

(1945) 04 CAL CK 0007
In the Calcutta High Court

Bazlu alias Bazlul Karim Biswas and Others

APPELLANT

Vs

Golam Hossain Halsana

RESPONDENT

Date of Decision : 20-04-1945

Acts Referred:

Bengal Money Lenders Act, 1940 — Section 2(22), 36

Citation : AIR 1945 Cal 281

Hon'ble Judges : Sen, J

Bench : Division Bench

Judgement

Sen, J.—This is an appeal from an order passed upon an application u/s 36, Bengal Money Lenders Act, made by the judgment-debtor. It was allowed by the learned Munsif but on appeal the learned District Judge has dismissed it. The facts briefly are as follows : Golam Hossain Halsana sued the defendant appellants to enforce a mortgage by conditional sale. The final decree in the suit was passed on 17th December 1938. Thereafter, some time after 1st January 1939, an application was made by the decree-holder for possession of the mortgaged property. The judgment-debtor thereupon made this application u/s 36, Bengal Money-Lenders Act, for re-opening the decree on the usual grounds. The only objection to the reopening of the decree was that, inasmuch as, the suit had been decreed before 1st January 1939, and inasmuch as no execution proceedings were pending on or after 1st January 1939, the application was barred by virtue of proviso 2 to Section 36, Bengal Money Lenders Act. The learned Munsif held that although the final decree was passed before 1st January 1939, nevertheless the judgment-debtor was entitled to the benefit of the Bengal Money-Lenders Act because the decree passed could not have been deemed to have been fully satisfied as there remained pending after 1st January 1939, an application by the decree-holder for possession of the property. He relied on the Explanation to proviso 2 of Section 36, holding that the decree-holder in this case should be deemed to be a purchaser of the mortgaged property in execution of the mortgage decree although there was in fact no decree for sale, the mortgage being a mortgage by conditional sale. On appeal the learned District

Judge reversed this decision. He held that as this was a decree passed under Order 34, Rule 3, Civil P. C., in a suit upon a mortgage by conditional sale, all the liability of the defendant was extinguished by the decree; he relied upon Order 34, Rule 3, Sub-rule (3) for this view. He then says that as there was no further liability on the mortgagor no proceedings in execution could follow and that the proceedings in connexion with the application for delivery of possession were not in respect of property purchased by a decree-holder in execution of a decree. In this view, he held that the Explanation to Section 36, Proviso 2, Bengal Money-Lenders Act, had no application. He accordingly allowed the appeal and dismissed the application of the judgment-debtor.

2. In my opinion, the order of the learned Munsif must be restored and this appeal must be allowed. My reasons, however, for allowing the application of the judgment-debtor under the Bengal Money-Lenders Act are somewhat different from those given by the learned Munsif. u/s 36 of the aforesaid Act, the borrower may obtain the reliefs provided in that section in any suit to which the Act applies provided he is not prevented from getting the reliefs by the provisos to the section. There are two provisos. We are concerned only with proviso 2 which is in these terms:

Provided that in the exercise of these powers the Court shall not--

* * * * (ii) do anything which affects any decree of a Court, other than a decree in a suit to which this Act applies which was not fully satisfied by 1st January 1939, or anything which affects an award made under the Bengal Agricultural Debtors Act, 1935.

Explanation--A decree shall not, for the purposes of this section, be deemed to have been fully satisfied so long as there remains undisposed of an application by the decree-holder for possession of property purchased by him in execution of the decree."

Now it is quite clear from this proviso that the Court is prohibited from interfering with any decree of a Court other than a decree such as is described in the proviso, namely:

a decree in a suit to which this Act applies which was not fully satisfied by the first day of January 1939.

The decree which may be interfered with must have two attributes: (i) it must be a decree in a suit to which this Act applies, and (2) it must be a decree which was not fully satisfied by 1st January 1939. What must be determined, first, is whether the decree passed in this mortgage suit by conditional sale is a decree which has these two attributes. Now, a "suit to which this Act applies" has been defined in Section 2 (22), Bengal Money-Lenders Act thus:

"suit to which this Act applies" means any suit or proceeding instituted or filed on or after the first day of January 1939, or pending on that date and includes a proceeding in execution--

(a) for the recovery of a loan advanced before or , after the commencement of this Act;

(b) for the enforcement of any agreement entered into before or after the commencement of this Act, whether by way of settlement of account or otherwise or of any security so taken in respect of any loan advanced whether before or after the commencement of this Act; or

(c) for the redemption of any security given before or after the commencement of this Act in respect of any loan advanced whether before or after the commencement of this Act.

