

(1946) 05 CAL CK 0004

In the Calcutta High Court

Case No : Appeal from Original Order No. 171 of 1941 converted into Appeal from Original Decree No. 245 of 1943

Mahendra Nath Sardar and Others

APPELLANT

Vs

Bireswar Bairagi and Others

RESPONDENT

Date of Decision : 06-05-1946

Acts Referred:

Citation : (1946) 05 CAL CK 0004

Judgement

1. The Respondents' father borrowed a sum of money from the Appellants on a mortgage. The mortgagees instituted a suit on the mortgage in 1922. A consent decree for Rs. 24,900 was passed. Thereafter the mortgaged properties were put up to sale and the mortgagees themselves purchased them for Rs. 10,000. This sale was confirmed on the 26th of February, 1935, and the mortgagees auction-purchasers got possession through Court of the properties that they had purchased on the 4th of April, 1934. Thereafter the mortgagees applied for execution of the balance, namely, Rs. 14,900. The execution case was numbered 38 of 1938. This was pending in January, 1939. On the 21st February, 1941, the Respondents, namely, the debtors made an application for review under sec. 36 (6) of the Bengal Money-Lenders Act, 1940, for re-opening the decree that had been passed by consent on the 9th of May, 1922, and for restoration of possession. Their prayers were allowed, the said mortgage decree was re-opened and a new decree for Rs. 5,435 was passed. The said sum has been made payable in five yearly instalments. Possession has been ordered to be restored to the Respondents. This appeal is by the creditors. Only one question has been raised in support of the appeal, namely, that the mortgage decree passed in the year 1922 by consent cannot in law be re opened in view of the provisions of sec. 36 (1) (i) of the Bengal Money-Lenders Act. That proviso deals with certain classes of adjustments or agreements between the parties which are beyond 12 years of the date of the suit. In the view we are taking it is not necessary for us to decide whether the date of the suit in the case before us is to be taken to be the date of the mortgage suit or the date of the application for review under sec.

36 (6) of the Bengal Money-Lenders Act. The question is whether a consent decree comes within the phrase "adjustment or agreement" as used in that proviso.

2. Provisos 1 and 2 are provisos to the main enactments contained in sub-sec. (1) of that section. Cl. (a) of sub-sec. (1) of that section gives the Court power to re-open any transaction and to take accounts. Cl. (b) gives power to the Court to re-open any account already taken between the parties notwithstanding any agreement purporting to close previous dealings and to create new obligations. Proviso 1 is obviously a proviso to cl. (b) of sub-sec. (1).

3. The word "transaction" used to cl. (a) of sec. 36 (1) includes a decree and proviso 2 is a proviso to sub-sec. (1) in part. In our judgment, a consent decree cannot be construed to be an adjustment or agreement between the parties either within the meaning of cl. (b) of sub-sec. (1) or proviso (i) to that subsection. No doubt an agreement between the parties is the foundation on which a consent decree rests, but after all a consent decree is a decree of the Court. The distinction between a mere agreement between the parties and an agreement which is embodied in an order of Court, that is to say, a consent decree, is pointed out in clear terms by Byrne, J., in the case of *Wilding v. Sanderson* (1897) 2 Ch. 594 at pp. 543 and 544. The relevant passage is as follows;--

A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at between the parties to proceedings embodied in an order of the Court. The fact of its being so expressed put the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is of course enforceable while it stands and a party affected by it cannot, if he conceives he is entitled to relief from its operation, simply wait until it is sought to be enforced against him, and then raise by way of defence the matters in respect of which he desires to be relieved. He must, when once it has been completed, obey it unless and until he can get it set aside in proceeding duly constituted for the purpose.

4. The proviso which deals with decrees, whether the decree be on adjudication or by consent, is in our judgment, proviso 2 and not proviso 1 to sec. 36. As admittedly the decree passed on the 9th May, 1922, was in a suit to which the Bengal Money-Lenders Act applied by reason of Execution Case No. 38 of 1938 being pending on the 1st of January, 1939, that decree can be re-opened.

5. We accordingly hold that the learned Subordinate Judge was right in re-opening the mortgage decree of the 9th of May, 1922, and in passing a new decree. As the decree-holders themselves were the purchasers, the order for restoration was a right order.

6. The result is that this appeal is dismissed with costs, hearing-fee, two gold mohurs. As by an order passed by this Court in Civil Rule No. 653 of 1941 the order for restoration of possession to the Respondents as well as the operation of the order directing payment of instalments to the decree-holders were stayed

during the pendency of the appeal which we are now dealing with, the dates of the payments of the instalments as given in the judgment of the learned Judge ought to be changed. We are not disturbing the number of the instalments or the amounts thereof. The first instalment of Rs. 1,035 is to be paid within Falgun, 1353 B.S. and the sum of Rs. 880 in each Falgun of the following five years. The amounts paid by the Respondents on account of revenue and cess due in respect of the mortgaged properties which have been purchased by the Appellants in execution of the mortgage decree are to be credited towards the instalments. The Respondent's would be entitled to get Lack possession of the property forthwith and as soon as they get possession they must pay their share of the revenue and cesses that may fall due at least 10 days before they fall due and in proof thereof file the chalans in Court, If there is any default in the payment of the said revenue and cesses by the Respondents after they have taken possession of the mortgaged properties, the decree-holders would be entitled to get back possession and in that event the amounts of their purchase money would be set off against the balance of new decree.