
(1943) 08 CAL CK 0007

In the Calcutta High Court

Case No : Civil Revision Case No. 1704 of 1942

Kamalakshya Chowdhury and Others

APPELLANT

Vs

Joychand Lal Babu and Others

RESPONDENT

Date of Decision : 13-08-1943

Acts Referred:

Citation : (1943) 08 CAL CK 0007

Judgement

1. This is a Rule directed against an order of the Subordinate Judge, Burdwan, dated July 18th, 1942, rejecting an application of the Petitioners for re-opening of a decree under sec. 36 (6) (a) (ii) of the Bengal Money-Lenders Act. The decree was an instalment decree of a composite character which was passed on the basis of a compromise in a mortgage suit, on October 9th, 1931. It is not disputed that the decree offends against sec. 30 of the Bengal Money-Lenders Act, and the Subordinate Judge further found that it was made in a suit to which the Act applies within the meaning of sec. 2 (22) of the Bengal Money-Lenders Act. The application has been refused primarily on the ground that the loan was a commercial loan and consequently the provisions of the Bengal Money-Lenders Act were not attracted to it. The Subordinate Judge further found that many of the properties, which were sold in execution of the decree sought to be re-opened and purchased by the decree-holder, were also sold either under Regulation VIII of 1819, or in execution of rent-decrees or certificates at the instance of the superior landlords, and although they were purchased by the decree-holders themselves in the benami of other persons, the judgment-debtors could not claim restoration of these properties, even if the decree was re-opened. For determining the point as to whether the decree should be re-opened or not, there are two things which require consideration: (1) whether the loan is a commercial loan within the meaning of the Bengal Money-Lenders Act, and (2) whether the decree was made in a suit to which the Act applies. Although on the second point the Subordinate Judge has found in favour of the Petitioners, it has been contended by Mr. Das, who appears for the Opposite Party, that the decision of the Subordinate Judge on this point is wrong.

2. So far as the first point is concerned, it is not disputed that the Petitioners had a rice-mill and a rice karbar at Katwa, and that they were in need of money for running that karbar. The question is whether the money was advanced with the intention that it would be used solely for purposes of the karbar. The recital in the document upon which the trial Court places reliance runs as follows:

We (borrowers) are running a rice-mill and a rice karbar at Katwa for which purpose and for other purposes we require large sums of money from time to time which we are unable to moot from our own fund..... It is for this reason that we are....

3. We are unable to agree with the Subordinate Judge that the purpose of the loan was only to finance the karbar that was not running well and did not include any other object, for which also the borrowers were in need of money as expressly stated in the document. If the clause "It is for this reason, etc.," refers only to the running of the karbar and has no connection with the other purposes mentioned earlier, it is difficult to see why other purposes were recited at all. We cannot hold that the recital in the mortgage bond conclusively shows that the only intention or purpose of taking the loan was the efficient running of the karbar. The Subordinate Judge was also not right in holding that there was a distinct admission in the written statement of the Petitioners filed in the mortgage suit that the loan was a purely commercial loan. There was indeed a general statement made by the mortgagees in their plaint that the money was taken for karbar. It was not a material allegation at that time, and hence strictly speaking no specific denial was necessary. The mortgagors, however, denied the entire allegation contained in that part of the plaint in general terms in paragraph 7 of the written statement. There is nothing in the written statement filed by the Petitioners in the mortgage suit from which we can spell out any admission on their part that the loan was taken exclusively for commercial purposes. The burden of proving the loan to be a commercial loan lies on the decree-holders and as the evidence on this point is altogether inconclusive, we are of opinion that the decree-holders failed to discharge the burden that lay upon them.

4. On the second point we are inclined to agree with the view taken by the Subordinate Judge. It appears from the execution record that quite apart from the fact that the writ of delivery of possession was missing, and hence no order of the Court completing the proceeding for delivery of possession to the decree-holder auction-purchaser could be made before June 3rd, 1940, there was a proceeding under Or. 21, r. 100 of the Code of Civil Procedure, which was not disposed of till April, 1939. It is true that this proceeding was started by a third party, but as delivery of possession to the decree-holders could not be effected till this proceeding was disposed of, it could not be said that the execution proceedings had terminated before that time. In our opinion, therefore, the decree should be re-opened.

