

**(1946) 08 CAL CK 0006**  
**In the Calcutta High Court**

Mahendra Nath Sardar and Others

APPELLANT

Vs

Kali Pada Haldar and Others

RESPONDENT

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**Date of Decision :** 01-08-1946

**Acts Referred:**

Bengal Tenancy Act, 1885 — Section 25G(5)

**Citation :** AIR 1947 Cal 249

**Hon'ble Judges :** Chakravartti, J

**Bench :** Division Bench

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## Judgement

Chakravartti, J.—This appeal, which is by the plaintiffs in a mortgage suit, raises two questions of law, both of which are of some interest and importance. The course by which the litigation has come to involve these points has been somewhat devious.

2. The material facts are as follows : On 21st chaitra 1329, B.S., corresponding to 7-3-1923, one Baruni Dasi, acting for herself and her two minor sons, borrowed a sum of Rs. 1400 from the plaintiffs on executing in their favour a possessory mortgage of certain lands. It was stipulated in the deed that the mortgagees would hold and enjoy the land in lieu of interest, but if the mortgagors failed to repay the loan by the end of the Bengali year 1339, the mortgage would be treated as an absolute transfer. No payment was made within the time fixed and the mortgagees continued to possess the lands. On 21-12-1938, the mortgagors made an application u/s 26G(5), Ben. Ten. Act, before the 3rd Subordinate Judge, Alipore, for restoration of the lands, on the ground that the mortgage, being a usufructuary mortgage of lands held in an occupancy right, had been extinguished by the lapse of fifteen years. The mortgagees replied to this application by filing a suit upon the mortgage in the same Court on 15-2-1939. Their case, both in the plaint of the mortgage suit and the objection to the application u/s 26G(5), was that the mortgage was a mortgage by conditional sale. In the proceeding u/s 26G(5) they contended that Section 26G (as it stood then) could not apply to the mortgage which was not a

usufructuary mortgage and, in the suit, they prayed for the usual decree for foreclosure.

3. It is not necessary to refer to the further contention of the mortgagees that the mortgagors were not occupancy raiyats, but mourashi mokarari tenants. The contention was negated by the trial Court and seems thereafter to have been abandoned.

4. The Subordinate Judge disposed of the mortgage suit and the application u/s 26G(5) by the same judgment, delivered on 26-3-1940. He held that the mortgage was not a mortgage by conditional sale, but a usufructuary mortgage and since the statutory period of fifteen years had elapsed, the application u/s 26G(5) must be allowed. As a consequence of this finding, the learned Judge held further that the mortgage suit must be dismissed.

5. Against so much of this decision as related to their mortgage suit, the mortgagees preferred an appeal to the District Judge and against so much of it as related to the mortgagors' application u/s 26G(5), they moved this Court in revision. The application to this Court succeeded and it was held by Derbyshire C.J. and Mukherjea J. that the mortgage was a mortgage by conditional sale to which Section 2GG (as it stood then) did not apply. The application of the mortgagors was accordingly dismissed. The decision of the High Court was given on 26-6-1940, and is reported in *Mahendra Nath Sardar and Another Vs. Kalipada Haldar and Others*, .

6. Thereafter, two statutory changes took place. By Bengal Act (8 [VIII] of 1940), which came into force on 11th July of that year, the Bengal Agricultural Debtors Act was amended and by the amendment a new sub-section was added to Section 18 as Sub-section (5), while to Sub-section (1) of Section 19 was added what is now Clause (c). By Act (18 [XVIII] of 1940), which came into force on 9-1-1941, Sub-section (1-a) of Section 26G, Ben. Ten. Act, was replaced by the present sub-section and a number of other sub-sections, which are the present Sub-sections 7 to 13, were added.

