

1947

*Maharajadhiraj
Uday Chand
Mahtab of
Burdwan*

v:

*Samarendra
Nath Mitra and
Others.*

Kania J.

and tenant existed on the date of the suit. There can arise no occasion for an ejection, or a claim to a first charge on a property liable to be sold in execution of a decree for the rent, unless on the date of the suit the parties were a landlord and tenant. In the course of that judgment, certain observations showing that the Bengal Tenancy Act would operate or would govern the rights of the parties when they were landlord and tenant, are found, but those observations, as has been repeatedly pointed out, must be read along with the facts of the case. A careful reading of the judgment shows that the Judicial Committee of the Privy Council were dealing only with the effect and interpretation of s. 65. We do not think that that case supports the wide proposition urged on behalf of the appellant.

The result is that the appeals fail and are dismissed with costs.

Appeals dismissed.

Agent for the appellant: *Ranjit Singh Narula.*

Agent for the respondents Nos. 4 & 5: *P. K. Bose.*

Agent for the Intervener: *P. K. Bose.*

SRIPATI LAL KHAN AND OTHERS

v.

PASUPATI MODAK.

ADVOCATE-GENERAL OF BENGAL (Intervener).

[SIR PATRICK SPENS C. J., SIR MUHAMMAD ZAIFULLA KHAN and SIR HARILAL J. KANIA JJ.]

Government of India Act, 1935, Sch. VII, List II, entry No. 21—Bengal Tenancy Act, 1885 (as amended by Act XVIII of 1940), s. 26-G—Provincial Legislature—Law providing that mortgage shall be deemed to have been extinguished if mortgagee was in possession for 15 years or more—Validity.

Under entry No. 21 of List II of the Seventh Schedule to the Government of India Act, 1935, a Provincial Legislature has power to make a law providing that if a mortgagee has been in possession

of the mortgaged land for a period of 15 years or more, the mortgage shall be deemed to have been extinguished, and s. 26-G of the Bengal Tenancy Act as amended by the Bengal Tenancy (Amendment) Act XVIII of 1940 is not therefore *ultra vires*.

The expression "transfer of agricultural land" in entry No. 21 of List II covers also the transfer of an interest in agricultural land.

APPEAL from the High Court of Judicature at Calcutta: (Civil Appeal No. IX of 1945).

The material facts of the case and the relevant statutory provisions are set out in the judgment.

1946. Dec. 17. *Purushottam Chatterjee (Samarendra Nath Mukherjee with him)* for the appellants. So far as s. 26-G extinguishes the mortgage debt, it is *ultra vires*. Under entry No. 21 a Provincial Legislature has power to make laws relating to land, land tenures and landlord and tenant. The law relating to the debt itself is governed by the law of contract and not by the law of landlord and tenant. The law relating to mortgage debts is regulated also by the Transfer of Property Act. The Provincial Legislature has no power to make laws extinguishing a mortgage debt even under the head "money-lending". The present case is one of an anomalous mortgage in which the mortgagee has a right to sue for the mortgage money under s. 68 of the Transfer of Property Act. The mortgagee has also a right to sell under s. 67. Section 26-G is therefore repugnant to ss. 67 and 68 of the Transfer of Property Act. Counsel referred to *Manomohan Das v. Parswanath Das* ⁽¹⁾ and *Saharuddin Dewan v. Altafuddin Ahmed* ⁽²⁾.

The respondent did not appear.

Rama Prosad Mukherjee (N. K. Sen with him) for the Intervener was not called upon.

Cur. Adv. vult.

1947. Jan. 4. The judgment of the Court was delivered by

KANIA J.—This is an appeal from the judgment of a Division Bench of the Calcutta High Court and raises the question of the validity of s. 26-G of the Bengal Tenancy Act, as amended by the Bengal Tenancy (Amendment) Act of 1940.

⁽¹⁾ (1943) 47 C.W.N. 789.

⁽²⁾ (1943) 47 C.W.N. 791.

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The material facts are these. On the 12th February, 1927, the father of the respondent mortgaged the disputed properties in favour of the father of the appellants. It was contended to be an anomalous mortgage. The lands were agricultural lands and it is common ground that the Bengal Tenancy Act applied to the transaction between the parties. The material portions of s. 26-G (before its amendment) ran as follows:—

“(1a) Notwithstanding anything contained in this Act or in any other law or in any contract, every usufructuary mortgage subsisting in or after the first date of August 1937 which was so entered into before the commencement of the Bengal Tenancy (Amendment) Act 1928 shall be deemed to have taken effect as a complete usufructuary mortgage for a period mentioned in the instrument or for 15 years whichever is less.”

“(5) Notwithstanding anything contained in this Act or in any other law or in any contract, the consideration (with all interest thereon) for a complete usufructuary mortgage or for any other form of usufructuary mortgage deemed under sub-s. (1a) to have taken effect as a complete usufructuary mortgage, entered into by an occupancy-raiyat in respect of his holding or a portion or share thereof, shall be deemed to have been extinguished on the expiry of the period (a) mentioned in the instrument of the mortgage, or (b) of fifteen years, whichever is less, from the date of the registration of the instrument, or where there is no registered instrument, from the date of the mortgagee's entry into possession, and the mortgagor shall thereupon become entitled to possession of the mortgaged holding, and he may, if he is not forthwith given possession, apply to the Court or to a Revenue Officer to be restored thereto.”

