
(1943) 11 PAT CK 0008
In the Patna High Court

Maharaja Bahadur Ram Ram Vijay Prashad Singh	APPELLANT
Vs	
Kishun Singh and Others	RESPONDENT

Date of Decision : 08-11-1943

Acts Referred:

Bihar Tenancy Act, 1885 — Section 163A
Civil Procedure Code, 1908 (CPC) — Section 115
Government of India Act, 1935 — Section 107(1)

Citation : AIR 1944 Patna 54

Hon'ble Judges : Fazl Ali, C.J; Manohar Lall, J; Chatterji, J

Bench : Full Bench

Judgement

Chatterji, J.—This miscellaneous appeal and the civil revision, which arise out of two separate rent execution cases, were referred to a Pull Bench, because the question involved in both the cases is whether Section 163A, Bihar Tenancy Act, is void by reason of the provisions of Section 107(1), Government of India Act, 1935. The civil revision may be disposed of on the short ground that it is not maintain, able. It is directed against an order of the Munsif dismissing a rent execution case. The decree under execution is a rent decree passed by a Munsif in a suit valued at Rs. 99-15-3. As the amount claimed in the suit exceeded Rs. 50, an appeal lay from the order complained of to the District Judge (see Section 153, Bihar Tenancy Act). No such appeal was filed, but this application in revision has been presented directly against the order of the Munsif. u/s 115, Civil P.C., no revision lies against an order which is appealable. Clearly, therefore, this application in revision is not maintainable; and I would dismiss it, but without costs.

2. The miscellaneous appeal is directed against an appellate order dismissing, in concurrence with the Court of first instance, a rent execution case. The suit in which the rent decree under execution was obtained was valued at Rs. 4-9-8 only. The decree was passed by a Munsif empowered to exercise final jurisdiction u/s 153, Bihar Tenancy Act. As the amount claimed in the suit did not exceed Rs. 50, the order passed by the Munsif in the "execution case was not appealable.

Therefore the appeal which was filed in the lower appellate Court was not competent. Consequently, this second appeal does not lie. But as the question argued is one of jurisdiction, the memorandum of appeal may be treated as an application in revision.

3. In the execution case the decree-holder asked for sale of the holding in respect of which the rent decree was obtained. The holding which consists of one plot only was valued by the Court at Rs. 52. When it was put up for sale, there was no bidder except the decree-holder and he bid up to the extent of the decretal amount only, i.e., Rs. 12-15-0. As the bid was low, the Court adjourned the sale. Again, when on the next date the holding was put to sale, the decree-holder was the only bidder and his bid was to the extent of the decretal amount. As this amount was less than the price specified in the sale proclamation, the Court did not accept the bid in view of the provision of Section 163A, Bihar Tenancy Act, and it dismissed the execution case. The decree-holder then preferred an appeal to the lower appellate Court which was dismissed. Hence this miscellaneous appeal by the decree-holder. Section 143, Bihar Tenancy Act, provides:

(1) The High Court may, from time to time, with the approval of the; Provincial Government, make rules consistent with this Act, declaring that any portions of the Code of Civil Procedure, 1908, shall not apply to suits between landlord and tenant as such or to any specified classes of such suits, or shall apply to them subject to modifications specified in the rules.

(2) Subject to any rules so made, and subject also to other provisions of this Act, the Code of Civil Procedure, 1908, shall apply to all such suits.

4. No rules have been framed by this High Court under Sub-section (1) barring the applicability of any provision of the Code of Civil Procedure. Therefore, according to Sub-section (2), the CPC will apply to all suits between landlord and tenant where there is no other provision of the Bihar Tenancy Act. When in 1936, the proviso to Order 21, Rule 66(2), Civil P.C., was added by this High Court in exercise of its rule making power conferred by Section 122 of the Code, there was no corresponding provision in the Bihar Tenancy Act. Consequently, the proviso to Order 21 Rule 66(2) would apply to execution cases under the Bihar e Tenancy Act; and it was in force when Section 163A was inserted in the Bihar Tenancy Act by the amending Act of 1937 (Bihar Act 8 of 1937).

