

(1943) 04 FED CK 0003

In the Federal Court

Venugopala Reddiar and Anr.

APPELLANT

Vs

Krishnaswami Reddiar alias Raja Chidambara Reddiar and
Anr.

RESPONDENT

Date of Decision : 19-04-1943

Acts Referred:

Citation : AIR 1943 FC 24

Hon'ble Judges : Justice Maurice Gwyer, Mr. Justice Srinivasa
Varadhachariar; Mr. Justice Torick Ameer Ali, JJ.

Bench : Full Bench

Judgement

Varadachariar, J.—On 1st April 1937, Burma ceased to be part of India. During the time that it remained part of British India, it was

permissible, Under Section 17, Civil P.C., to include immovable property situate in Burma as part of the subject-matter of a suit instituted in any

other Province. What is the effect of the separation on a suit of this kind which was pending at the time in a south Indian Court? That is the

question raised for decision in this appeal. The principal respondent had instituted this suit more than ten years ago, praying either for recovery of

the properties specified in Schedule C to the plaint or for a repatriation of the properties specified in Schedules A, B and C. The subject-matter of

the suit was valued at about Rs. 22 lakhs and a large portion of the properties specified in Schedule C to the plaint was situate in Rangoon. The

written statements of the contesting defendants were filed in October 1932, and issues seem to have been framed as early as in November 1933,

and yet, for some reason or another, the suit did not become ripe for trial for several years--a feature by no means uncommon in Indian litigation,

however much we may regret it. In the meanwhile came the separation of

Burma; and, in November 1938, the contesting defendants filed an additional statement contending that the Court had thereafter no jurisdiction to deal with the Burma properties. An additional issue (No. 33) embodying this question was framed in June 1940, and after hearing arguments thereon, the trial Court gave a finding, in August 1940, to the effect that the Court had no longer jurisdiction to try the suit "regarding the moveables and immovables situated in Burma.

2. On a revision petition filed by the plaintiff against this order of the trial Court, a Division Bench of the Madras High Court held that the plaintiff's right to continue the pending action had not been taken away by the Constitution Act and that the combined effect of the relevant provisions of the law was to reserve to the Trichinopoly Court jurisdiction to try the suit See ("42) 29 AIR 1942 Mad. 614. The decision was based on the ground that Article 10, Government of India (Adaptation of Indian Laws) Order, 1937, provided that the powers which were exercisable by any authority (a word which, the High Court were of opinion, would include a Court) before the Act came into force should continue to be exercised even thereafter, until other provision was made by a competent Legislature or authority. The learned Judges were also of the opinion that the right to continue a duly instituted suit was in the nature, of a vested right and could not be held to have been taken away except by a clear indication of intention to that effect. They laid stress on the fact that the separation of Burma had been brought about by an enactment passed by a supreme Legislature which had the power to make what provision it liked even in respect of the separated territory and that Burma was accordingly not altogether in the position of a foreign State. Against this order of the High Court (dated 31st October 1941) this appeal has been preferred by the contesting defendants, on a certificate given by the High Court Under Section 205, Constitution Act.

3. The argument in support of the appeal was mainly based on the well-known principle embodied in the municipal law of all civilised States that a Court can have no jurisdiction to entertain an action for the determination of the title to or the right to the possession of foreign land. This contention ignores the circumstance, rightly stressed by the High Court, that in this case the two States concerned have not ab initio been

independent foreign States, but represent areas which at one time had been constituted by parliamentary legislation into a single State and were

later on split up by similar parliamentary legislation into two States. This peculiar feature of the case gives rise to three consequences, each of which

has a material bearing on the decision of the question of the Court's jurisdiction: (a) But for the unity of the two areas before April 1937, there

would not have been the possibility of the suit having been duly instituted in a Court of competent jurisdiction; (b) the fact that the separation was

effected by legislation attracts the application to the problem of rules governing the interpretation of statutes; and (c) the fact that it was effected by

a supreme Legislature like Parliament, which had legislative authority over Burma both before and after the separation, takes the case out of the

domain of private international law. If, for instance, Section 46, Constitution Act, had expressly provided that notwithstanding the separation of

Burma from British India, suits pending at the time in British Indian Courts would be heard and disposed of by those Courts though they might

include lands in Burma it could not be said that this provision would conflict with any rule of private international law or would be in excess of the

legislative authority of Parliament even tested by the generally accepted principles of private international law. The position could not be different if

the same result as to pending suits should be reached as a reasonable inference from the application of well-known rules of statutory interpretation.

The question has accordingly to be determined mainly as a matter of interpretation of the relevant statutory provisions. Even in ordinary

circumstances

the question what jurisdiction can be exercised by the Courts of any country according to its municipal law cannot be conclusively determined by a

reference to principles of international law,

but

in considering what jurisdiction our Courts possess, and have claimed to exercise in relation to matters arising out of the country, the principles

which have found general acceptance amongst civilized nations as defining the limits of jurisdiction are of great weight. (Per Lord Herschell L.C. in

British South Africa Co. v. Companhia De Mocambique (1893) 1893 AC 602 at page 624.)

