SUBHANAND CHOWDHARY AND ANOTHER.

1940.
Feb. 29;
Mar. 18.

v.

APURBA KRISHNA MITRA AND ANOTHER.

[SIR MAURICE GWYER, C. J., SIR SHAH SULAIMAN AND SIR SRINIVASA VARADACHARIAR, JJ.]

Government of India Act, 1935, *s.* 205—*Grant of certificate by High Court—Bihar Money-Lenders Act,* 1938 *(Bihar Act No. III of* 1938), *s.* 11—*Repeal and re-enactment—Bihar Money-Lenders (Regulation of Transactions) Act,* 1939 *(Bihar Act No. VII of* 1939), *s.* 7—*Whether certificate becomes "infructuous" or can be vacated—Code of Civil Procedures,* 1908 *(Act No. V of* 1908), *ss.* 151 *and* 152—*Grounds of appeal to the Federal Court—Jurisdiction of Federal Court.*

In a case turning on the question of the validity of s. 11 of the Bihar Money-Lenders Act, 1938, the High Court at Patna granted the appellants a certificate under s. 205 of the Constitution Act. The date of the certificate was January 17, 1939. On May 1, 1939, the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, which repealed and re-enacted with retrospective effect s. 11 of the Act of 1938, came into force. The validity of the new Act, which had received the assent of the Governor-General, could not be challenged, but it was contended that the certificate had now become "infructuous" and ineffective and that the Federal Court had no jurisdiction to hear the appeal either on the constitutional issue or on any other ground.

Held, that when jurisdiction to hear an appeal is once vested in the Federal Court by the grant of a certificate under s. 205 (1) of the Constitution Act, it cannot be divested by any subsequent event.

A certificate once granted cannot be cancelled or vacated. S. 152 of the Code of Civil Procedure has no application, and there is no inherent power to alter a decree or certificate, which was correct at the time when it was made or given, namely by reason of the happening of some subsequent event.

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Held, therefore, that the Court had jurisdiction to hear the appeal.

APPEAL from the High Court at Patna.

B. B. Tawakley (*Major Surendropal Singh* with him) for the appellants.

Sir Brojendra Mitter, A.-G. of India (*Raghbir Singh* with him), for the first respondent. The other respondent did not appear.

The facts and arguments of the case appear sufficiently from the judgment.

Cur. adv. vult.

The Judgment of the Court was delivered by

GWYER C. J.—In this case the facts do not differ materially from others which have come before us lately from Bihar; but the Advocate-General of India, on behalf of the first respondent, has raised a novel and interesting point.

The plaintiff (the present first respondent) obtained a decree in the court of the Subordinate Judge Muzaffarpur, and the decree (with certain modifications in his favour) has been upheld in the High Court. The defendants' claim to have the benefit of s. 11 of the Bihar Money-Lenders Act, 1938([1]), was rejected, since that provision had already been held by the High Court to be void : *Sadanand Jha* v. *Aman Khan*([2]); but High Court granted a certificate under s. 205 (1) of the Constitution Act.

The date of the judgment of the High Court and of their certificate was 17th January, 1939. On 1st May, 1939, the Bihar Money-Lenders (Regulation of Transactions) Act, 1939([3]), came into force. The application of the appellants to the High Court for admission of their appeal to the Fedral Court was made on the 11th May, and the appeal was finally

(1) Bihar Act No. III of 1938. (2) (1938) I. L. R. 18 Pat. 15.

(3) Bihar Act No. VII of 1939.

admitted by the High Court on the 2nd October last. The Act of 1939, which has been before this Court in several cases during the present sittings, repealed and re-enacted s. 11 of the Bihar Money-Lenders Act, 1938, and since it had been reserved for the consideration of the Governor-General and had received his assent, its validity cannot be challenged as that of the Act of 1938 had been.