A complete usufructuary mortgage is defined in s. 3(3) as follows:—

“Complete usufructuary mortgage means a transfer by a tenant of the right of possession in any land for the purpose of securing the payment of money or the return of grain advanced or to be advanced by way of loan upon the condition that the loan, with all interest thereon, shall be deemed to be extinguished by the

profits arising from the land during the period of the mortgage.”

By the Bengal Tenancy (Amendment) Act of 1940, for sub-s. (1a), the following sub-section was substituted:—

“(1a) Notwithstanding anything contained in this Act or in any other law for the time being in force or in any contract, every mortgage (including a mortgage by conditional sale) entered into by an occupancy-riyati in respect of *ins* holding or of a portion or share thereof in which possession of land is delivered to the mortgagee—

(a) which was so entered into before the commencement of the Bengal Tenancy (Amendment) Act, 1928, and was subsisting on or after the first day of August 1937, or

(b) which, being other than a usufructuary mortgage having under sub-s. (1) no force or effect, was so entered into after the commencement of the Bengal Tenancy (Amendment) Act, 1928, and before the commencement of the Bengal Tenancy (Amendment) Act, 1940, and was subsisting on or after the commencement of the Bengal Tenancy (Amendment) Act, 1940, shall be deemed to have taken effect as a complete usufructuary mortgage for the period mentioned in the instrument or for fifteen years, whichever is less.”

In the case before us, after the amendment was made in April, 1940, the respondent applied to the Debt Settlement Board for settlement of his debts. While the matter was pending before the Board, on the 28th March, 1942, the respondent filed an application under the amended s. 26-G for restoration of the mortgaged premises to him. That application was opposed by the appellant on the ground that money was due to him and the debt cannot be extinguished. It was contended that s. 26-G, in so far as it affected the rights of the parties under an anomalous mortgage, was *ultra vires* the Provincial Legislature. The appellant failed in the two lower Courts. The High Court, however, granted a certificate under s. 205 of the Government of India Act, 1935, and the appellant has therefore come in appeal before us.

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On his behalf it was contended that the Provincial Legislature had no power to extinguish the debt and while the debt remained unpaid, he could not be ordered to hand over possession of the mortgaged premises. In our opinion, the wording of entry No. 21 of List II of Schedule VII of the Constitution Act affords a complete answer to the appellant's contention. Entry No. 21 runs as follows:—

“Land, that is to say, rights in or over land land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove.”

The creation of an usufructuary mortgage and the rights of the parties thereunder are clearly covered by the words of that entry. In the same way, the rights of a landlord and tenant under an anomalous mortgage in respect of agricultural lands are equally capable of being defined and, if so, altered by a Provincial Legislature. Therefore when a Provincial Legislature passes an Act providing that a mortgagee, who is in possession for 15 years and more, shall be considered and treated as if the mortgage debt and interest were paid off, it does not go beyond the legislative powers of the Province. The same provision can be made in respect of an usufructuary mortgage or other mortgage. The amendment, in our opinion, is thus clearly within the terms of entry No. 21 of List II. We are not concerned in the present case with the question of extinguishment of the debt. That question is still pending before the Debt Settlement Board. We are concerned only with the order made by the lower Courts to deliver over possession of the lands to the mortgagor. It was contended that this amendment is in conflict with the Transfer of Property Act, because a mortgage is created under the Transfer of Property Act. In our opinion, this argument cannot be accepted, because entry No. 21 of List II covers the transfer of agricultural land. That will cover the transfer of an interest in such land also.

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

Appeal dismissed.

Agent for the appellants: *Ranjit Singh Narula.*

Agent for the Intervener: *P. K. Bose.*

THE PUNJAB FLOUR AND GENERAL
MILLS CO., LTD., LAHORE

v

THE CHIEF OFFICER, CORPORATION OF THE
CITY OF LAHORE AND THE PROVINCE
OF THE PUNJAB.

[SIR PATRIC SPENS C. J., SIR MUHAMMAD ZAFRULLA
KHAN and SIR HARILAL J. KANIA JJ.]

Government of India Act, 1935, Sch. VII, List I, entry No. 58, List II, entries No. 2, 49—Municipal corporation—Levy of "Octroi without refunds" on goods carried by air or railway—Legality—Difference between "terminal taxes" and "cesses on entry of goods into a local area"—Powers of Centre and Provinces—"Use", meaning of—Punjab Municipal Act, 1911, s. 11.

There is a definite distinction between the type of taxes referred to as terminal taxes in entry No. 58 of List I of the Seventh Schedule to the Government of India Act, 1935, and the type of taxes referred to as cesses on the entry of goods into a local area in entry No. 49 of List II, and so far as rail borne goods are concerned, they may be subjected to local taxation under entry No. 49 of List II, even though they may also be liable to taxation under entry No. 58 of List I.

In the year 1926 the Lahore Municipality imposed under its then existing powers of local taxation, a tax called terminal tax on the gross weight of consignments or per tail on certain articles including grain. After the enactment of the Government of India Act, 1935, by Notifications of 1938 and 1940, a tax called "Octroi (without refunds)" was imposed in supersession of the tax imposed in 1926: *Held*, on a consideration of the real nature and incidence of the two kinds of taxes, that the tax called Octroi (without refunds) imposed in 1938 and 1940 was not a terminal tax within entry No. 58 of List I but a cess on the entry of goods into a local area within entry No. 49 of List II and could therefore be properly imposed by the Municipality, provided the goods in respect of which the tax was imposed in fact entered the municipal area for consumption, use or sale therein *Held also*, that the

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