

(1947) 02 PRI CK 0004

In the Privy Council

Case No : Privy Council Appeal No. 19 of 1946

Prafulla Kumar Mukherjee and others

APPELLANT

Vs

Bank of Commerce Ltd., Khulna, Advocate-General of Bengal,
Intervener

RESPONDENT

Date of Decision : 11-02-1947

Acts Referred:

Citation : (1947) AIR(PC) 60

Hon'ble Judges : John Beaumont, Madhavan Nair, Uthwatt, Lord Porter, Lord Wright, JJ.

Advocate : T.L. Wilson and Co., India Office, P.C. Basu, S.P. Khambatta, Sir Herbert Cunliffe, B. Mackenna, Sir Walter Monckton, for the Appearing Parties.

Judgement

Lord Porter

This group of cases and those which immediately follow necessitate a consideration of the principle upon which the respective jurisdictions of the Federal and Provincial Legislatures in India are to be delimited and of the method to be adopted in determining the subjects which are to be dealt with by the one or the other under the provisions of Ss. 99 and 100, Government of India Act, 1935, and the three lists set out in Sch. 7 thereto.

2 The question immediately in dispute is as to the validity of the Bengal Money-lenders Act, 1940. By way of introduction it is enough to say that that Act limits the amount recoverable by a moneylender on his loans for principal and interest and prohibits the payment of sums larger than those permitted by the Act.

3 The respondents are an incorporated body to which by an order of 12-5-1941, passed by the High Court of Calcutta under S. 153A, Companies Act, the assets of the Khulna Loan Bank Ltd. (earlier known as the Khulna Loan Coy. Ltd.) were transferred.

4 Some of the cases now under appeal to their Lordships' Board were brought by the respondents who claimed to recover loans and interest alleged to be due

upon promissory notes executed by appellant borrowers and in other instances by appellant debtors claiming a declaration that their indebtedness was at least diminished by the provisions of the Act and even in some instances that they were entitled to repayment of sums overpaid.

5 The proceedings began in 1941, 1942 and 1943, but are concerned with loans made at a much earlier date not by the respondents but by the Khulna Loan Company or the Khulna Loan Bank. In every case the loans were secured by promissory notes executed contemporaneously with the transaction.

6 The Act, the validity of which their Lordships have to determine, by S. 30 provides that:

"Notwithstanding anything contained in any law for the time being in force, or in any agreement (1). No borrower shall be liable to pay after the commencement of this Act-" more than a limited sum in respect of principal and interest or more than a certain percentage of the sum advanced by way of interest. Moreover it is retrospective in its effect, and its limitations can be relied upon by a borrower by way of defence to an action by the moneylender or the borrower can himself institute a suit in respect of a loan to which the provisions of the Act apply. Section 100, Government of India Act, 1935, is in the following terms:

"100. (1) Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in Sch. 7 to this Act (hereinafter called the "Federal Legislative List").

(2) Notwithstanding anything in the next succeeding subsection, the Federal Legislature, and subject to the preceding subsection, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the "Concurrent Legislative List").

(3) Subject to the two preceding subsections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the "Provincial Legislative List").

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof."

7 The Federal Legislative List referred to in this section assigns to the Federal Legislature jurisdiction to make laws with respect to

"(28) Cheques, bills of exchange, promissory notes and other like instruments."

"(33) Corporations, that is to say, the incorporation regulation and winding up of trading corporations including banking "

"(38) Banking, that is to say, the conduct of banking business " and denies

that jurisdiction to Provincial Legislatures.

8 The Provincial Legislative List however empowers the Provincial Legislature in Item (27) to make laws with respect to "Trade and Commerce within the Province?.; money lending and money lenders," and therefore no objection could be taken to the provisions of the Bengal Money-lenders Act, if they were concerned only with the limitation of capital and interest recoverable. But the Bengal Act goes further : Section 2 contains certain definitions in the following terms :

"(1) "bank" denotes a banking company as defined in S. 277F, Companies Act, 1913 "

(2) "borrower" means a person to whom a loan is advanced

(9) "lender" means a person who advances a loan and includes a money lender.