Such are the facts of the case, and the Advocate-General admitted that, if the appeal were properly constituted, the appellants would be entitled to the benefit of the Act of 1939; but he contended that there was no appeal properly before the Court. He put his argument in this way. The certificate under s. 205 (1), granted on 17th January, certified that the case involved a substantial question of law as to the interpretation of the Constitution Act, that question being (or so it is to be presumed, for the certificate does not mention any particular question of law) whether s. 11 of the Bihar Money-Lenders Act, 1938, was, as the High Court had held in their earlier decision, void under s. 107 of the Constitution Act, because repugnant to an existing Indian law, *viz.*, s. 2 of the Usury Laws Repeal Act, 1855(1), s. 3 of the Usurious Loans Act, 1918(2), and possibly also s. 37 of the Indian Contract Act, 1872(3). The Advocate-General admitted that on the day when this certificate was granted it was a good and valid certificate, and that the appellants were entitled at that time to appeal to this Court not only on the question as to the validity of s. 11 of the Act of 1938, but also on any other ground mentioned in s. 205 (2) of the Constitution Act. But, he said, the question of law as to the validity of s. 11 ceased to exist at the beginning of May, when the new Act of 1939 came into force; and, since the Act was retrospective, the certificate, had become, to use his own expression, "infructuous" and ineffective. Accordingly, he argued that this Court had no longer jurisdiction to hear the appeal, either on the constitutional or on any other ground,

(1) Act No. XXVIII of 1855. (2) Act No. X of 1918.

(3) Act No. IX of 1872.

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since an effective certificate alone is the foundation of the Court's jurisdiction; and that the appellants must seek their remedy, if any, before the Judicial Committee. He also pointed out that the object of the appeal now is to obtain the benefit of the Act of 1939, that is to say, of a law which was not yet in existence when the certificate was granted by the High Court.

S. 205 of the Constitution Act is in the following terms :—

> "205.—(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.
>
> (2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

The granting of a certificate is thus the necessary condition precedent to the exercise of its jurisdiction by this Court; and it sets in motion a train of consequences. No provision is made for the cancellation or vacating of a certificate after it has once been granted. The Advocate-General did indeed suggest

that the High Court had power in appropriate circumstances to vacate a certificate under s. 151 or s. 152 of the Code of Civil Procedure. He abandoned the suggestion however before the conclusion of his argument, and in our opinion he was prudent to do so. Plainly s. 152 of the Code has no application to such a case as the present, and there can be no inherent power to alter a decree or certificate, which was correct at the time when it was made or given, because of the happening of some subsequent event.

If the High Court had no power to vacate its certificate, this Court has certainly no power to do so. Can it then treat an existing certificate as having become "infructuous", because the constitutional question with respect to which it was given subsequently becomes of no more than academic interest? The Advocate-General referred us to the observations of the Judicial Committee in *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada*(1), where the Lord Chancellor stated that it was the practice of the Committee not to entertain appeals which have no relation to existing rights created or purported to be created or to express opinions on subjects which are no longer of any practical interest. In our opinion it would be convenient for this Court to follow the same practice; and we have in an earlier case declined to hear arguments on the validity of the repealed Bihar Act of 1938 : *Shyamakant Lal* v. *Rambhajan Singh*(2). But we are not now considering the convenience or otherwise of a particular practice; we are considering a question of jurisdiction. The certificate granted by the High Court on 17th January, 1939, admittedly conferred jurisdiction on this Court to hear the appeal; and we have to determine whether that jurisdiction has been taken away from us, by reason of the alteration of circumstances. In our opinion, when jurisdiction to hear an appeal is once vested in this Court by the grant of a certificate, it cannot be divested by any subsequent event. A certificate is the key which unlocks the door into this Court, and a litigant who has once passed through that door cannot afterwards be ejected by the happening of events outside

(1) [1939] A. C. 117, at pp. 122, 128. (2) [1939] F. C. R. 193.

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and beyond his control. It seems to us quite immaterial that the relief which the appellants now claim arises from an Act which was not law when the certificate was granted. Section 205 (2) is plain; and once a certificate has been granted, an appellant can appeal on any ground whatsoever, if the Court thinks fit to give him leave to do so. Nor do we think, though it is not necessary to decide the point, that the jurisdiction of this Court to entertain the appeal on those other grounds would be excluded, even if an appellant declined to agrue before us that the decision of the High Court on the constitutional question with respect to which the certificate had been granted was wrong.

