

(1939) 05 CAL CK 0013
In the Calcutta High Court

Achinta Nath Sasmal

APPELLANT

Vs

Gobinda Prosad Das and Others

RESPONDENT

Date of Decision : 29-05-1939

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26F, 26G(5)

Citation : AIR 1939 Cal 705

Hon'ble Judges : Latifur Rahman, J;Henderson, J

Bench : Full Bench

Judgement

Henderson, J.—This is a rule calling upon the opposite parties to show cause why an order of the District Judge dismissing an appeal summarily should not be set aside. The opposite party filed an application u/s 26-G, Sub-section 5, Ben. Ten. Act of 1938, asking that he might be restored to possession of the property. An objection was filed by the petitioner inter alia on the ground that the mortgage was not a usufructuary mortgage. The Munsif allowed the application. The petitioner appealed to the District Court and the learned District Judge dismissed the appeal summarily on the ground that it was incompetent. The petitioner then obtained this rule. The question for our decision there fore is whether an appeal lies in these cases. The solution of the problem depends upon the meaning to be attached to the words "such order shall have the effect of a decree of a Civil Court" in Sub-section 6. In our opinion it is not necessary to consider now what precise meaning is to be attached to this provision. Undoubtedly, difficult and complicated questions of res judicata may arise which will have to be considered on an appropriate occasion, for example the case, which is before us, may raise the question whether the Munsif's decision that the mortgage is a usufructuary mortgage is res judicata or not. It will be an important question whether it is open to the petitioner to challenge that decision in a title suit. As I have already said, we do not propose to consider that matter now. The only question that arises for our decision is whether an appeal lies. The Bengal Tenancy Act provides for many appeals in clear and specific terms. The right of appeal is the creation of the statute and should not be inferred from analogy or deduced by

implication. In the present case if we seek to deduce an appeal by implication, an immediate practical difficulty will arise. It is to be noticed that these applications may be made either to a Court or to a Revenue Officer. The CPC makes no provision for the hearing of appeals from the decisions of Revenue Officers and, if we are to hold that the present Section provides for such appeals, it will be very difficult to say what Court is competent to hear them.

2. The learned advocate who appeared for the opposite party drew our attention to the fact that the Amending Act has amended Section 26-G and Section 26.F. In the latter case an appeal was provided for in clear and specific terms. He also drew our attention to the provisions of Section 158 of the Act. Sub-section 3 of that Section is in these terms:

The order on any application under this Section shall have the effect of, and be subject to the like appeal as, a decree.

3. In our opinion this is conclusive. It shows that at any rate in this Act the words "shall have the effect of a decree" do not provide for an appeal. In the course of the argument, Mr. Janah informed us that this point was considered by Edgley, J. in an unreported case Civil Rule No. 361 of Gadadhar Mandal Vs. Gobinda Prosad Manna, . We accordingly sent for the record and have considered the judgment. It appears that the learned Judge did not give any reason for the conclusion at which he arrived. He seems to have assumed that there must be an appeal. He appears to have been pressed by the consideration that the question whether the applicant was an occupancy raiyat and whether the mortgage was a usufructuary mortgage could not be subsequently challenged in a proper suit. I have already said that we do not propose to consider that question, because, in our opinion it does not arise in connexion with this matter. But at any rate, one thing appears to be reasonably plain. The Section does not take away the ordinary jurisdiction of the Civil Courts. It is optional with the mortgagor to make an application under the Section and it is optional with the Court to make an order. There can be no doubt that this procedure provides a cheap and expeditious remedy by which a mortgagor can recover possession of the land and be awarded compensation for any time during which he may have been improperly deprived thereof. If the intention of the Legislature is that the decree shall have no more effect than that, then no useful purpose would be served by providing for an appeal. After all, cases in which the status of the applicant and the nature of the mortgage are in dispute will be comparatively few. For the reasons given above, we are of opinion that the learned Judge was right when he decided that the appeal was incompetent. The rule is accordingly discharged with costs?hearing fee one gold mohur.

Latifur Rahman, J.

4. I agree.