
(1939) 03 CAL CK 0024
In the Calcutta High Court

Gadadhar Mandal

APPELLANT

Vs

Gobinda Prosad Manna

RESPONDENT

Date of Decision : 31-03-1939

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26G

Citation : AIR 1939 Cal 458

Hon'ble Judges : Edgley, J

Bench : Division Bench

Judgement

Edgley, J.—This Rule is directed against the order of the Munsif, Second Court, Contai, dated 11th February 1939, in which he rejected an application u/s 26-G, Ben. Ten. Act. The petitioner maintained that he had borrowed a sum of Rs. 650 by executing a usufructuary mortgage in favour of the opposite party on 16th May 1922. On 17th September 1938 he filed an application u/s 26-G(5) of the Act to be restored to possession of the mortgaged property and also for compensation on account of failure to restore the land to him or after the date of the expiry of the mortgage. The learned Munsif took the view that the mortgage deed did not create a complete usufructuary mortgage and that therefore the petitioner was not entitled to recover possession of the mortgaged property.

2. A preliminary objection has been put forward in this case by the learned advocate for the opposite party to the effect that this application in revision is incompetent and he contends that the order of the learned Munsif should be treated as a decree and therefore appealable as such in view of the provisions of Sub-section (6) of Section 26-G of the Act. The application with which we are concerned purports to have been filed under Sub-section (5) of Section 26-G. This Section empowers the mortgagor who has become entitled to possession of the mortgaged holding after the mortgage has been extinguished, if he is not forthwith given possession, to apply to the Court or to a Revenue Officer to be restored thereto. The procedure to be followed with reference to an application of this nature, when it comes before the Court or a Revenue Officer, is mentioned in

Sub-section (6). This Section provides that an application under Sub-section (5) shall be accompanied by a process fee of the prescribed amount for service of the notice on the mortgagee and it goes on to say that the Court or Revenue Officer to whom such an application is made, may, after service of such notice, do two things, viz. (1) award to the mortgagor such compensation as appears equitable in respect of the period during which the mortgagee retained possession after the date on which the mortgagor became en-titled to be restored to possession and (2) pass an order restoring the possession of the land mortgaged to the mortgagor. The sub-section concludes with the words "such order shall have the effect of a decree of a Civil Court." Having regard to the context in which the concluding words are used, it would appear that the words "such order" must relate to an order which has been passed by the Court or the Revenue Officer under Sub-section (6). Such order, as already pointed out, may relate to the award of compensation to the mortgagor or to the restoration of the possession of the mortgaged land to the mortgagor. It stands to reason that, if the Court or the Revenue Officer is empowered to make these orders in favour of the mortgagor, such Court or Revenue Officer is equally competent in an appropriate case to reject any application made under Sub-section (5) with reference to these matters. In my view the language used in the concluding portion of this sub-section is sufficiently wide to provide that any order passed by the Court or the Revenue Officer with reference to the matters mentioned in that sub-section shall have the effect of a Civil Court decree whether such order rejects or grants an application which has been filed under Sub-section (5).

3. If Section 26-G, Ben. Ten. Act, be read as a whole, it appears that the main intention of the Legislature was to enlarge the privileges of occupancy raiyats in respect of usufructuary mortgages and to hold that an order refusing an application under Sub-section (5) would not have the effect of a decree of the Civil Court would deprive occupancy raiyats of a very valuable right of appeal in case any adverse order was passed against them in respect of such an application. I do not think that this could have been the intention of the Legislature. Having regard to the considerations mentioned above, the [preliminary objection must prevail. The remedy of the petitioner with reference to the order of the learned Munsif dated 11th February 1939 will be to file an appeal against this order in the ordinary way, if so advised. The Rule is accordingly discharged. I make no order with regard to costs. Let the certified copy of the order of the Munsif, Second Court, Contai, dated 11th February 1939 filed with the application be returned to the learned advocate for the petitioner provided he files an uncertified copy thereof.