5. The next question is whether on re-opening of the decree the judgment-debtors are entitled to be restored to possession of those properties which were

purchased by the decree-holders. The contention raised on behalf of the decree-holders is that they are in possession of these properties not merely as purchasers in execution of the decree made in the mortgage suit but as purchasers in rent sales or certificate sales held at the instance of the superior landlords, and consequently their possession could not be disturbed. Under sec. 36 (2) (c) of the Bengal Money-Lenders Act the Court is bound, on re-opening a decree, to order the restoration to the judgment-debtor of such property, if any, of the judgment-debtor acquired by the decree-holders in consequence of the execution of the re-opened decree may be in the possession of the decree-holders on the date on which the decree was re-opened. The Court, therefore, is not only competent but bound to restore possession of those properties only which the decree-holders acquired in consequence of the execution of the decree which is re-opened. We agree with Mr. Gupta that if after purchase in execution of the re-opened decree, the decree-holder acquired another and an independent title to the same property, which destroys or defeats the title previously acquired, the Court could not order restoration of possession in such cases. It would be otherwise, however, if the subsequent acquisition was subject to the previous purchase and did not over-ride it.

6. Let us see what has happened in the present case. The decree in the case, as we have said already, was a composite decree and was a combination of a final decree for sale as well as of a personal decree under Or. 34, r. 6 of the Code of Civil Procedure. In execution of this decree the mortgaged properties were put up to sale on August 7th, 1933, and they were purchased by the decree-holders. The sale was confirmed on February 13th, 1934, and the decree-holders took possession through Court on November 26th, 1934. There were five properties included in the mortgage of this item No. 4, which is putni jama Bamanpara, was sold under Regulation VIII of 1819 on May 15th, 1933, before the sale in execution of the mortgage decree took place. This property, therefore, was not sold in execution of the mortgage decree at all, and consequently it is not disputed that the mortgagors cannot claim restoration of this property when the decree is re-opened. As regards the four other properties included in the mortgage item No. 1, which is an 8 annas share of putni lot Jamara, was sold in a certificate sale under the Public Demands Recovery Act at the instance of the Maharaja of Burdwan on December 17th, 1934. This sale, therefore, was long after the mortgage sale and the purchaser, it is admitted, was a benamdar of the mortgagee decree-holders. If the certificate sale had the effect of transferring merely the right, title and interest of the certificate debtors and did not pass the tenure itself, obviously the previous mortgage sale could not be affected in any way. The sale-certificate has been produced before us. It not only says that the right, title and interest of the debtors passed to the purchaser, it further says that the property was sold subject to encumbrances. It is difficult to say in these circumstances that the effect of the sale was as is contemplated by sub-sec. (3) of sec. 20 of the Public Demands Recovery Act. If only the right, title and interest of the judgment-debtors passed to the purchaser, obviously the title acquired by

purchase at the mortgage sale would stand unaffected by the certificate proceedings. We hold, therefore, that the judgment-debtors are entitled to restoration of these properties. Regarding item No. 2 of the mortgaged properties the position is this: It is 4 annas share of putni lot Kamal and was sold under Regulation VIII of 1819 on November 17th, 1933. The putni sale would undoubtedly have the effect of wiping off the previous encumbrances and consequently the title acquired by the purchaser at the Regulation sale would prevail over any other earlier title. The learned Advocate appearing for the Petitioners says that the liability of the putni rents for which this tenure was sold was upon the mortgagee decree-holder and they accrued at a time when this particular property was already purchased by him at the mortgage sale. Even if that is so, the utmost that the judgment-debtors can do is to claim a reconveyance of the property on the footing that the purchaser holds the position of a trustee, but these are questions which are altogether foreign to the scope of a proceeding under sec. 36 of the Bengal Money-Lenders Act. As the previous mortgage sale cannot possibly survive a sale under the Regulation, we are of the opinion that the judgment-debtors' claim for restoration of this property must fail.