(12) loan means an advance, whether of money or in kind, made on condition of repayment with interest and includes any transaction which is in substance a loan, but does not include

(d) a loan advanced before or after the commencement of this Act-

(i) by a bank which was a scheduled bank on 1-1-1939, or by a bank which has been declared to be a notified bank under S. 3.

(e) An advance made on the basis of a negotiable instrument as defined by the Negotiable Instruments Act, 1881, other than a promissory note.

(13) "Moneylender" means a person who carries on the business of money-lending in Bengal or who has a place of such business in Bengal, and includes a pawnee as denned in S. 172, Contract Act, 1872.

(14) "Money-lending business" and "business of money- lending" mean the business of advancing loans either solely or in conjunction with any other business."

9 Section 277F, Companies Act, defined a banking Company as :

"A Company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque draft or order notwithstanding that it engages in addition in any one or more of the following forms of business, namely-

(I) ... the lending or advancing of money either upon or without security. ..." and S. 3, Bengal Money-lenders Act, enacts that

"The Provincial Government may by notification in the Official Gazette declare any bank to be a notified bank for the purposes of this Act."

10 Section 13 of the Act requires a money-lender to be licensed. Sections 24, 25 and 26 prescribe the form in which accounts are to be kept and require the

lender to furnish each borrower with a copy of his own account with certain penalties if he does not do so. Sections 28 and 29 of the Act impose a duty upon a money-lender in assigning a loan to furnish full particulars to the assignee but protect the position of a bona fide transferee without notice unless he himself be a money-lender. Section 34 enables the Court to direct payment by instalments and S. 36 gives power to reopen transactions subject however to the rights of a bona fide holder for value.

11 Having regard to these provisions the respondents say that whilst it is true that they are money-lenders, yet they are engaged in banking and are holders of promissory notes, matters which are solely within the Federal jurisdiction and that a Provincial Act such as the Bengal Money-lenders Act is ultra vires in that it deals with Federal matters. These matters, they say, are so intertwined with the rest of the Act that they cannot be disassociated and therefore the Act is wholly void. But whether this be so or not the particular loans, the subject-matter of the actions under review, are secured by promissory notes and in addition are matters of banking; accordingly they say that the Act is void at any rate so far as concerns promissory notes or banking.

12. The cases under review originally came before the subordinate Judge at Khulna where the only points which appear to have been taken were, not that the Act was wholly void but only that it was void in so far as it affected promissory notes and that its provisions remained suspended until the Government decided what banks should become notified banks under S. 2, of the Act.

13. The latter contention is plainly untenable and indeed was not persisted in the Federal Court or before their Lordships' Board. Moreover it is to be observed that in the subordinate Court no reliance appears to have been placed upon the contention that banking rights were interfered with. The point, however, seems to have been taken in the High Court but no decision on it was given there or in the Federal Court. In these circumstances their Lordships do not think that the respondents are entitled to argue that they carry on the business of banking. No proof has been given that they do so and the facts cannot be assumed without proof. The respondents are however entitled to say that the Act deals with banks and banking and is therefore void in whole or in so far as it deals with banking matters.

14 In the present cases the Judges of the High Court found in favour of the appellants on the ground that though the Federal List prevails over the Provincial List where the two lists come in conflict, yet the Act being a Money-lenders Act, deals with what is in one aspect at least a Provincial matter and is not rendered void in whole or in part by reason of its effect upon promissory notes. In their view the jurisdiction of the Provincial Legislature is not ousted by the inclusion of provisions dealing with promissory notes though that subject-matter is to be found in item 28 of the Federal List. The reference to Bills of Exchange and promissory notes in that item, they held, only applies to those matters in their

aspect of negotiability and not in their contractual aspect. In their contractual aspect the appropriate item, as they considered, was entry (10) of List III "contracts." "Interest on promissory notes," they say, "is a matter with respect to contracts, a subject to be found in the Concurrent Legislative List. The Bengal Act has received the assent of the Governor-General, and in view of the provisions of S. 107 (2), Constitution Act, Ss. 29 (2) and 30, Bengal Money-lenders Act, 1940, must prevail."

