
(1942) 07 CAL CK 0018
In the Calcutta High Court

Madhu Mian and Others

APPELLANT

Vs

Rajaram Barai and Another

RESPONDENT

Date of Decision : 17-07-1942

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26(g)(5)

Citation : AIR 1943 Cal 177

Judgement

1. This rule is directed against an appellate order made by the Subordinate Judge, Fourth Court, Dacca, in Miscellaneous Appeal No. 207 of 1941 affirming an order of the Munsif, Third Court of that place by which an application made by the petitioners u/s 26(g)(5), Ben. Ten. Act, was rejected. The petitioners' case was that on 1st December 1925 they had executed a usufructuary mortgage bond in favour of the opposite parties in respect of certain land described in the petition, to secure an advance of Rs. 1000 received from the latter; and as more than 15 years had elapsed from the date of the registration of the mortgage deed they prayed for restoration of the mortgaged property u/s 26(g)(5), Ben. Ten. Act. This application was resisted by the opposite parties principally on the ground that the petitioners had no title to the mortgaged property at the date when the mortgage bond was executed. The trial Court upheld this contention of the opposite parties and rejected the application of the petitioners u/s 26(g)(5), Ben. Ten. Act. An appeal was taken against this order and the lower appellate Court, as has been said already, dismissed the appeal and affirmed the order of the trial Judge. Against this order of the appellate Court this present rule was obtained. A preliminary point has been raised on behalf of the opposite parties in this rule and it has been contended by the learned advocate who appears for them, that as the order of the lower appellate Court could have been challenged by way of appeal it was not competent to the petitioners to come up in revision u/s 115, Civil P.C. It seems to us that this contention is sound and must prevail. The determination of this point turns on the Interpretation to be put on the words of Sub-section 7 of Section 26(g), Ben. Ten. Act, which is one of the new clauses added by the amending Act 18 of 1940. Sub-section (7) reads as follows:

Any order made by a Court under Sub-section (6) shall have the effect of a decree of a civil Court and shall be subject to the provisions of the Code of Civil Procedure, 1908, in respect of the appeal, revision or review.

2. Sub-section (6) has also been altered to some extent by the amending Act mentioned aforesaid and it now stands as follows:

An application under Sub-section (5) shall be accompanied by a process-fee of the prescribed amount for service of notice on the mortgagee and the Court to which such an application is made may after service of such notice award to the mortgagor such compensation as appears equitable and may pass an order restoring possession of the mortgaged property to the mortgagor.

3. Thus it is clear that if the order is one passed under Sub-section (6) of Section 26(g), Ben. Ten. Act, it would have the force of a decree under the CPC and would be appealable as such. The controversy centres round the short point whether the order complained of does come within the purview of Sub-section (6) of Section 26(g), Ben. Ten. Act. It has been argued on behalf of the petitioners that the order contemplated by Sub-section (6) is an order restoring possession of the mortgaged property to the applicant and when such an order is passed it will have the force and effect of a decree, but when the application is rejected and no order for possession is made the order of dismissal is not an order under Sub-section (6) within the meaning of Sub-section (7). Such an order cannot operate as a decree and cannot be appealed against as such. It is suggested that the Legislature may have good grounds for not giving the right of appeal in such cases. Section 26 (g)(5) after all provides for a summary remedy and does not take away the ordinary remedy which the mortgagor may otherwise have and the rejection of the application of the mortgagor cannot stand in the way of his availing himself of other remedies open to him in law. It is true that it is quite optional with the mortgagor to proceed by way of an application u/s 26(g)(5), Ben. Ten. Act, or not. But, although, the rule of res judicata may not apply to summary proceedings of this sort, we are not sure that a litigant who has the choice of two alternative remedies and has made his choice in a particular way can afterwards turn round and seek the other remedy where he has got an adverse order against him in the first proceeding. But it is not necessary for us to decide this matter finally for, in our opinion, these are not relevant considerations and cannot outweigh the positive provisions of the statute. The only question for our consideration is whether an order refusing the relief prayed for under Sub-section (5) is "an order made under Sub-section (6)."

4. It cannot be denied that when a Court is empowered to grant a relief it may also refuse to grant the same. Sub-section (6) is the only " provision for disposal on the merits of an application made under Sub-section (5). Sub-section (6) uses the word "may" and in our opinion the use of this word implies that the Court can, if the case so requires, also refuse to grant the relief prayed for. Such an order of refusal will be an order under Sub-section (6) of Section 26 (g), Ben. Ten. Act. By way of analogy, we may refer to Order 43, Rule 1, Clauses (r) and

(s), Civil P.C., which provide inter alia for appeals against orders made under Order 39, Rule 1 as well as Order 40, Rule 1, Civil P.C. Under Order 89, Rule 1 the Court can make an order granting temporary injunction restraining the defendant from doing certain acts and under Order 40, Rule 1 the Court may appoint a receiver whenever it considers such appointment to be just and proper. Yet when orders are passed rejecting an application either for appointment of a receiver or for granting of a temporary injunction the orders are held to be orders under those rules and hence appealable under the rules of Order 43, mentioned above. The result there fore is that in our opinion the order made by the Munsif rejecting the application of the petitioners u/s 26(g)(5), Ben. Ten. Act, is an order under Sub-section (G) of that section and, consequently, it is appealable in accordance with the provisions of the Code of Civil Procedure.

5. As in this case a second appeal lay from the decision of the lower appellate Court this rule must be held to be incompetent. Mr. Das who appears for the petitioners has prayed to us that we may allow him to convert his petition in revision to a memorandum of appeal. There cannot be any objection to that inasmuch as the requisite court-fees have already been paid. We order accordingly that this petition may be treated as a memorandum of appeal and this may be registered as an appeal from an appellate decree. As the appeal involves questions of law, we admit it under Order 41, Rule 11, Civil P.C., and direct that notices be issued on the learned advocate who appears for the opposite party. The petitioners must however pay to the opposite parties the costs of this rule, hearing-fee being assessed at one gold mohur.