sold and to estimate the value of it or of that part of it which the Court considers will be sufficient to satisfy the decree.

Where, therefore, the decree-holder, who had obtained a decree for rent, applied for execution on the 9th of February, 1938, and on the 7th of March the executing Court directed the issue of a writ of attachment and a sale proclamation, fixing the 5th of May as the date of sale, but the writ and the sale proclamation were not actually issued until the 28th of March, and in the meantime the Bihar Tenancy (Amendment) Act, 1938, having come into force on the 10th of March, 1938, the judgment-debtor objected to the sale being held on the ground that the Court had not valued the property to be sold as required by section 163(5) :

Held, that sections 158B(2), 163(5) and 163A applied to the execution proceeding and, therefore, that the executing Court was bound to estimate the value of the holding and decide whether it was necessary to sell the whole or only a part of it, after hearing the parties.

Held, further, that as the sale proclamation had not been issued when the amending Act came into operation, there was no question of giving retrospective effect to section 158B(2) or section 163(5).

Appeal by the judgment-debtor.

The facts of the case material to this report are set out in the judgment of Agarwala, J.

Lalnarain Sinha, for the appellant.

Ahmed Raza and *Anwar Ahmed*, for the respondents.

AGARWALA, J.—This is an appeal by the judgment-debtor from a decision of the Subordinate Judge of Gaya confirming a decision of the Munsif of

1939.

BIGAN SINGH v. SYED SHAH ZAFFAR HUSSAIN.

AGARWALA, J.

Aurangabad. The respondent obtained a decree for rent against the appellant and on the 9th of February, 1938, applied to execute the decree. On the 7th of March the executing Court directed the issue of a writ of attachment and a sale proclamation, fixing the 5th of May as the date of sale. The writ and the sale proclamation were not actually issued until the 28th of March. On the date fixed for the sale, namely, the 15th of May, the judgment-debtor objected to the sale being held on the ground that the Court had not valued the property to be sold as required by section 163(5) of the Bihar Tenancy Act. This sub-section (5) was introduced into the Tenancy Act by an amending Act which came into operation on the 10th March, 1938. The question for decision is whether in view of the provisions introduced by the amending Act it was necessary for the Court to issue notice to the judgment-debtor before issuing the sale proclamation and to decide whether the whole or only a part of the property should be put up for sale and what the value of the whole or part was. On behalf of the appellant it is contended that the amending Act being one regulating the procedure of the Court governs all proceedings that were pending when the Act came into operation: while on behalf of the respondent it is urged that in the absence of express provision in the Act it was only such steps as remained to be taken after the Act came into operation that are governed by its provisions. We have been referred to a large number of cases in which the effect of an amendment of the law on pending proceedings has been the subject-matter of consideration. The general principle which emerges from these cases is that the amending Act does not affect rights which have vested or obligations which have been defined before the amending Act comes into operation but that no person has a vested right in the procedure of a Court [*Republic of Costa Rica* v. *Erlanger*(1)] and, consequently, an Act which merely regulates procedure governs all proceedings

(1) (1876) 3 Ch. Div. 62.

that are pending at the time when the Act comes into operation [*per* Wilde, J. in *Wright* v. *Hale*(1)] provided that existing orders are not deprived of their finality [*Delhi Cloth and General Mills Co.* v. *Income-tax Commissioner of Delhi*(2)] and that the application of the provisions of the Act does not work injustice.

Before the amendment of 1938 the holder of a decree for rent was entitled to put the judgment-debtor's property up for sale and in consequence of an amendment of Order XXI, rule 66, of the Code of Civil Procedure, made by this Court in the exercise of its rule-making powers under section 122 of the Code, it was not necessary for the Court to determine the value of the property to be sold. All that the Court was required to do was to insert in the sale proclamation the value put on the property by the judgment-debtor and the decree-holder, respectively. There is no doubt that frequently cultivators' holdings were sold for an inadequate price at Court sales and that the object of the amending Act of 1938 was to remedy this state of affairs. The amendment in the Tenancy Act effected by the Act of 1938 has two objects in view (*1*) to prevent the sale of the judgment-debtor's property for an inadequate price and (*2*) to prevent the sale of more of the judgment-debtor's property than is sufficient to discharge the decretal debt. To achieve these objects the amending Act requires that the judgment-debtor shall be heard on the question of valuation before the issue of the sale proclamation and that the Court shall determine the value of the property sought to be sold and whether the sale of a part of it will suffice to discharge the decretal dues. It further prohibits the sale of the judgment-debtor's property or the part of it which the Court considers should be sufficient to satisfy the decree for less than the amount determined by the Court. As the Tenancy Act was originally amended in 1938 no provision was made to meet the possibility of there being no bidder for the property at the value fixed by the Court.

(1) (1860) 6 H. & N. 227.
(2) (1927) L. R. 54 Ind. App. 421.

1939.

BIGAN SINGH v. SYED SHAH ZAFFAR HUSSAIN.

AGARWALA, J.