15 Section 107, Constitution Act, is in the following terms :

"107-(1) 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.

(2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter :

Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) If any provision of a law of a Federated State is repugnant to a Federal law which extends to that State, the Federal law, whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy, be void."

16 The High Court's conclusion would no doubt be true, if they are right in saying that interest on promissory notes is a matter with respect to contracts and therefore an item contained in the Concurrent List. The Act to which it was said to be repugnant was the Negotiable Instruments Act, 1881, which no doubt applied to the whole of India, but, as the High Court points out this Act is not a Federal but an existing Indian Act, and under the provisions of S. 107 (2) would give place to the Bengal Money-lenders Act (which had received the assent of the Governor-General) provided that Act does not deal with matters over which the Federal Legislature alone has jurisdiction. This opinion, however, was reversed in the Federal Court which thought the Act a clear interference with the subjects set

out in Item 28 in the Federal List and declared the Bengal Act to be ultra vires in so far as it dealt with those subjects. It was not, however, in their opinion totally void.

17 The Federal Court had in fact already given the matter some consideration in two previous cases, viz. : (1) 1940 FCR 188,1 a case in which the Madras Agriculturists' Relief Act of 1938 was impugned. That Act did not specifically mention promissory notes but it did contain provisions limiting the liability and diminishing the debts of agriculturists in terms wide enough to include debts due on promissory notes. In that case, however, judgment had been obtained upon the promissory note and the Court held that inasmuch as the debt had passed into a claim under a decree, before the Agriculturists' Relief Act had been enacted, there was nothing to preclude it from being scaled down under the terms of that Act. Accordingly the Court found it unnecessary to deal with a matter in which a claim on promissory notes as such was involved. (2) A similar result was reached in 1944 FCR 126,2 a case upon which their Lordships have to pronounce at a later stage.

18. All the Courts in India have considered the Bengal Money-lenders Act, to deal in pith and substance with money-lenders and money lending and with this view their Lordships agree. But such a view is not necessarily conclusive of the question in India and indeed, as the respondents contend, is not decisive of the matter even in Canada or Australia. With these and the other questions arising in the case their Lordships must now grapple.

19 The appellants set out their contentions under four heads. Firstly, they said that power to make laws with respect to money-lending necessarily imports the power to affect the lender's rights against the borrower upon a promissory note given in the course of a money-lending transaction. The Constitution Act they said must be read as a whole so as to reconcile Item 28 of List I with Item 27 of List II, and so read Item 27 is a particular exception from the general provisions of Item 28.

20 Secondly, they argued that the impugned Act is in pith and substance an Act with respect to money-lenders and money-lending and is not rendered void in whole or in part because it incidentally touches upon matters outside the authorized field.

21 Thirdly, they maintained that upon its true construction item 28 is confined to that part of the law relating to negotiable instruments which has reference to their negotiability and does not extend to that part which governs the contractual relationship existing between the immediate parties to a bill of exchange or promissory note. That part, they said, lay in the field of contract.

22 If then the subject matter of the Act lay in contract, which is one of the items within the concurrent List, it was, it was true, in conflict with an existing Indian Law-viz.: the Negotiable Instruments Act, 1881- within the meaning of S. 31 (1), Constitution Act, but inasmuch as the impugned Act had received the assent of

the Governor-General, it must prevail over the Negotiable Instruments Act as a result of the provision of S. 107 (2), Constitution Act.