7. In the meantime, the mortgagors, frustrated in the civil Court, had betaken themselves to a Debt Settlement Board and, on some date which does not appear, made an application before the ordinary Board at Banagram. The hearing of the appeal, pending in the District Judge's Court, was stayed by a notice u/s 34, Bengal Agricultural Debtors Act, but how the notice came at that stage to be issued by the Special Board at Alipore, is not clear. The order of the District Judge, staying further proceedings in the appeal, is dated 22-7-1940. The Banagram Board gave its decision on 15-8-1941 and held that by reason of subsequent amendments of the law, the question of the liability of the applicants under the mortgage could be reopened, in spite of the decision of the High Court. The Board then referred to Section 26G, Ben. Ten. Act, as amended, and Sections 18(5) and 19(1)(c), Bengal Agricultural Debtors Act and held that since mortgages by conditional sale had now been brought within the purview of

Section 26G and since no mortgagee could keep in possession lands of an agricultural mortgagor for more than fifteen years under either of the two Acts, the debt must be held to have been extinguished and the mortgagors were entitled to restoration of the lands. As, however, the mortgagees were not agreeable to accepting this decision and the board, being an ordinary board, was unable to make an order without their consent, it referred the case to the Special Board at Alipore. The Special Board confirmed the decision on 5-9-1941.

8. Intimation of the decision of the Special Board was received by the District Judge on 10-2-1942 and on nth, the mortgagees made an application before him, whereby they prayed that the order of the Debt Settlement Board might be ignored and the appeal decided in accordance with law. Arguments were heard by the learned District Judge on 25-2-1942, not on the appeal, but on this application, as the order recorded on that date would show, and by his judgment, dated 4-3-1942, the learned District Judge held that the order of the Debt Settlement Board could not be disregarded and the appeal had become infructuous. In the result, he dismissed the appeal. It is against this decision that the present second appeal is directed.

9. I may observe that upon the view taken by the learned District Judge, the proper way of disposing of the appeal was not to dismiss it, but to record an order, in terms of Section 34, Bengal Agricultural Debtors Act, that the appeal had abated. An order of dismissal pre-supposes a subsisting appeal, but where an appeal has abated by operation of law, there is obviously no appeal to be dismissed.

10. Many of the grounds upon which the application of the mortgagees was pressed before the District Judge were, on the face of them, untenable and, wisely, they were not repeated in the argument on the present appeal. Here, the learned advocate for the appellants confined himself to two contentions. The first was that inasmuch as, in coming to the decision that the debt had ceased to exist, the Board had not followed the procedure laid down in Sub-sections (2) and (5) of Section 18, Bengal Agricultural Debtors Act, but had simply relied on certain other provisions of law, its order was without jurisdiction and could not be taken notice of by any civil Court. The second was that under the provisions of law relied upon, the debt, in the case of a mortgage by conditional sale, was not extinguished by the mortgagee's possession of the mortgaged lands for 15 years.

11. The argument on the first contention was put in the following way. A Debt Settlement Board is a creature of a Special Act and, in exercising its powers, must follow the procedure prescribed by that Act. Sub-section (2) of Section 18 requires that the Board must determine the amount due in respect of each debt "in accordance with rules made under the Act" and Sub-section (5) requires that where a creditor has taken possession of any immovable property of the debtor in lieu of payment of the debt or of the interest thereon, the Board, in determining the amount due, shall prepare an account of the receipts derived from the property and the expenses thereon in the prescribed manner. The

section does not authorise the Board to declare a debt to be non-existent, simply by reference to some other provisions of the Act or some other law: indeed, it is not entitled to refer to other provisions and laws at all. Since, in the present case, the Board did not follow the rules made under the Act and did not prepare an account, but only referred to Section 19(1)(c) of the Act and Section 26G, Ben. Ten. Act, its order was made without jurisdiction.

12. It is necessary to point out first how this argument bears on the present case. There was a notice served on the District Judge u/s 34 of the Act and it cannot be questioned that the Board had authority to give the notice. The provision of Section 34 is that when a notice under the section has been given, if the Board ultimately includes the debt in its award or decides that the debt does not exist, the proceeding before the civil Court, so far as it relates to such debt, shall abate. The argument of the appellants must be that in order to cause the result mentioned in the section, the decision of the Board must be a valid decision and the appeal before the District Judge did not, in the present case, abate, because the decision that the debt had been extinguished was a nullity.