4. From this point of view also, it is not without significance in this case that Parliament had full legislative authority over Burma even after and in spite of its separation from British India.

5. The decision of the High Court is based on three grounds: (1) The provisions of Article 10, Government of India (Adaptation of Indian Laws)

Order, 1937, dated 18th March 1937; (2) the provisions of Section 38, Interpretation Act, 1889; and (3) the principle of the decision of the

Judicial Committee in *Colonial Sugar Refining Co. v. Irving* (1905) 1905 AC 369. With due respect to the learned Judges, we are not satisfied that

it will be right to base the decision of the question arising in this case on Article 10, Adaptation of Indian Laws Order. It is not necessary to say

that the word "authority" in that article may not include a Court as a matter of etymological significance. Reading the article as a whole and in the

particular context in which it occurs, we are not satisfied that that provision was intended to apply to questions like the present. If so applied, it

would lead to the position that even suits instituted after the date of the separation in the Courts of one country may include immovable properties

situate in the other country, until Section 17, Civil P.C., is formally amended so as to prevent the institution of such suits. Without further

consideration, we are not prepared to go so far.

6. Section 38, Interpretation Act, will no doubt govern the interpretation of the Constitution Act and Section 46(2), Constitution Act, is in

substance a provision repealing that portion of the earlier Government of India Acts which declared Burma to be a part of British India. Paragraph

(e) of Sub-section (2) of Section 38 of course provides that any legal proceeding in respect of any right acquired or accrued under the repealed

enactment may be "continued" as if the repealing Act had not been passed. The interpretation of this paragraph is not however free from difficulty.

The view has some times been taken that what is saved is a substantive right acquired under the repealed enactment and that the paragraph cannot

be invoked in cases where the substantive right is not taken away by the repealing Act, but the forum for or the method of enforcing it is changed.

It has, on the other hand, been maintained that a right to obtain relief in a suit pending at the time when the repealing enactment comes into

operation is itself in the nature of a substantive right. As we consider that the

third ground of decision adopted by the High Court, namely, the principle of the ruling in *Colonial Sugar Refining Co. v. Irving* (1905) 1905 AC 369 is sufficient to support the decision of the High Court, we prefer to rest our decision on that ground. *Colonial Sugar Refining Co. v. Irving* (1905) 1905 AC 369 was sought to be distinguished on behalf of the appellant on the ground that a right of appeal against a decree stands on a different footing from a right to continue a suit to its normal termination. This may be a difference in the facts, but we are unable to see any distinction in principle between the two cases. Their Lordships' pronouncement emphasises the limitation to be placed upon the rule, sometimes broadly stated, that all alterations in procedure are retrospective, unless there is some good reason to the contrary. In one sense, a right of appeal may be spoken of as a matter of procedure and it is usually provided for in Codes relating to procedure. But the decision recognizes that that is not sufficient to make a legislative provision governing the right of appeal retrospective.

7. It will be noticed that in that case the Judiciary Act was passed during the pendency of the action in the Court of first instance and their Lordships' decision recognized that, from the date of the initiation of the action, the suitor had a right of appeal to a superior tribunal according to the state of the law as it stood at the time of the commencement of the proceeding. This necessarily involves the recognition of an equally valuable right that the proceedings should in due course be tried and disposed of by the tribunal before which it had been commenced. This principle that a statute should not be so interpreted as to take away an action which has been well commenced has been affirmed in various cases in differing circumstances. In *Marsh v. Higgins* (1850) 9 CB 551 it was observed by Wilde C.J. that it must have been well known to both branches of the Legislature that strong and distinct words would be necessary to defeat a vested right to continue an action which has been well commenced, (cf. (1876) *In re Joseph Suche and Co., Ltd.*, (1876) 1 ChD 48 and see also *Vedavalli Narasiah v. Mangamma* ('04) 27 Mad. 538 and *Subbaraya Mudaliar v. Rakki* ('09) 32 Mad. 140)

8. In this view, it will be necessary to see whether there is any indication in the

Constitution Act clearly implying that Section 46(2) was intended to have the effect even of putting an end to pending suits which had been duly instituted under the pre-existing law. It seems too much to imply it merely from the fact that, by the separation, Burma became foreign territory. As we have already endeavoured to show, that circumstance by itself is not conclusive, because it was not beyond the power of Parliament to permit British Indian Courts to adjudicate on title to property in Burma in spite of the separation. That the separation involves certain consequences, is recognized even when it is said that the relevant legislative provision has prospective operation; if we are to rely upon that very circumstance, without more, as also sufficient to divest the Court of jurisdiction to try suits pending at the time, we will be ignoring the presumption against retrospective operation in respect of pending suits. The learned counsel for the appellant relied upon the principle that every statute is to be so interpreted and applied as not to be inconsistent with the established rules of international law (Maxwell's Interpretation of Statutes, Edn. 8, p. 130). This is merely the former argument in a different form. As the context in Maxwell's book and the whole discussion from page 126 onward shows, this limitation comes into operation only when the Legislature would, on a different interpretation, be exceeding its jurisdiction. As we have already pointed out, no question can arise in this case of Parliament exceeding its jurisdiction.

