FULL BENCH (CIVIL).

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Leach, and Mr. Justice Braund.

1937

June 15.

IN RE O.N.R.M.M. CHETTYAR FIRM

v.

THE CENTRAL BANK OF INDIA, LTD. AND ANOTHER.*

Rule making powers of the High Court—Rules regulating procedure—Application to set aside Court sale on ground of fraud or irregularity—Rule requiring deposit of money as a preliminary before hearing—Common law rights—Rule regulating mode of proceedings—Rule preventing exercise of substantive right—Civil Procedure Code (Act V of 1908), s. 122—Proviso (b) *of rule 90, O. 21* ultra vires.

Per ROBERTS, C.J.—The effect of proviso (*b*) of rule 90 of Order 21 of the Civil Procedure Code as framed by the High Court (which has since been cancelled by an order dated 27th January 1937) is that an application to set aside a sale never comes before the Court unless and until the applicant deposits with his application the amount mentioned in the sale warrant or an amount equal to the amount realized by the sale, whichever is less. Such a rule is not a rule to regulate procedure but lays down an indispensable preliminary before any proceedings take place at all. The High Court has powers to make rules regulating procedure and may therefore abrogate existing rights of the subject but only in matters of procedure and not beyond. The rule shuts out an applicant who fails to deposit the amount required from proceeding with his application at all, and is therefore *ultra vires*.

Capel v. *Child*, 2 Cr. & J. 558 ; *Poyser* v *Minors*, 7 Q.B.D. 333, followed.

Gendaram v. *C.A.C.R M. Chettyar Firm*, Civil Misc. App. 13 of 1930, H.C. Ran., overruled.

Per LEACH, J.—The Legislature may take away common law rights, but the Court, by virtue of its rule-making powers, cannot. The Court has full power to regulate its procedure, but regulation of procedure cannot imply that a man may be condemned unheard or have his property taken away without an opportunity being given to him to urge that it would be unjust to do so. A Court may put a litigant on terms but before doing so it must first hear him. If proviso (*b*) of rule 90 were allowed to stand he might never be able to obtain a hearing.

Per BRAUND, J.—Proviso (*b*) to O. 21, rule 90 goes beyond a mere matter of procedure. It is a mandatory rule by which when read with s. 47 (*1*) of the Code, the Court purports, not merely to regulate the mode of its exercise of jurisdiction, but to divest itself altogether of jurisdiction in all cases in which

* Civil Reference No. 4 of 1937 arising out of Civil First Appeal No. 176 of 1936 of this Court.

the applicant cannot, or will not, make a substantial deposit. Such a rule does not merely regulate its mode of proceeding but alters the substantive rights of the applicant.

Rodrigues for the appellant. In 1925 the Rule Committee of the High Court amended O. 21, r. 90 of the Civil Procedure Code which was enacted by the Legislature. The Committee introduced proviso (*b*) requiring an applicant to deposit a sum of money before his application to set aside a sale could be heard. The proviso was in force till the 27th January 1937 when it was deleted. (*Burma Gazette*, 30th January 1937, Pt. IV, p. 126.) The order appealed from was made in 1936 and so the repealed proviso applies. This proviso is *ultra vires*. There is no such rule made by any of the High Courts in India. S. 122 of the Code gives power to the High Court to make rules regulating procedure and s. 128 amplifies it. Under s. 47 of the Code a party has a free right to make an application to the Court without any preliminary conditions being imposed on him.

[ROBERTS, C.J. You may say I have a right to be heard and that right should not be hampered. After hearing the application the Court may impose conditions.

Leach J. referred to *Capel* v. *Child* (1), and to O. 9, r. 13 of the Code which empowers the Court to put a party on terms *after* hearing his application.]

The effect of the proviso is to whittle down my right of application. The case of *Gendaram* v. *C.A.C.R.M. Firm* (2) was wrongly decided.

N. M. Cowasjee for the 1st respondent. The High Court has very wide powers to make rules; only, the

(1) 2 Cr. & J. 558 at p. 579. (2) A.I.R. (1931) Ran. 179.

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rules so made must not be inconsistent with the provisions of the sections of the Code. The rule is like a legislative enactment and we are not concerned whether it is a fair rule or not. The Court is dealing with procedure only and it was thought desirable to add this rule to prevent frivolous applications being made. The rule relates to procedure only and does not shut out an application from being made. *Mani Mohan Mandal* v. *Ramtaran Mandal* (1).

[ROBERTS, C.J. Where do you draw the line? Can there be a rule demanding a lakh of rupees to be deposited? If a man complains that his property has been wrongly sold, is he not to be heard?]