13. In my opinion, this argument is plainly unsound and further, as was pointed out by Mr. Ghose who appeared for the respondents, there is no room for it in the present case. Section 18(1), Bengal Agricultural Debtors Act, contemplates two distinct things, a decision as to whether a debt exists and the determination of its amount. It is only after the existence of a debt has been found that the question of determining its amount can arise, and Sub-sections (2) and (5) of Section 18, on which the appellants relied, relate expressly to the second matter and have no reference to the first. While Sub-section (2) provides that the Board shall "determine in respect of each debt the amount...due" in accordance with the rules made under the Act and Sub-section (5) directs that the Board shall prepare an account "in making the determination under Sub-section (2)", neither provision requires the Board to follow any particular procedure in deciding whether a debt exists or not. In the present case, the Board only decided that the debt had ceased to exist and, obviously, this decision cannot be impugned on the ground that the procedure prescribed by Sub-sections (2) and (5) of Section 18 was not followed.

14. But it was contended that even in deciding the first question, the Board would, of necessity, have to follow the procedure laid down in section, for, it could not decide whether a debt existed or not "by intuition" or merely at sight. The answer to this contention is that the section does not enjoin that the Board shall follow that procedure, and, consequently even if the Board had to follow it in practice, omission to do so could not be a cause for impugning the decision as a nullity on the ground that the special procedure, prescribed by the special Act, had not been followed. But, as a matter of fact the Board need not, in all cases, resort to an accounting in order to find that no debt exists. If the facts bring a case within some law under which the debt must be deemed to have been extinguished, e.g., Section 26G(1a), Ben. Ten. Act, the Board can decide

straightway against the existence of a debt.

15. To this it was objected that the Board had no jurisdiction to refer to any other law, nor to any other provision of the Act, but must keep itself within the confines of Section 18, or its decision would not be valid. In my opinion, this argument is plainly unsound. It involves that if a debtor makes an application under the Bengal Agricultural Debtors Act, he must immediately forfeit the benefit of other laws as to his liability under the debt and be limited to the arithmetical result of an accounting. Although the Bengal Tenancy Act may provide that no mortgage debt of a raiyat shall subsist after 15 years' possession of the mortgaged lands by the mortgagee, or the Bengal Money Lenders Act may provide that no amount exceeding double the principal shall be recoverable, yet the Board will act illegally if it takes these provisions of law into account in deciding whether any debt is due, but must only find out, on an accounting, what amount, if any, is still outstanding. No contention could be less tenable. The principle that a special tribunal must act within the limits set by the statute creating it and that it must follow the procedure, there prescribed, does not mean that the tribunal cannot apply the law of the country, unless specially empowered. On the other hand, in the absence of special provision, matters dealt with by special statutes are not withdrawn from the general law of the country:

The general law of the country is not altered by special legislation made without particular reference to it, though a statute passed for a particular purpose must, so far as that purpose extends, over-ride general enactments;

and

it will not be held, in the absence of clear language, that Parliament intended to destroy the common law rights of the King's subjects by placing them at the mercy of irresponsible tribunals.

(See Halsbury's Laws of England, Hailsham Edition, Vol. 31, pp. 526, 548, 652 and the cases there cited.) The Bengal Agricultural Debtors Act does not exclude Section 26G, Ben. Ten. Act, in terms. The object of the Act, as its preamble states, is to provide for the relief of indebtedness of agricultural debtors and to amend the law governing the relations "between them and their creditors. It would be strange if it were held that the advancement of this object required that a provision, which merely laid down what things were to be done if the amount of a debt had to be determined, must be interpreted as overriding by implication the general law of the country, limiting the liability under debts or providing that, in certain circumstances, it will be extinguished automatically. The argument that Section 18 does not expressly empower the Board to apply Section 26G, Ben. Ten. Act., hardly deserves consideration. Laws enacted by the Bengal Legislature are laws made for the province of Bengal and they are available of their own force to all persons and bodies within the province, including Debt Settlement Boards.

16. In my opinion, the first contention of the appellants, viz., the decision of the Board was without jurisdiction for the reason that it was arrived at by reference to provisions of law not mentioned in Section 18, Bengal Agricultural Debtors Act, must be overruled.

