
(1949) 11 CAL CK 0043
In the Calcutta High Court
Case No : Civil Revision Case No. 228 of 1949

Md. Samayun Sheikh

APPELLANT

Vs

Gostha Bala Dasi

RESPONDENT

Date of Decision : 15-11-1949

Acts Referred:

Citation : (1949) 11 CAL CK 0043

Judgement

Sen, J.—This Rule has been obtained by a creditor, against whom an order has been passed in favour of the debtor, who applied u/s 8 read with Section 18 of the Bengal Agricultural Debtors Act, for the settlement of his debts.

2. The facts briefly are as follows: The debtor applied before the Debt Settlement Board stating that he had executed a usufructuary mortgage in respect of certain property in favour of the creditor and that his debt had been extinguished by the usufruct enjoyed by the creditor from that property. The creditor opposed the application and his case was as follows. The mortgage in his favour was not a usufructuary mortgage but a simple mortgage and the mortgagor remained in possession of the mortgaged property. After some time the mortgagor sold a portion of the mortgaged property to the creditor and the consideration was the amount due upon the mortgage and also the amount due upon another debt which was unsecured. After this sale, which was effected by mere delivery of possession, the mortgage was extinguished and the erstwhile mortgagee went into possession as a purchaser. Some years thereafter, as there was a likelihood of some dispute, a document was executed by the debtor declaring that the property had been sold to the creditor some years previously.

3. The Debt Settlement Board held that the alleged sale was a fictitious transaction. It further held that the mortgagee got into possession of the property and enjoyed the usufruct thereof. This finding was upon an admission made by the mortgagee. The Board thereafter calculated the value of the usufruct enjoyed by the mortgagee from the date on which he went into possession and found that no sum was due from the debtor to the creditor and

ordered restoration of the property.

4. Against this decision the creditor appealed and the Appellate Officer allowed the appeal, holding that there was no relationship of debtor and creditor between the parties, inasmuch as the debtor had sold his property to the creditor and thereby extinguished his debt. Against this decision an application was made by the debtor for revision to the District Judge and he has restored the order of the Board. Against this order the creditor has obtained this Rule.

5. On behalf of the creditor, learned advocate argued that the application of the debtor was not maintainable inasmuch as in his application he denied the existence of any debt. He contended that the Debt Settlement Board had no jurisdiction to entertain the application and that, consequently, the order of the Debt Settlement Board, which has been restored by the District Judge, is one without jurisdiction. For this purpose he relies upon the decision of Chakravarti J. in the case of *Rahim Bux Talukdar v. Kanak Lata Chaudhurani* ILR (1947) 1 Cal. 13, in which it was held that an application u/s 8 of the Bengal Agricultural Debtors Act, wherein the debtor specifies a single debt but denies total liability regarding the same, is not a valid application under the Bengal Agricultural Debtors Act and that an order passed on such an application is a nullity. His next contention was that, even if the application were maintainable, relief could not be granted to the debtor, inasmuch as the creditor had got the property, not pursuant to his right under the mortgage but by virtue of an out and out sale.

6. On behalf of the debtor it is pointed out that the decision of my learned brother Chakravarti J. in the case mentioned above is not applicable to the facts of this case and that this case should be governed by the decision of the Chief Justice in the case of *Golapjan Bibi v. Sk. Sarif Ahmed* (1944) 49 C.W.N. 143, where the decision of Chakravarti J. was distinguished. I may mention here that there is another case, namely, that of *Srikanta Kamar v. Atul Krishna Biswas* (1944) 49 C.W.N. 143, where it was held that an application before the Debt Settlement Board in which the Applicant does not admit his liability for any debt whatsoever is not maintainable by the Board. This case also was distinguished by the Chief Justice in the case of *Golapjan Bibi v. Sk. Sarif Ahmed* (supra). The learned Chief Justice held that the other cases related to a decretal debt and that, in the petition of the debtor, the existence of this debt was denied. In the case before his Lordship the application related to a usufructuary mortgage and the Applicant, who was a usufructuary mortgagor, after stating that there was such a mortgage for a debt alleged that the mortgage debt had been extinguished by the usufruct. His Lordship held that in such a case an application u/s 8 read with Section 18 of the Bengal Agricultural Debtors Act was maintainable, although the petition stated that the debt had been extinguished. What his Lordship said is this:

Usufructuary mortgagor can go to a Debt Settlement Board, ask them to take an account and ask them to deliver possession to him if it is found that the mortgagee had been repaid from the usufruct. If the Board is of opinion that the

mortgage has been discharged it will order possession to be given to the debtor-Applicant.

The argument in the present case is this that if a usufructuary mortgagor states the true facts in his petition, namely, that the mortgage has been discharged by the usufruct his application must be dismissed. On the other hand, if he quite falsely alleges that Rs. 10 is still due from him, the application would be in order.... Surely that cannot be the effect of the Bench decision to which I have made reference. That Bench decision and the single Judge decision must be confined to the particular facts of the case, namely, that in each case there was an application to settle a debt, the very existence of which was denied.

7. In my opinion the present case should be governed by this decision of the learned Chief Justice. The debtor has stated that there was a usufructuary mortgage. He has further alleged that the mortgage debt has been extinguished by the enjoyment of the usufruct by the mortgagee. The application, on the face of it, was maintainable and there was, therefore, no error of jurisdiction in the Board entertaining the application.

8. It was contended, however, by learned advocate appearing for the Petitioner that the debtor, at the time of the hearing, produced the mortgage deed and that the mortgage deed clearly showed that it was a simple mortgage and further that the mortgagor retained possession. On this ground, he argued that the debtor had no right to succeed in his application for restoration of the property and that he should not have been allowed to contradict the terms embodied in the mortgage document. The answer to that point is to be found in Section 18(5) of the Bengal Agricultural Debtors Act. I shall quote the first portion of the sub-section which is as follows:

Notwithstanding anything contained in this Act or in any other law for the time being in force or in any contract, where a creditor has taken possession on any terms whatsoever of any immovable property of the debtor as security for, or in lieu of payment of, any portion of the principal of the debt or any portion of the interest thereon....

9. It is quite clear from this sub-section that the Board is empowered to Act u/s 18, not only in the case of mortgages, but also in the case where a creditor has taken possession of immovable property belonging to the debtor in lieu of payment of any portion of the principal of the debt or any portion of the interest thereon. In the present case, if the creditor's allegation be accepted in toto, it merely establishes that the debtor made over possession of his immovable property to the creditor in lieu of payment of the mortgage debt as well as of some other debt. The case, therefore, comes within the purview of Sub-section (5) of Section 18, which in very express terms says that Section 18 shall apply where a creditor has taken possession on any terms whatsoever of any immovable property of the debtor as security for or in lieu of payment of any portion of the principle of the debt or any portion of the interest thereon. It is

clear, therefore, that the principle enunciated by the Chief Justice in the case of Golapjan Bibi v. Sarif Ahmed (*supra*) will apply to a case of this description. The application of the principle should not be restricted to mortgages, it would apply in a case of this description where it is found that a creditor has taken possession of the immovable property of the debtor in lieu of payment of the debt or interest thereon.

10. I, accordingly, hold that the Board was right upon the facts of this case in making the order which it has done restoring the property to the debtor. The order of the learned District Judge is upheld and this Rule is discharged. There will be no order for costs.