The result was that if no one bid up to the price fixed by the Court the holding could not be sold although, of course, the decree-holder was at liberty to enforce his decree against other property of the judgment-debtor. The Act has since been amended in 1939 by the addition of two provisos. The effect of these is that if the highest amount bid for the holding or portion of the holding to be sold is less than the price specified for the same in the sale proclamation the Court may now sell the holding or portion of it for such highest amount if the decree-holder consents in writing to forego so much of the amount of the decree as is equal to the difference between the highest amount bid and the price specified for the holding or portion of it in the sale proclamation. The provisions of the Act with which we are concerned are sections 158AA, 158B (*2*), 163 (*5*) and 163A. Section 158AA provides as follows:

"A decree for arrears of rent may be executed by the attachment and sale of the property of the judgment-debtor, both movable and immovable:

Provided that the movable property of the judgment-debtor shall not without his consent in writing be so attached or sold unless the decree cannot be satisfied by the attachment and sale of the holding for arrears of the rent of which the decree was passed."

The relevant portion of section 158B(*2*) is as follows:

"When the application mentioned in section 158AA is made and the decree-holder wants to proceed against the tenure or holding in respect of which the decree was obtained, the Court executing the decree shall, before proceeding to sell the tenure or the holding, or a part of the holding, give to the parties to the decree notice of the application and of the date on which the sale proclamation shall be drawn up, and may, notwithstanding anything contained in the Code of Civil Procedure, 1908, simultaneously issue attachment."

In parenthesis it may be observed that section 158AA does not refer to any application. The words "the application mentioned in section 158AA" which occur in section 158B(*2*), however, obviously refer to an application to execute the decree by attachment and sale of the judgment-debtor's property. The relevant portions of section 163 are as follows:

"(*1*) When a tenure or a holding or part of a holding is ordered to be sold in execution of a decree for the arrears of the rent of such

tenure or holding, the Court shall cause a proclamation of the intended sale to be made:

* * * * * *

(5) Before issuing the sale proclamation the Court executing the decree shall hear the parties and estimate the value of the holding or of that portion of the holding the proceeds of the sale of which it considers will be sufficient to satisfy the decree."

Section 163A, before the amendment of 1939, was as follows:

"Notwithstanding anything contained in the Code of Civil Procedure, 1908, a holding or portion of a holding advertised for sale shall not be sold for a price lower than that specified in the sale proclamation."

It is contended on behalf of the appellant that as the amending Act of 1938 had come into operation before the sale was actually held, section 163A bars the sale except for a price not lower than that specified in the sale proclamation and that this necessarily implies that the Court should first hear the parties under section 163(5), estimate the value of the holding and determine whether it is necessary to sell the whole or only part of it. On behalf of the respondent, on the other hand, it is contended that the stage at which this is required to be done had already passed before the amending Act came into force and that the Court is not required to recommence the execution proceeding. Reliance is placed on section 158B(2) which, it is contended, means that notice to the parties regarding the drawing up of the sale proclamation is required to be given when the application for execution is made and that as that stage had passed before the amending Act came into operation and as the order for the issue of the sale proclamation had also been made before that date the execution proceeding was not affected by the amendment. As I have already stated above, the object of the amendment was to remedy a defect in the procedure of the executing Court, which experience showed frequently resulted in the sale of agricultural holdings and tenures below their market price. The amending statute being a remedial one should be construed as widely as possible to give effect to the intention of the legislature in as many cases as

1939.

BIGAN SINGH v. SYED SHAH ZAFFAR HUSSAIN.

AGARWALA, J.

possible in so far as this can be done without injustice to the parties. The question whether and to what extent proceedings which commenced before an amendment of the law are affected by any change in the law was considered by a Full Bench of twelve Judges in *Jogodanund Singh* v. *Amrita Lal Sircar*(1) in which it was observed that the rule against retrospective operation is intended to apply not so much to the law creating a new right as to the law creating a new obligation or interfering with a vested right. The facts of that case were as follows: A decree was obtained on 8th of February, 1894. An application for execution was made on the 26th of July. A writ of attachment was issued on the 3rd of August and served on the 5th. Sale proclamation was issued on the 11th of August and served on the 14th. The sale took place on the 20th of September. In the meanwhile, on the 2nd of March, 1894, section 310A had been added to the Code of Civil Procedure. This section entitled the judgment-debtor to have the sale set aside on depositing the amount due to the decree-holder and compensation to the auction-purchaser. Relying on this section the judgment-debtor, on the 27th of September, before the sale had been confirmed, applied to set aside the sale on depositing the decretal dues and compensation. The executing Court refused to set aside the sale on the ground that the new section was not a mere matter of procedure and, therefore, had no retrospective effect The Full Bench held that section 310A applied to the execution proceedings and that the Court was, therefore, bound, upon the application of the judgment-debtor, to set aside the sale. The Full Bench considered a former Full Bench decision in *Lal Mohun Mukherjee* v. *Jogendra Chunder Roy*(2). In that case the question was whether section 174 of the Bengal Tenancy Act was applicable to a sale held after that Act had come into operation when execution had been applied for and the sale proclamation issued under the

(1) (1895) I. L. R. 22 Cal. 767, F. B.
(2) (1887) I. L. R. 14 Cal. 636, F. B.