23 The Respondents on the other hand pointed out in the first place that the Constitution Act differs in form from the British North America Act and the Australian Commonwealth Act. Those Acts, they said, contain no concurrent list and therefore recognize, as the Constitution Act does not, that there must be some overlapping of powers. Moreover, the Indian Act contains a strict hierarchy of powers since under the terms of S. 100, Federal List prevails over both the Concurrent and the Provincial List, and the Concurrent List in its turn prevails over the Provincial List. "The Provincial Legislature", as it enacts, "has not power to make laws with respect to any of the matters enumerated in List I", and this prohibition, they contend, extends to any matter whatsoever set out in the Federal List, however incidental to a matter contained in the Provincial List. No question could arise, they maintained, as to pith and substance. The Constitution Act directly prohibits any interference by a Province with any matter set out in List I.

24 For the same reasons they said that there could be no question of an exception out of the generality of expressions used in List I on the ground that a matter dealt with in List II was particularly described whereas it was only referred to generally in List I under a wider heading.

25 In any case they said the expression "Money Lending" was no more particular than the expression "Bills of Exchange, promissory notes, and other instruments of the like kind". Finally, they contended that if money-lending was to be regarded as an incidence of contract, then the Negotiable Instruments Act being an Act of the Government of India had precedence over the impugned Act, in those subjects with which they both dealt.

26 From the facts stated and the arguments presented to their Lordships it is apparent that the discussion ranged over a wide field, but in reaching their conclusion the Board do not think it necessary to determine all the issues presented to them.

27 For instance it is no doubt true, as has been pointed out above, and has been accepted in the Courts in India that in the case of a matter contained in the Concurrent List, the Act of a Provincial Legislature which has been approved by the Governor-General prevails over an Existing Indian Law (See S. 107 (2), Government of India Act, 1935). If then the impugned Act is to be considered as a matter of contract, it would prevail over the Negotiable Instruments Act if that Act or the part of it in respect of which repugnancy is alleged is also to be regarded as contractual and therefore coming within List III.

28 But this result depends upon two assumptions viz .: (1) that the impugned Act in dealing with promissory notes, or for that matter with banking, is concerned with contract and (2) that the reference to negotiable instruments, promissory notes and the like instruments in List I Item 28 is a reference to

them in their capacity of negotiability only.

29 The point was raised in the Federal Court in 1940 FCR 1881 but that Court did not find it necessary finally to decide it, though Sulaiman J. in his dissenting judgment inferentially rejected it. Like the Federal Court, their Lordships in the present case do not find it necessary to express a final opinion upon these points, but it is, they think, essential to determine to what extent under the Indian Constitution Act of 1935 the jurisdiction of the several legislatures is affected by ascertaining what is the pith and substance of an impugned Act.

30 The two remaining points taken on behalf of the appellant can in their Lordships' opinion and indeed must be considered together since to say that power to make laws in respect to money-lending necessarily imparts power to affect the lender's rights in respect of promissory notes given as security in money-lending transactions is in their view to maintain that if the pith and substance of the Act, the validity of which is challenged, is money-lending, it comes within the Provincial jurisdiction. Three questions therefore arise, viz. :

(1) Does the Act in question deal in pith and substance with money-lending?

(2) If it does is it valid though it incidentally trenches upon matters reserved for the Federal Legislature ?

(3) Once it is determined whether the pith and substance is money-lending, is the extent to which the Federal field is invaded a material matter?

31. (1) All the Courts in India have held that the transactions in question are in pith and substance money-lending transactions and their Lordships are of the same opinion. To take a promissory note as security for a loan is the common practice of money-lenders and if a legislature cannot limit the liability of a borrower in respect of a promissory note given by him it cannot in any real sense deal with money-lending. All the lender would have to do in order to oust its jurisdiction would be to continue his normal practice of taking the security of a promissory note and he would then be free from any restrictions imposed by the Provincial Legislature. In truth, however, the substance is money-lending and the promissory note is but the instrument for securing the loan.