17. It was next contended that assuming the Board was entitled to refer to other provisions of the Act or other laws, its decision was still wrong, because a mortgage debt was not extinguished by 15 years' possession of the mortgaged property u/s 19(1)(c), Bengal Agricultural Debtors Act, and that u/s 26G, Ben. Ten. Act, it was not so extinguished in the case of a mortgage by conditional sale.

18. I may point out at once that this contention, even if correct, would not serve the appellant's purpose, for, it would only establish that the Board's decision was wrong in law. But the error would not be an error of jurisdiction and the Board's decision would not be a nullity.

19. The contention might, however, be examined on its merits. I am doubtful if Section 19(1)(c), Bengal Agricultural Debtors Act, implies that a mortgage debt of a raiyat or under raiyat must be deemed to be extinguished by the mortgagee's possession of the mortgaged property for fifteen years. The section does not say so in terms, but only provides that the creditor shall in no case be allowed to enjoy possession of the land of a raiyat or under raiyat for a period exceeding fifteen years. The section, as a whole, applies to all agricultural debtors and to mortgages of all kinds of immovable property; but the portion I have quoted applies only to raiyats and under-raiyats and only to mortgages of their land. The main provision of the section is that a Special Board may order that a debt be settled in accordance with the offer made by the debtor and "may pass a further order", directing the creditor to restore to the debtor the Immovable property in his possession by a given date. The provision as to the land of raiyats and under, raiyats is a proviso to this provision. The form in which the section is expressed does not exclude the possibility that the Board may direct a certain payment in cash for, such may be the debtor's offer and "further" direct that the mortgagee "must restore the property to the mortgagor by a given date. In the case of raiyats and under-raiyats and mortgages of their land, it must be seen that the total period of the mortgagee's possession does not exceed fifteen years, but this provision, by itself, does not seem to imply that the debt will also be extinguished. It is to be noticed that the maximum limit as to the mortgagee's possession of the mortgagor's property does not apply to debtors other than raiyats and under raiyats; it is further to be noticed that even in the case of raiyats and under-raiyats, the limit does not apply to property other than land. There seems to be no reason why the Act, which is meant to relieve all agricultural debtors, should make a distinction between one class of debtor and another, if by the provision is meant that a raiyat or under, raiyat mortgagors' debt will be extinguished by the mortgagee's possession of the mortgaged lands for fifteen years. Obviously, in the case of other debtors, there will be no such extinction of the debt, even if the mortgaged property be their land. And, even in

the case of raiyats and under-raiyats, there will be no such extinction under the section, if the mortgaged property be not land but some other, property. The true meaning of the provision seems to be that it only directs that in the case of raiyats and under-raiyats, their land is not to be allowed to remain in the possession of the mortgagee for more than fifteen years, presumably for the reason that this class of debtors must not be kept from the means of their livelihood for long but this provision has nothing to do with the extinction of the debt. The direction as to the restoration of the property is only a "further" direction, not an order by which the debt is settled and disposed of. If in the case of debtors, other than raiyats and under-raiyats, and in the case of property, other than land, possession by the mortgagee for any length of time can be allowed, but in the case of mortgages of land by raiyats and under-raiyats, the maximum period that can be allowed is fifteen years, the Board may, in the latter case, direct a cash payment and adjust it accordingly, so far as this section goes. But, on the other hand, it may be that the section is here only adopting the principle of Section 26G, Bengal Tenancy Act. The matter is not free from difficulty and, speaking for myself, I would prefer the first construction. I do not overlook the consideration that the position as to the extinction of a debt by fifteen years" possession of the mortgaged property ought not to be held to be different under two statutes of the same Legislature, unless the words of the statutes compel such construction. All that I am saying is that Section (19)(1) (c), Bengal Agricultural Debtors Act, by itself, does not provide for such extinction. The Board may hold the debt to have been extinguished by applying Section 26G, Bengal Tenancy Act in cases to which that section applies and to the extent provided for therein.

