

(1946) 01 CAL CK 0027
In the Calcutta High Court
Case No : Appeal No. 1608 of 1942

Keshab Chandra Mondal and others

APPELLANT

Vs

Nagendra Nath Ghose and others

RESPONDENT

Date of Decision : 22-01-1946

Acts Referred:

Citation : (1946) 01 CAL CK 0027

Final Decision : Dismissed

Judgement

Chakravartti, J.—This appeal is by a borrower and arises out of a suit brought by him under S. 36, Bengal Money-lenders Act, for the reopening of a mortgage decree. The trial Court reopened the decree and passed a new one but the lower appellate Court held that the decree sought to be re-opened could not be interfered with.

2. The mortgage, I am informed, was executed in the year 1931 for an advance of Rs. 550 carrying an interest of 18 per cent, per annum. A preliminary decree was passed on 9th May 1933 and a final decree on some day in July followed. In execution of that decree a sale took place on 11th July 1934, which was confirmed on 16th August 1934. Delivery of possession was shortly thereafter taken. On 22nd August 1936, a personal decree was passed and certain proceedings in execution were thereafter taken for satisfaction of the personal decree, the last of which terminated on 9th December 1938. Sometime later - the precise date was not given to me-the decree-holder-purchaser brought a suit for possession of a part of the mortgaged properties against the judgment-debtors and that suit was compromised on 23rd March 1939, one of the terms of the compromise being that the unsatisfied balance of the personal decree was written off.

3. The trial Court relying upon certain decisions of this Court which were good law at the time, held that since by the execution sale the total amount of the decree had not been realised, nor was the personal decree satisfied before 1st January 1939 the suit was to be deemed as pending after that date. Acting upon

that view, the learned Munsif, as I have already stated held that the decree was liable to be re-opened and be purported to pass a new decree. About the nature of the decree a question has been raised to which reference will be made later.

4. The lower appellate Court, having the advantage of certain later decisions which clarified the meaning of the word "pending" held that no proceeding in the present case could be held to have been pending after the statutory date. In that view, it reversed the decision of the trial Court and dismissed the plaintiff's suit. Thereupon the present second appeal was preferred. In support of the appeal Mr. Ghose has taken two points before me. On the merits he submitted that the suit for possession of a part of the mortgaged properties which was pending after 1st January 1939 must be taken to be a suit to which the Act applies. Proceeding on that basis, he contended that there was a suit pending after the statutory date and therefore the lower appellate Court had been in error in reversing the decision of the Munsif.

5. It seems to me quite impossible to accept Mr. Ghose's contention. A suit to which the Act applies must satisfy the definition given in S. 2 (32), Bengal Money-Lenders Act. It must be a suit or proceeding either for recovery of a loan or for the enforcement of any agreement or a security or for redemption of any security. An execution case is treated as a suit to which the Act applies because it is a continuation of the original suit and can be regarded as a proceeding for the recovery of a loan within the meaning of S. 2 (22) (a). It is impossible to predicate of a title suit for recovery of possession that it satisfies any of the sub-clauses of the definition section.

6. Mr. Ghose referred to the explanation appended to sub-s. (1) of S. 36 which is to the effect that a decree shall not 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. His argument was that the suit which was brought in the present case and which was pending after 1st January 1939 should be regarded as an application by the decree-holder for possession of the auction-purchased property within the meaning of the explanation. I am not prepared to accede to this contention. Section 36, Money-Lenders Act, itself shows the awareness of the Legislature of the distinction between a suit and an application; and, in my view, it is quite impossible to hold that when the Legislature in the explanation was using the word "application" it intended thereby to include a suit as well. It may next be pointed out that all that the explanation does is to enlarge the class of decrees not fully satisfied; it has no reference whatever to a suit to which the Act applies or the pendency of any proceeding. And lastly in order that a decree may be interfered with, it must be, besides not having been fully satisfied on or before 1st January 1939, a decree in a suit to which the Act applies. Surely, the mortgage decree in the present case cannot be regarded as a decree in the title suit for recovery of possession on which Mr. Ghose relied. I am, therefore, entirely unable to accept Mr. Ghose's contention.

7. Mr. Ghose also referred incidentally to S. 36 (4). I cannot see what application that sub-section has to the question before me. Mr. Ghose contended in the second place that in any event the appeal to the lower appellate Court was incompetent. He referred to the concluding passage in the judgment of the trial Court where the nature of the decree passed by that Court was set out. It was contended that the learned Munsif had not passed a new preliminary decree at all but merely made an order that (sic, on) some future date such a decree would be passed if the Commissioner who was being directed to take accounts, reported that some money was due from the borrower. From such an order, it was argued, no appeal lay.

8. I am wholly unable to accept this contention of Mr. Ghose. It is now settled by a decision of a Special Bench of this Court that when a mortgage decree is re-opened under the provisions of S. 36, Bengal Money-Lenders Act, the new decree which is to be passed must be one in accordance with S. 34 of the Act. When one refers to S. 34, one finds that by Cl. (a) of sub-section (1) the Court is directed to give certain additional directions "at the time of the passing of the preliminary decree under R. 2 or R. 4 of the said Order," meaning thereby O. 34, Civil P. C. This provision contemplates quite clearly that a preliminary decree which can properly be passed under the Bengal Money-Lenders Act can be one in conformity with either R. 2 or R. 4 of O. 34, Civil P. C. When one turns next to Rr. 2 and 4 of O. 34, one finds that a preliminary decree for sale can be passed in the form laid down either in cl. (a) or cl. (b) of R. 2. Clause (a) of R. 2 speaks of a preliminary decree ordering that account be taken of what was due to the plaintiff at the date of such decree and the form for the decree to be passed in accordance with this clause is Form No. 5 in Appx. D to the Civil Procedure Code.

9. The decree which was passed in the present case provided that an Accounts Commissioner would be appointed to take accounts and he would take accounts in accordance with certain directions incorporated in the decree. It was next provided that on receipt of the report of the Commissioner a new preliminary decree would be drawn up under S. 34 (1) (a), Bengal Money-Lenders Act, and the plaintiff would be entitled to pay the decretal due, if any were found due, in five annual instalments. It seems to me that this decree is in complete conformity with O. 34, R. 2 (a) and also with the relevant prescribed form, namely, Form No. 5, and, therefore, in complete conformity with S. 34 (a), Bengal Money-Lenders Act. There can be two kinds of preliminary decree under O. 34, Civil P. C., and room has been made under S. 34, Bengal Money-Lenders Act, for both the kinds. In a case where the Court does not itself declare the amount due but makes a reference to a Commissioner for accounts to be taken, the decree can only be in the form which was adopted in the present case. It is a complete mistake to support (sic suppose) that S. 34, Bengal Money-Lenders Act, is wholly independent of O. 34 of the Code.

10. The matter becomes clearer when one refers to the definition of a decree and the contents of the decree in the present case. Quite clearly, all rights between

the parties were finally adjudicated upon by the trial Court and what was left to the Commissioner was merely the supplying of the figure, if any amount was found due. The decree not only contained all that it has to contain under O. 34, Rr. 2 and 4, but also the supplementary provisions which require to be added under the provisions of S. 34, Bengal Money-Lenders Act.

11. In my opinion, there was a proper preliminary decree in the present case and that being so, the appeal to the lower appellate Court was perfectly competent. In the result both the points urged by Mr. Ghose fail. The appeal is dismissed with costs, hearing fee one gold mohur.