9. It was next contended that the British Indian Court should not proceed with the trial of the suit, so far as it related to the Burma properties, if the Burma Courts were likely to hold that the British Indian Court has no jurisdiction to pass a decree in respect of those properties; and three decisions of the High Court at Rangoon were relied on as showing the view taken by the Rangoon High Court in this matter. We see no reason for assuming that on the facts of the case, now before us, the Burma Courts would hold that the British Indian Court had no jurisdiction to deal with the Burma properties. The three cases relied on are clearly distinguishable, whatever their bearing upon the application of Article 10 of the Adaptation Order may be. It has no doubt been broadly observed in some of those judgments that the Civil Procedure Code confers no substantive rights. This observation should not be taken too literally so as to

conflict with the pronouncement of the Judicial Committee in Colonial

Sugar Refining Co. v. Irving (1905) 1905 AC 369 because a right of appeal is conferred only by the Civil Procedure Code. In Arunachallam v.

Valliappa ("38) 25 AIR 1938 Rang. 130 a Full Bench of the High Court at Rangoon had to deal with an application for stay of trial Under Section

10, Civil P.C. The application was made after the separation of Burma had taken effect and in a suit which had been instituted in Burma after the

separation. No doubt the reason given in support of the application for stay of proceedings was the pendency of an earlier instituted suit in British

India. The learned Judges had not in that case to deal with the jurisdiction of the British Indian Court to deal with the British Indian suit. Taking the

facts as they stood on the date of the application Under Section 10, they held that that section by its very terms could be invoked only on the

ground of the pendency of a suit in another Court in British Burma.

10. In the next case, Muthukaruppan Chettyar v. Sellami Achi ("38) 25 AIR 1938 Rang. 385 a Division Bench had to deal with an application to

execute a decree transferred from British India. The execution application was filed only after 1st April 1937. The learned Judges held that, after

that date, the decree of the British Indian Court must for purposes of execution be regarded as a foreign decree. We may note in passing that one

of the learned Judges (Baguley J.) made a reservation as to the position that would have arisen if the execution proceedings in Burma had been

initiated before 1st April 1937. In the third case in the same volume, Chettyar Firm v. Valliappa Chettyar ("38) 25 AIR 1938 Rang. 459 the suit

itself was instituted in Burma after 1st April 1937, and all that the learned Judges decided was that in such a suit, the plaintiff could not claim relief

in respect of immovable property situated in British India. None of these cases touches the point arising for decision in this appeal and there is

nothing in them to warrant the contention that the Courts in Burma are likely to treat a decree passed by the British Indian Court in the present case

as one passed without jurisdiction so far as it may relate to the properties situate in Burma.

11. Our attention was drawn to Article 18 of the Aden Colony Order dated 26th September 1936, and it was argued that the absence of a similar

provision in the Orders-in-Council relating to India and Burma supported the

appellant's contention. There is no force in this argument. That order followed the lines indicated in Section 288, Constitution Act, and para. (c) of Sub-section (3) of that section mentioned provision for "the validity and continuance of proceedings" already commenced as one of the matters to be provided for. The order had to make elaborate provision for the constitution of the Colony, since there was no Constitution Statute in respect of Aden, corresponding to the Government of India Act or the Government of Burma Act. In so making provision, the Order-in-Council constituted the pre-existing District and Sessions Court into a Supreme Court for the Colony. In these circumstances, it was apparently thought desirable to make express provision in Article 18 in respect of proceedings pending on the date of the separation of the Colony. The mere omission of a similar provision in relation to India and Burma cannot, in these circumstances, be made the basis of a serious argument. The true position, as we have already stated, is not whether there is an express provision permitting the continuance of pending proceedings, but whether there is any clear indication against the continuance of pending proceedings to their normal termination. The appeal fails and is dismissed with costs.

12. On one point we wish to reserve our opinion. The order of the High Court only held that the lower Court had jurisdiction in the matter and directed it to proceed with the trial of the suit. This is clearly not a "final order" within the meaning of Section 205, Constitution Act, (cf. *Abdul Rahman v. D.K. Cassim and Sons* ('33) 20 AIR 1933 PC 58). It may be a question whether or not it is a "judgment" so as to be appealable under that section. If a narrow interpretation should be placed upon the word "judgment" limiting it like "decree" to a determination of the rights of the parties in controversy in the suit, (cf. *Sevak Jeranchod Bhogilal v. Dakore Temple Committee* ('25) 12 AIR 1925 PC 155), it would be open to doubt whether this appeal was competent. But as no objection to the maintainability of the appeal was taken on behalf of the respondent and as we are dismissing the appeal on the merits, we express no opinion on the question of appealability. We have, however, thought it safer to make this reservation so as to avoid being understood to have decided by implication that an appeal would lie in such circumstances.