5. It has been argued that Section 163A, Bihar Tenancy Act, is repugnant to the proviso to Order 21 Rule 66(2), Civil P.C., and is, therefore, void u/s 107(1), Government of India Act, 1935. Section 168A, Bihar Tenancy Act, (omitting the provisos which are not material to this case) runs 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.

The proviso to Order 21 Rule 66(2), Civil P.C., is in these words:

Provided that no estimate of the value of the property, other than those, if any, made by the decree-holder and judgment-debtor respectively together with a statement that the Court does not vouch for the accuracy of either, shall be inserted in the sale proclamation.

Section 107(1), Government of India Act, provides:

If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

6. The expression "existing Indian law," according to the definition given in Section 311, Government of India Act, means:

any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part 3 of this Act by any Legislature, authority or person in any territories for the time being comprised in British India, being a Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation.

Part 3 of this Act refers to "The Governor's Provinces." The proviso to Order 21 Rule 66(2), Civil P.C., came into force before the commencement of part 3. The contention is that. Section 163A, Bihar Tenancy Act, deals with a matter relating to " Civil Procedure " which is covered by item No. 4 of the Concurrent Legislative List, which stands thus:

Civil Procedure, including the law of Limitation and all matters included in the CPC at the date of the passing of this Act; the recovery in a Governor's Province or a Chief Commissioner's Province of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such, arising outside that Province.

7. That being so, it is said, Section 163A which was enacted by the Provincial Legislature, is void inasmuch as it is repugnant to the proviso to Order 21 Rule 66(2), Civil P.C., which is an "existing Indian law." I shall assume for the moment that the provision of Section 163A, Bihar Tenancy Act is a matter which is covered by item No. 4 of the Concurrent Legislative List and does not fall within the Provincial Legislative List. u/s 100(2), Government of India Act, a Provincial Legislature also has power to make laws with respect to any of the matters enumerated in the Concurrent Legislative List. It cannot, therefore, be disputed that Section 163A, Bihar Tenancy Act, was within the competence of the Provincial Legislature. The true effect of Section 143(2), Bihar Tenancy Act, in my opinion, is that the CPC will apply only so long as there is no provision of this

Act. In other words, if there is no provision of this Act, the CPC will apply, but once a provision is made in the Act no matter when, provided it is enacted by a competent authority, the CPC will no longer apply. If this is the true effect of Section 143(2) of the Act, this was the "existing Indian law" at the time Section 163A of the Act was enacted. In this view no question of repugnancy of Section 163A of the Act arises. Then again there is the following saving clause in Section 4(1), Civil P.C.:

In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

8. This provision clearly recognises that nothing in the Code will affect any special form of procedure prescribed by any other law for the time being in force. In the Federal Court case, *Megh Raj v. Alla Rakhia* AIR 1924 F.C. 27, Varadachariar J., referring to the decision in *Stock Motor Ploughs v. Forsyth* (1932) 48 C.L.R. 128 said (at p. 507):

The principle of that decision is that where the paramount legislation does not purport to be exhaustive or unqualified, but itself permits or recognises other laws restricting or qualifying the general provision made in it, it cannot be said that any qualification or restriction introduced by another law is repugnant to the provision in the main or paramount law.

9. In the present case the paramount law is the Code of Civil Procedure. The effect of the above saving clause in Section 4 of the Code is that there being no specific provision to the contrary, nothing in the Code will affect the provision of Section 163A, Bihar Tenancy Act, which prescribes a special form of procedure. Therefore, according to the said decision of the Federal Court, the provision of Section 163A, Bihar Tenancy Act, cannot be said to be repugnant to the proviso to Order 21, Rule 66(2), Civil P.C. I shall now consider how far the contention that the provision of Section 163A, Bihar Tenancy Act, is a matter covered by item 4 of the Concurrent Legislative List can be accepted. It has been contended, on the other hand, by the learned Advocate-General, who appeared on behalf of the Provincial Government to support the validity of Section 163A, that it refers to a matter covered by item 2 or 21 of the Provincial Legislative List. These two items are as follows:

2. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this list; procedure in Rent and Revenue Courts.