The rule does not take away the right to be heard. The test is, is the rule inconsistent with any of the sections of the Code, not whether it may cause hardship in a particular case. There is a statutory right to appeal to His Majesty in Council, but the rules demand security.

Chakravarti for the 2nd respondent. The Code provides safeguards for the debtor whose property is going to be sold. O. 21, r. 66 of the Code requires a proclamation of sale to be published with full particulars and it cannot be issued without notice to the decree-holder and the judgment-debtor. It safeguards the debtor against irregularities taking place, and if afterwards he wants to challenge the sale, the Court is justified in imposing conditions.

ROBERTS, C.J.—The question which has been referred to a Full Bench is whether Order 21 Rule 90B as it existed prior to January 27th 1937 is *ultra vires* or not. It arises because certain landed properties of

(1) I.L.R. 43 Cal. 148.

a judgment debtor were sold by Court auction on May 2nd 1936 in execution of a mortgage decree. On June 1st 1936 the judgment debtor filed an application to set aside the sale on the ground of material irregularity or fraud in publishing or conducting the sale.

At that time Order 21 Rule 90 ran as follows :

90. "Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it ;

Provided that no application to set aside a sale shall be admitted unless—

(*a*) it discloses a ground which could not have been put forward by the applicant before the sale was conducted, and

(*b*) the applicant deposits with his application the amount mentioned in the sale warrant or an amount equal to the amount realized by the sale, whichever is less, and in case the application is unsuccessful the costs of the opposite parties shall be a first charge on the amount so deposited ;

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

The Assistant District Judge held that failure to comply with proviso (*b*) was fatal to the judgment debtor's application. The judgment debtor appealed and has urged before us that proviso (*b*) is *ultra vires* the Rule making committee of the High Court. I think he is right.

Section 122 of the Civil Procedure Code gives power to the High Courts established under the Indian High Courts Act 1861 or the Government of India Act 1915 to make rules for regulating their own procedure

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and the procedure of the civil Courts subject to their superintendence, and to add to any of the rules in the First Schedule. Such rules shall (by section 128) be not inconsistent with the provisions in the body of this Code but subject thereto may provide for any matters relating to the procedure of civil Courts.

The effect of Rule 90B is that an application made under the rule never comes before the Court unless and until the deposit of money referred to therein has been made by the applicant. It is not a rule to regulate procedure but lays down an indispensable preliminary before any proceedings take place at all. Although the Rule Committee has wide powers and can, provided any new rule it seeks to lay down is not inconsistent with the body of the Code, abrogate existing rights of the subject, it can only do so in matters of procedure, and has no power to make any alteration which goes beyond a matter of procedure. Hence a rule which directed that upon an application being heard the Court might require the deposit of moneys, or put the applicant upon terms (though stringent) as part of the procedure in the hearing of the application, would seem to be valid. But the rule as laid down does not do this ; it purports to shut out any applicant who fails to deposit the amount required from proceeding with his application at all.

Our attention was called to the unreported case of *Gendaram* v. *C.A.C.R.M. Chettyar* (Civil Miscellaneous Appeal No. 13 of 1930) in which a Bench of this Court declared that the provisos to Order 21 Rule 90 which are in question " do not deprive the judgment debtor of any substantial legal right " and held therefore that they were valid. But as Lush L.J. pointed out in *Poyser* v. *Minors* (1) procedure

(1) 7 Q.B.D. 333.

"denotes the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines that right."

The only valid rules which can therefore be made by the High Courts under the provisions of section 122 of the Code which confer the rule making power must regulate the mode of proceeding to enforce a legal right, and cannot stray beyond it. The proviso under review seeks to take away an existing right, namely the right of being heard to impeach a sale in execution subsisting in a person whose interests are affected by it, unless he is able and willing to deposit with his application the amount mentioned in the sale warrant or an amount equal to that realized by the sale whichever is less.

The right which exists is not, I am persuaded, conferred upon the person interested by Order 21 Rule 90, which is in this respect declaratory of the common law. As pointed out in Broom's maxims (9th Ed. at p. 78) it has long been a received rule that no one is to be deprived of his property in any judicial proceeding unless he has an opportunity of being heard. And see *Capel* v. *Child* (1). I am of opinion that as Order 21 Rule 90 proviso B (which has since been cancelled by an order of the Rule Committee dated January 27th 1937) does not regulate the procedure by which the right can be enforced it is invalid as *ultra vires* the Rule making Committee of the High Court, and therefore I answer this question in the affirmative.

LEACH, J.—I agree that the question referred should be answered in the affirmative.

Our system of law does not permit a person to be condemned unheard or deprived of his property by an order of the Court without an opportunity being given

(1) (1832) 2 Cr. & J. 558.

