
(1939) 07 CAL CK 0003
In the Calcutta High Court

Kishori Mohan Banik and Others

APPELLANT

Vs

Maijannessa Bibi and Others

RESPONDENT

Date of Decision : 24-07-1939

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26G
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1939 Cal 719

Hon'ble Judges : Henderson, J

Bench : Division Bench

Judgement

Henderson, J.—This Rule raises questions regarding the interpretation of Section 26-G, Ben. Ten. Act, and the powers of this Court to interfere in revision u/s 115, Civil P.C. I have little doubt, as I have said once before, that the intention of the Legislature was to provide a cheap and expeditious remedy in cases where there is no real dispute as to the nature of the document. The right to make an application assumes that there is in existence a usufructuary mortgage. If the intention of the Legislature was that this question should be finally decided in summary proceedings of this nature, one would expect that there would be some provision providing an appeal and that Revenue Officers would not be empowered at all. Whatever however the intention might have been, it is necessary to examine the effect of the language actually used in the Section The important words are these:

2. Sub-section 5:

The mortgagor shall thereupon become entitled to possession of the mortgaged holding and may, if he is not forthwith given possession, apply to the Court or to a Revenue Officer to be restored thereto.

3. Sub-section 6:

The Court or Revenue Officer to whom such application is made may...pass an order restoring the possession of the land mortgaged to the mortgagor and

such order shall have the effect of a decree of a Civil Court.

4. The first question that naturally arises is the effect of an order dismissing the application. It seems reasonably clear that, the jurisdiction of the ordinary Courts is not taken away by this Section. Not only is there no definite provision to that effect but it is entirely optional to the mortgagor to proceed by way of an application or not. It is further optional to the Court to make an order or not and I have come across a case in which, although there was a finding that the mortgage was a usufructuary mortgage, the Court declined to make an order. Furthermore, while an order restoring possession has the effect of a decree of a Civil Court, there is no such provision with regard to an order rejecting an application. In this view, in my judgment, in such a case no question of res judicata can arise and the mortgagor has another remedy in the ordinary Courts. On this view there would be no justification for interference by this Court in revision with an order rejecting an application. Indeed, it is difficult to see how such interference would be justified when it is left to the Court to say whether an order should be made or not. Different considerations however must arise when an order restoring possession is made. This has the effect of a decree of a Civil Court. An order can only be legally made in the case of a usufructuary mortgage. If in fact there is no such mortgage the order is without jurisdiction and this Court can interfere u/s 115, Civil P.C. Speaking for my. self, I should always be willing to do so because although there is nothing to debar the mortgagee from instituting a suit such a suit would almost certainly be defeated by a successful plea of res judicata.

5. From what has been said above it would appear that a mortgagee, whose case has been wrongly decided by a Revenue Officer will have no remedy whatever and it seems to me desirable that this should engage the attention of the revenue authorities. In the present case the application was dismissed by the Munsif. The applicant appealed with success to the District Judge. The petitioner then obtained the present Rule which has been pressed on two grounds: (1) that the District Judge had no jurisdiction to entertain the appeal; and (2) that the decision of the Munsif on the merits was right. The first point was decided in favour of the petitioner in Civil Revision Case No. 541 of Achinta Nath Sasmal Vs. Gobinda Prosad Das and Others, by Latifur Rahman, J. and myself. With his usual fairness, Mr. Chatterjee informed me that the same view was taken in a later case See Digambar Ponda and Another Vs. Satish Chandra Das, by my Lord the Chief Justice and my learned brother Nasim Ali. The result is that the order of the District Judge must be held to have been without jurisdiction. Mr. Chatterjee however asked me to decline to interfere on the ground that this order, though without jurisdiction, was a right order. In order to reach a decision on this point it would be necessary to examine and interpret the terms of the document. From what I have already said, it appears that the applicant has another remedy and accordingly there is no reason why an order passed without jurisdiction should not be set aside; The Rule is accordingly made absolute. The order of the learned District Judge is set aside and that of the Munsif is restored. I make no order as

to costs.