The definition makes it quite clear that by the word "suit" proceedings in execution are included so long as the proceedings are for the enforcement of decrees or orders passed in suits or proceedings for the reliefs mentioned in Sub-section (22), and, so long as the execution proceedings were filed or were pending on or after 1st January 1989. In other words, if in a suit for the reliefs mentioned in the section a decree is passed and an execution proceeding in respect of that decree is pending on or after 1st January 1939, the suit will be deemed to be pending on that date although it may have been decreed prior to it and the decree will be deemed to be a decree passed in a suit to which the Act applies.

3. In this case admittedly there was an application pending on 1st January 1989, that was an application for possession of the property mortgaged by conditional sale. It is contended on behalf of the respondent that such an application is not an application in execution. I am unable to accept that view. The final decree in a suit upon a mortgage by conditional sale, where the defendant has not paid the amount decreed by the preliminary decree within the time specified by the preliminary decree, declares that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and if the defendant is in possession of the mortgaged property, it orders the defendant to put the plaintiff in possession thereof. This was the position of the parties in the present suit. The defendant was in possession of the mortgaged property. Now, if the defendant against whom a final decree in a suit upon a mortgage by conditional sale has been passed, does not carry out the directions in the decree regarding making over possession to the plaintiff, what is the decree holder to do? He must obviously make an application for execution of the decree asking for possession of the property. I cannot see how it can be said that such an application is anything else than an application for the execution of the decree. I am, therefore, of opinion that there was a proceeding in execution pending after 1st January 1939. That proceeding was one in execution of a mortgage decree and therefore the decree must be held to be a decree passed in a "suit to which this Act applies" within the meaning of Section 2, Sub-section (22).

4. The next point for determination is whether the decree passed was fully

satisfied. The learned District Judge relying on the provisions of Order 34, Rule 3, Sub-rule (3) holds that inasmuch as the liability of the defendant has been discharged by the decree, the decree was fully satisfied. In my opinion, the learned Judge has misconceived the law. The defendant's liability under the mortgage, it is true, is discharged by the final decree passed in the mortgage suit. But it is one thing to be discharged of one's liability under the mortgage and quite another thing to be discharged of one's liability under the decree passed on the mortgage. True, the decree discharges the defendant from all liability under the mortgage, but until the defendant complies with the decree, the decree is not satisfied, and the proviso is concerned with the satisfaction of the decree passed and not with the question of the liability of the mortgagor in respect of the mortgage. There can be no question, therefore, that in this case the decree was not satisfied inasmuch as possession had not been made over to the plaintiff in compliance with the directions in the decree. It follows from what I have said that in this case the decree passed was a decree in a "suit to which this Act applies," and that it was not fully satisfied. That being so, the application of the borrower for relief under the Bengal Money-Lenders Act was not hit by the prohibition contained in proviso 2, and it is, therefore, entitled to succeed. The learned Munsif gave effect to the application on the basis of the explanation to proviso 2 which I have already quoted. He held that the decree-holder must be deemed to be a purchaser of the mortgaged property in execution of a decree and that the application for possession must be deemed to be an application by a purchaser in execution of his decree. In this view he held that Expl. 2 applied and therefore the decree was one which was not fully satisfied. I do not see how this Explanation applies. The decree-holder was not a purchaser at all as the decree was not a decree for sale but a decree in a suit upon a mortgage by conditional sale. The Explanation is designed to meet other purposes, and, it cannot be called in aid in the manner in which the learned Munsif has done. The application, however, must succeed on the ground that I have mentioned above.

5. I may mention here that although this was a suit upon a mortgage by conditional sale and although the decree should have been passed in accordance with Form No. 4 of Appendix D, it was discovered in this Court that it was by error passed in accordance with Form No. 5. The learned advocates for both sides, however, agree that the decree should be treated as one passed in accordance with Form No. 4, Appendix D, and both the Courts below and the parties have so treated it all along. In view of what I have said above, this appeal must be allowed with costs in this Court and the order of the learned Munsif must be restored.