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to him to state his case. In the leading case of *Capel* v. *Child* (1), to which the learned Chief Justice has referred, Bayley B. observed,

"I know of no case in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property, without his having an opportunity of being heard."

Proviso (*b*) in the rule under discussion clearly offends against this principle, because in effect it says that a person shall not enter the Court and ask for redress until he has deposited a sum of money, not by way of Court fee, but as a warranty of good faith. It is said that the proviso was inserted in the rule in order to prevent applications of a frivolous character being filed; but, unfortunately, its effect does not stop there. It can operate to prevent a person who has suffered a wrong coming into Court for redress because he has not the means to make the deposit demanded by the rule.

The Legislature may take away common law rights, but the Court, by virtue of its rule-making powers, certainly cannot. The Court has been given full power to regulate its procedure, but regulation of procedure cannot imply that a man can be condemned unheard or have his property taken away without an opportunity being given to him to urge that it would be unjust to do so. The proviso, therefore, cannot be regarded as a rule regulating procedure. In fact, it is designed to prevent proceedings being instituted.

I can well understand a rule stating that once a litigant has been heard the Court shall have the right to say that he shall carry the matter no further unless he complies with certain conditions, but before putting a litigant on terms the Court must first hear him, and if proviso (*b*) were allowed to stand he might never be able to obtain a hearing.

(1) 2 Cr. & J. 558.

BRAUND, J.—I agree.

I think that the point is really a very short one.

The power of the Rule Committee to amend, alter or add to all or any of the rule is derived from section 122 of the Code of Civil Procedure, 1908.

The only qualification of this power of amendment, alteration or addition is contained in that section itself and in section 128 (*1*). For, by section 122, the power of annulment, alteration or addition has to be effected by rules "regulating" the procedure of the Court and, by section 128 (*1*), the amending rule must be consistent with the provisions of the body of the Code and must "relate" to the procedure of the Court.

In my judgment, therefore, an amending rule, made in exercise of the statutory power, which is not inconsistent with the body of the Code and "regulates" or "relates to" the procedure of the Court, is necessarily *intra vires* under the Statute, whatever its effect may be upon individual rights.

What is a "matter of procedure" only is not always easy to determine. But I am content to adopt the definition of Lush L.J. in *Poyser* v. *Minors* (1) that it means

> "the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right . . . . . ."

Some clue to what is mere procedure for the purposes of the Code of Civil Procedure may be afforded by those illustrations of it—which, nevertheless, are not exhaustive—that are given in section 128 (*2*) of the Code. They are plainly matters of internal practice only, arising in the conduct of proceedings within the Court.

(1) 7 Q.B.D. 329, 333.

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Proviso (*b*) to Order XXI Rule 90, so far as it imposes an onerous condition precedent upon an applicant to set aside a sale, appears to me to go further than a mere matter of procedure. It is a mandatory rule by which, when read with section 47 (*1*) of the Code, the Court purports, not merely to regulate the mode of its exercise of jurisdiction, but to divest itself altogether of jurisdiction in all cases in which the applicant cannot, or will not, make a substantial deposit. To use the words of Lord Justice Lush again, it does not regulate "its mode of proceeding" but, in effect, it alters the rights of the applicant, whether those rights spring from Order XXI Rule 90 itself or from some more general right to seek redress *ex debito justitiæ* in any case of irregularity or fraud.

APPELLATE CRIMINAL.

Before Mr. Justice Dunkley.

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Nov. 26

MOHAMED KAKA AND OTHERS

v.

THE DISTRICT JUDGE OF BASSEIN.*

Offences against public justice—Complaint by the Court—Complaint when to be made—Party's application to Court to lay complaint—Delay in applying—Filing of complaint a judicial act—Procedure—Additional evidence—Notice to accused—Inquiry to be by Court—Investigation by Police—Illegal for Court to act on Police statements and report—Criminal Procedure Code (Act V of 1898), ss. 476, 155 (2), 162, Ch. XIV.

In case of offences against public justice before exercising its discretion to lay a complaint the Court should find that (1) it is in the interest of public justice that a complaint should be made, and (2) there is a reasonable probability of a conviction resulting from the complaint. If action is to be taken by the Court under s. 476 of the Criminal Procedure Code, it should be taken immediately after the judgment, for the desirability of prosecution must be present in the mind of the Judge when pronouncing judgment. A party may move the Court to lay a complaint by bringing to the notice of the Court matters on the record but which had escaped attention of the Court, or by

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* Civil Misc. Appeal No. 91 of 1936 from the order of the District Court of Bassein in Civil Misc. Case No. 17 of 1936.