Bengal Act VIII of 1869. The former Full Bench had answered that question in the negative holding that section 174 of the Bengal Tenancy Act could not have any retrospective operation as it conferred upon the 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 operation. The later Full Bench pointed out that the reasoning in the judgment in *Lal Mohun Mukherjee* v. *Jogendra Chunder Roy*(1) consists of two distinct and independent parts: first, that since the 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. Secondly, that since proceedings commenced under any law ought not to be affected by any change in that law, and since the proceedings in question were commenced under the old rent-law, therefore they ought not to be affected by section 174. The later Full Bench disagreed with both these reasonings. With regard to the first it pointed out that the vested right of the decree-holder to obtain satisfaction of his decree was left unaffected by section 174 except in so far as it was to his advantage, for whereas under the former law the auction-sale might not have resulted in satisfaction of the decretal dues in full, section 174 ensured that they would be paid in full before the sale was set aside. With regard to the rights of the auction-purchaser it was held that although the application of section 174 might deprive him of the fruits of a favourable bargain yet, as the sale took place after the new law came into operation, he must be taken to have made his bid with full knowledge of the law and it could not be said that any right vested in him was affected by it. The later Full Bench also held that section 174 did not create any new

(1) (1887) I. L. R. 14 Cal. 686, F. B.

1939.

BIGAN SINGH v. SYED SHAH ZAFFAR HUSSAIN.

AGARWALA, J.

substantive right in the judgment-debtor but merely embodied a rule of procedure which barred the auction-purchaser's right to have the sale confirmed provided the deposit required by the section was made. It was also denied that the effect of applying section 174 to a sale which took place after that section had been enacted was to give it a retrospective effect. It was observed, " In setting aside, under section 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 ". Reference was made to the observation of Lord Denman in *Queen* v. *The Inhabitants of St. Mary Whitechapel*(1) 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 a time antecedent to its passing ".

With regard to the contention that section 174 ought not to be applied to proceedings commenced before the enactment of the section because it contains no express words to indicate that it was to have retrospective effect the Full Bench stated: " 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*(2)]. 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

(1) (1848) 12 Q. B. 121, 127.
(2) (1869) L. R. 4 Ch. App. 735.

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 ". These observations apply with equal cogency to the present case where we are dealing with a remedial measure the object of which is to prevent the sale of a cultivator's holding for an inadequate price and the sale of more of his holding than should suffice to satisfy his obligations if the property is sold for an adequate price. It ought, therefore, to be liberally construed to achieve this object in as many cases as possible. For this reason I would reject the contention that because section 158B(*2*) contemplates that notice of the date on which the sale proclamation is to be drawn up should be given when the application for execution is made the remedial provisions of the amending Act should not be applied in cases where the application for execution is made before the amending Act came into operation. Section 158B(*2*) is merely one of a group of sections by which the Legislature has sought to remedy an evil and it must be construed in relation to the other sections in the group, including section 163A. That section expressly prohibits the sale of a holding for a price lower than that specified in the sale proclamation. It was suggested that as the sale proclamation in the present instance contained the value put upon the property by the decree-holder all that the section prohibits in the present case is the sale of the property below that value.

1939.

BIGAN SINGH v. SYED SHAH ZAFFAR HUSSAIN.

AGARWALA, J.

If section 163A applies at all to the present case, as in my opinion it does, for the sale has not yet taken place, it would be defeating the salutary provisions of the amendment to adopt this suggestion. Section 163A must be read with the group of sections of which it is a part and which includes sections 158B(2) and 163(5) which require the court to hear the parties in the matter of the value of property to be sold and to estimate the value of it or of that part of it which the Court considers will be sufficient to satisfy the decree.

This construction of the provisions of the amending Act does not result in giving retrospective effect to the statute merely because, in the words of Lord Denman cited above, "A part of the requisites for its action is drawn from a time antecedent to its passing". Nor can this view result in any injustice to the parties concerned. The vested right of the decree-holder is to have his dues satisfied out of the property of the judgment-debtor in so far as that is possible. It never was his right to have the property of the judgment-debtor sold for an inadequate price. The law always contemplated that the price realized at a public auction should approximate to the real market value of subject-matter of the sale. All that the amendment seeks to achieve is to ensure that it shall do so. Furthermore, the sale proclamation had not been issued when the amending Act of 1938 came into operation so there was no question of giving retrospective effect to section 158B(2) or 163(5) Before this proclamation was issued the law had been amended and the Court was required to hear the parties as to the value of the holding sought to be sold.

I would, therefore, set aside the order of the Court below and direct that the Court do proceed to estimate the value of the holding and decide whether it is necessary to sell the whole or only a part of it, after hearing the parties.

MEREDITH, J.—I agree.

S. A. K.

Appeal allowed.