20. As regards Section 26G, Bengal Tenancy Act, the difficulty created as to mortgages by conditional sale by Sub-section (8) of the section is well-known. Certain aspects of that difficulty were referred to by me in the recent Full Bench case in *Badsha Mia v. Mobarak Ali* 33 AIR 1946 Cal. 348 but by that discussion the difficulty was not exhausted. Sub-section (1a) of the section expressly mentions mortgages by conditional sale : Sub-section (8) dealt with such mortgages only. The latter provision deals with mortgages subsisting at the commencement of the Amending Act of 1940, whenever entered into, and the former deals with mortgages, (a) entered into before the Act of 1928 and subsisting on or after 1-8-1937 and (b) those entered into after the Act of 1928 and subsisting at the commencement of the Amending Act of 1940. Sub-section (8), therefore, covers mortgages which may come under either of the two classes mentioned in Sub-section (1a) or, to put it in another way, all mortgages covered by Sub-section (8) are also covered by the other sub-section. But while Sub-section (1a) provides that all mortgages with possession must be deemed to have taken effect as complete usufructuary mortgages, that is to say, the loan will be deemed to be extinguished by 15 years" possession, Sub-section (8) provides that even after the expiry of 15 "years, the mortgagee of a mortgage by conditional sale may sue for a declaration that the loan subsists, that is to say, it

has not, in fact, been extinguished. If he succeeds in proving his case, he will, under Sub-section (11), obtain a mortgage decree for a certain sum and may also get an order for possession for a further period. Prima facie, therefore, as respects mortgages by conditional sale, the provisions of Sub-section (1a) and Sub-section (8) are directly opposed to each other.

21. It seems to me, however, that some reconciliation between the two sections is possible. It is to be observed that the suit which the mortgagee is authorised to bring under Sub-section (8), is not the usual suit on a mortgage by conditional sale, i.e., a suit for foreclosure, but only a suit for a declaration that the loan has not been extinguished by the profits arising from the land. The position under Sub-sections (1a) and (8), read together, would therefore seem to be that under Sub-section (1a), a mortgage by conditional sale is converted into a usufructuary mortgage in all cases, but as to whether it is covered into a "complete" usufructuary mortgage, there is a proviso enacted in Sub-section (8) under which the mortgagee is given the right to prove by evidence that the loan, in a particular case, has not in fact been extinguished by the profits derived during 15 years. The conversion into a usufructuary mortgage is not avoided by Sub-section (8), but it is only the completeness of the usufructuary mortgage which is avoided. The reason for this exception may be that a mortgagee of a mortgage by conditional sale would ordinarily pay a much larger sum than a mere usufructuary mortgagee would.

22. It follows that in the case of a mortgage, by conditional sale with possession, it cannot be said, as soon as 15 years have elapsed, that the loan has been extinguished as a matter of law under the provisions of Section 26G. It may be said that it will still be right to assume that it has been extinguished, unless the mortgagee has brought a suit under Sub-section (8) or unless, as soon as an assumption is sought to be made in any proceeding, the mortgagee asks for a stay of the proceeding, and brings a suit. But this view, in my view, can hardly be correct. Since Sub-section (8) clearly implies that 15 years' possession will not automatically extinguish the debt, its subsistence cannot depend upon the institution of a suit by the mortgagee; and when the law provides that some part of the debt may be subsisting, and it is a matter of accounting whether it is so in fact, it cannot be lawful to declare that it has been extinguished on the footing that as a matter of law it is gone.

23. I am accordingly of opinion that the Board was not right in holding, merely on the basis of Section 19(1)(c), Bengal Agricultural Debtors Act and Section 26G, Ben. Ten. Act, that the debt had ceased to exist.

24. But as I have pointed out already, this error of the Board would not make its decision a nullity, nor entitle the Court to disregard the decision. The remedy of the mortgagee lay in an appeal under, the Special Act. So far as the appeal before the District Judge was concerned, Section 34 was bound to take effect and the appeal was bound to be treated as having abated, the moment the Board's decision was given and so-long as it stood.

25. It may be pointed out further that even if it were held, that the decision of the Board could be ignored and the appeal heard on the merits, the appellants would be in no better position. Their suit, as a suit for foreclosure, was bound to be dismissed on the ground that in view of the provisions of Sub-sections (1a) and (8) of Section 26G, Ben. Ten. Act, it was not maintainable in any view of the sections.

26. For the reasons given above, I am of opinion that the view taken by the learned Judge on this question is correct, although his judgment contains several erroneous statements on other matters. The appeal is accordingly dismissed with costs.