32 (2) The second is a more difficult question and was put with great force by Counsel for the respondents. The principles, it was said, which obtain in Canada and Australia have no application to India. In the former instances either the Dominions and Provinces or the Commonwealth and States divide the jurisdiction between them, the Dominion or as the case may be the States retaining the power not specifically given to the Provinces or the Commonwealth. In such cases it is recognised that there must be a considerable overlapping of powers. But in India, it is asserted, the difficulty in dividing the powers has been foreseen. Accordingly three, not two lists, have been prepared in order to cover the whole field and these lists have a definite order of priority attributed to them so that anything contained in List I is reserved solely for the Federal Legislature,

and however incidentally it may be touched upon in an Act of the Provincial Legislature, that Act is ultra vires in whole or at any rate where in any place it affects an entry in the Federal List.

33 Similarly, any item in the Concurrent List if dealt with by the Federal Legislature is outside the power of the Provinces and it is only the matters specifically mentioned in List II over which the Province has complete jurisdiction, although so long as any item in the Concurrent List has not been dealt with by the Federal Legislature the Provincial Legislature is binding.

34. In their Lordships' opinion this argument should not prevail. To take such a view is to simplify unduly the task of distinguishing between the powers of divided jurisdictions. It is not possible to make so clean a cut between the powers of the various legislatures : they are bound to overlap from time to time.

35 Moreover, the British Parliament when enacting the Indian Constitution Act had a long experience of the working of the British North America Act and the Australian Commonwealth Act and must have known that it is not in practice possible to ensure that the powers entrusted to the several legislatures will never overlap. As Sir Maurice Gwyer C. J. said in 1940 FCR 1881 (supra) at p. 201:

"It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpolation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the judicial Committee, whereby the impugned statute is examined to ascertain its pith and substance or its true nature and character for the purpose of determining whether it is legislation with respect to matters in this list or in that."

36 Their Lordships agree that this passage correctly describes the grounds upon which the rule is founded, and that it applies to Indian as well as to Dominion legislation. No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provisions should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two or even by arranging for a hierarchy of jurisdictions.

37. Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with.

38. (3) Thirdly, the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.

39 This view places the precedence accorded to the three lists in its proper perspective. No doubt where they come in conflict List I has priority over Lists III and II and List III has priority over List II, but, the question still remains, priority in what respect? Does the priority of the Federal Legislature prevent the Provincial Legislature from dealing with any matter which may incidentally affect any item in its list or in each case has one to consider what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordships' opinion the latter is the true view.

40 If this be correct it is unnecessary to determine whether the jurisdiction as to promissory notes given to the Federal Legislature is or is not confined to negotiability. The Bengal Money-lenders Act is valid because it deals in pith and substance with money-lending, not because legislation in respect of promissory notes by the Federal Legislature is confined to legislation affecting their negotiability - a matter as to which their Lordships express no opinion.

41 It will be observed that in considering the principles involved their Lordships have dealt mainly with the alleged invalidity of the Act, based upon its invasion of the Federal entry, "promissory notes" Item (28) in List I. They have taken this course, because the case was so argued in the Courts in India.

42. But the same considerations apply in the case of banking. Whether it be urged that the Act trenches upon the Federal List by making regulations for banking or promissory notes, it is still an answer that neither of those matters is its substance and this view is supported by its provisions exempting scheduled and notified banks from compliance with its requirements.

43. In the result their Lordships are of opinion that the Act is not void either in whole or in part as being ultra vires the Provincial Legislature. This opinion renders it unnecessary to pronounce upon the effect of the Ordinance No. 11 of 1945, purporting to validate, inter alia, the impugned Act and their Lordships express no opinion upon it. But having regard to their views expressed in this judgment they will humbly advise His Majesty that the appeal be allowed. The respondents must bear the costs of the appellants throughout.