7. The third item of properties included in the mortgage is 16 annas share of darputni Nabagram. This was sold in execution of a rent decree obtained by the superior landlords on March 14th, 1935, after the mortgage sale was confirmed. The question is whether the rights of the purchaser in execution of the mortgage decree were affected by the sale. It is argued by the learned Advocate for the Petitioners that even if this sale had the effect of a rent sale, it could not ipso facto annul the rights of the mortgagee-purchaser which were an encumbrance upon the tenure and which had to be annulled in compliance with the procedure laid down in the Bengal Tenancy Act. Mr. Gupta pointed out that the mortgage-decree having culminated in a sale of the mortgaged property, it was no longer existing as an encumbrance and consequently did not require to be annulled. The question really is whether the mortgagee purchaser can set up the mortgagee-rights as a shield against the purchaser at a rent sale. On this point the decisions of this Court are not quite uniform. Conflicting views have been taken in different decisions of this Court. Vide *Bonbehari Kapur v. Khetra Pal Singh Roy* I. L. R. 38 Cal. 923; S. C. 16 C. W. N. 259 (1911), *Sabjan Mondal v. Haripada Saha* 25 C. W. N. 424 (1920) and *Sital Chandra Majhi v. Parbati Charan Chakravarti* 35 C. L. J. 1 (1922). We do not think that it would be necessary for our present purposes to discuss which of the views is correct. Assuming that the mortgagee's lien did not survive the sale and consequently did not exist as an encumbrance when the rent sale took place, the landlord, we find, put this tenure to sale at a time when the tenure had already vested in the mortgagee-purchaser. In order that the tenure might pass by such sale it is incumbent, we think, upon the landlords decree-holders to make the actual owner of the tenure at the date of the sale party to the execution proceeding. If he did not do that, the rent sale would not affect the rights of the purchaser [vide *Sreemati Binapani Debi v. Banku Behari*

Mondal 47. C. W. N. 651 (1943)]. We hold, therefore, that so far as the third item is concerned, the judgment-debtors are entitled to be restored to possession. Item No. 4 of the mortgaged property we have dealt with already. As regards item No. 5, it is agreed by both parties that it was not sold in execution of a rent decree at all. The position, therefore, is that the mortgagors, in our opinion, are entitled to claim restoration of items Nos. 1, 3 and 5 of the mortgaged properties. Item No. 4, as has been said already, was not sold at all in execution of the mortgage decree, and with regard to item No. 2 the claim for restoration must fail as it was sold subsequently under Regulation VIII of 1819.

8. We now come to the personal properties which were put up to sale after the mortgaged properties were sold in execution of the composite decree. They are described in schedule (kha) to the petition. The Petitioners did not dispute that they could not claim restoration of any of these properties which were actually sold in execution of the rent decrees later on. The only dispute is as to which of the properties were actually sold subsequently. Mr. Das has pointed out to us that items Nos. 6 to 9, 11 and 15 of this list were sold. The learned Subordinate Judge does not come to any clear finding on this point, and on the other hand there are two passages in his judgment which record conflicting findings. Mr. Das however agrees that the Petitioners can claim restoration of properties 1 to 5, 10, 12, 13, 14 and 16 to 18. We think that it will be for the trial Court to consider when the case goes back for passing a new decree as to which of the properties described in schedule kha to the petition had been actually sold in execution of the rent decrees subsequent to the mortgage sale.

9. The result, therefore, is that we make this Rule absolute. The judgment of the Court below is set aside and the case is sent back in order that the decree might be re-opened in accordance with the directions given above, after taking proper accounts as may be necessary under the provisions of the Bengal Money-Lenders Act. The Court, on re-opening the decree, will make an order for restoration of items Nos. 1 to 3 and 5 of schedule ka properties, and of those properties of schedule kha which he would find had not been sold subsequently in execution of the rent decrees. From the amount ascertained to be due to the mortgagees on taking accounts, the prices actually fetched by the properties, with regard to which the judgment-debtors cannot claim restoration and with regard to which the decree-holders have acquired title by subsequent purchases, shall be deducted, and for the balance only a new decree will be passed. We direct that the judgment-debtors may be allowed the liberty to pay the decretal dues in not less than ten annual instalments.

10. The Rule is thus made absolute and case is sent back to be disposed of in accordance with law and in accordance with directions given above. We make no order as to costs.