21. 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.

10. It must be borne in mind that the Bihar Tenancy Act, as its preamble shows,

is an enactment "relating to the law of landlord and tenant." Section 163A finds place in Ch. 13 of the Act which, as it now stands after amendment by the Bihar Act 2 of 1938, is headed "Judicial Procedure for the Recovery of Rent by suit" and consists of Sections 143 to 177A. Prior to the amendment of 1938, Ch. 13, which consisted of Sections 143 to 158, was headed "Judicial Procedure" and Sections 158B to 177 were included in Ch. 14 headed "Sale for arrears under decree." The amendment of 1938 merely altered the arrangement of the various sections which were previously included in Chs. 13 and 14, and it is clear from the present heading of Ch. 13 that Section 163A is a matter of procedure for the recovery of rent by suit. The expression "the collection of rents" in item 21 of the Provincial Legislative List seems to me to be wide enough to include recovery of rent by suit. In this connexion it will be useful to refer to the following observations of Gwyer C.J. in the case in AIR 1941 16 (Federal Court)

The subjects dealt with in the three legislative lists are not always set out with scientific definition. It would be practically impossible, for example, to define each item in the Provincial List in such away as to make it exclusive of every other item in that list, and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import. I think however that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.

11. The general descriptive words in item 21 of the Provincial Legislative List include "the collection of rent;" and if the Provincial Legislature can legislate with respect to collection of rents amicably, it must also have power to legislate with respect to recovery of rents by suit. In my opinion, therefore, Section 163A, Bihar Tenancy Act, refers to a matter covered by item 21 of the Provincial Legislative List.

12. In this view of the matter, it is unnecessary to decide whether the provision of Section 163A is also covered by item 2 of the Provincial Legislative List. I may, however, observe that as the section puts a limitation on the power of the Court executing a rent decree to sell a holding or a portion of a holding for a price lower than that specified in the sale proclamation, it may come under item 2. Item 4 of the Concurrent Legislative List refers to "Civil Procedure." The expression "Civil Procedure," as I understand it, means procedure of the Courts of Civil Judicature, or in other words, procedure in civil suits. This may be gathered from the preamble to the CPC which shows that it is an Act relating to "the procedure of the Courts of Civil Judicature." Section 9 of the Code indicates that the Courts of Civil Judicature are to try all civil suits. Suits under the provisions of the Bihar Tenancy Act cannot be called civil suits. In fact the distinction between civil suits and rent suits is well recognised. Nor can the Court trying rent suits be regarded as a Court of Civil Judicature. It is true that suits under the Bihar Tenancy Act are tried by the civil Court, but it is because

jurisdiction is specially conferred on the civil Court by the provisions of the Act. The Bihar Tenancy Act is a special law which has its own provisions relating to procedure in rent suits, Section 143 of the Act, which I have already quoted, makes it clear that the procedure in rent suits under the Act may be different from the procedure in civil suits. Procedure in rent suits under the Bihar Tenancy Act, therefore, can hardly be said to be "Civil Procedure." Consequently, the provision of Section 163A of the Act does not fall under item 4 of the Concurrent Legislative List. For the aforesaid reasons I am of opinion that Section 163A, Bihar Tenancy Act, is not void.

13. There is one other point raised on behalf of the appellant. It is said that the executing Court was not justified in dismissing the execution case merely because the decree-holder refused to bid up to the amount specified in the sale proclamation. This contention must prevail. There nothing in Section 163A to warrant such dismissal. The Court ought to have given the decree-holder an opportunity to take out a fresh sale proclamation, or to take such further steps as he thought proper; and if he failed to take any further steps, it would, of course, have been open to the Court to dismiss the execution case. I would accordingly allow the appeal, treating the memorandum of appeal as an application in revision, set aside the orders passed by the Courts below and remit the case to the first Court so that it may be dealt with according to law in the light of the observations made above.

14. In the circumstances, there will be no order for costs.

Fazl Ali C.J.

I agree.

Manohar Lall J.

I agree.