It is sufficient for us to base our judgment on what we conceive to be the true construction of s. 205 of the Constitution Act, and we do not think it necessary to decide whether the appellants had also a vested right under the Act of 1938, which was saved to them by s. 8 of the Bihar General Clauses Act(1), notwithstanding the repeal of the Act of 1938 by the Act of 1939.

The facts in the present case are unusual and are unlikely to recur. We do not suppose that Parliament ever contemplated a contingency of the kind; but that is no reason why we should not give effect to the plain language of the Act. Nor could we lightly adopt a construction which would have this result, that an appeal properly begun and continued in this Court was suddenly, by the action of a Provincial Legislature, taken out of our jurisdiction and transferred to the jurisdiction of the Judicial Committee.

In our opinion therefore this Court has jurisdiction to entertain the appeal. The appellants' counsel did not argue any grounds of appeal other than the application of the Bihar Act of 1939, and, as we have already said, the Advocate-General of India, on behalf of the respondents, admitted that, if the appeal were properly constituted and this Court had jurisdiction, the appellants were entitled to the benefit of the Act. We accordingly allow the appeal to the

(1) Bihar Act No. I of 1917.

extent of reducing the interest payable to the plaintiff up to the date of the institution of the suit to Rs. 8,500 in respect of the first mortgage bond, Exhibit I, and to Rs. 3,995 in respect of the second bond, Exhibit I (a).

As regards interest *pendente lite*, this is governed in the case of mortgage actions by O. XXXIV, r. 11, of the Code of Civil Procedure, which provides that the Court "may" order payment of interest, up to the date on or before which payment of the amount found due is under the preliminary decree to be made by the mortgagor, at the rate payable on the principal, or where no such rate is fixed at such rate as the Court may deem reasonable; and it is to be observed that though this provision has found a place in the Code since 1929, s. 7 of the Bihar Act of 1939 is expressly limited to interest claimable up to the date of the institution of the suit. The Act has maintained a distinction between loans advanced before the Act and loans advanced subsequently; as regards the latter it has limited the rate of interest (s. 5) and has also prohibited compound interest (s. 6), while as regards the former it has only limited the aggregate amount of interest payable up to the date of the institution of the suit (s. 7). The contract for the payment of interest thus not having been declared illegal, but only unenforceable beyond a certain point, the creditor retains his contractual rights except to the extent to which the statute has expressly limited them. In these circumstances, it may perhaps be open to doubt whether the policy of the Bihar legislation can properly be taken into account by a Court which is considering whether there are any grounds for reducing the rate of interest to which a mortgagee would ordinarily be entitled under the provisions of O. XXXIV, r. 11 of the Code, since this would in effect be to extend the Act to a period with which the Legislature has not chosen to deal; but it may be that the wide powers of reopening transactions originating before or after the commencement of the Act given to the Court by s. 8 of the Bihar Act of 1939 were regarded by the Legislature as conferring a much wider discretion than that given by O. XXXIV,

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r. 11, or by the Usurious Loans Act, 1918. Having regard to all the circumstances, we think that the justice of the case will be met by allowing the plaintiff (respondent) simple interest at 12 per cent. per annum rather than the 12 per cent. compound interest with yearly rests specified in the contract, in respect of the principal amount due on both the bonds from December 20th, 1934, to the date fixed for payment in the revised decree to be passed by the High Court. From the latter date the aggregate amount due for principal, interest and costs will carry interest at 6 per cent. per annum till the date of realization or payment.

The case will be remitted to the High Court with a direction to discharge their order, dated January 17th 1939, and the order of the Subordinate Judge, dated March 2nd, 1936, and to pass a decree in the terms above stated. The respondents will retain the costs already awarded to them in the High Court and in the Court below; there will be no order as to costs in this Court.

Case remitted to High Court.

Agent for Appellants : *T. K. Prasad.*

Agent for the first Respondent : *B. Banerji.*