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(1941) 08 CAL CK 0006

In the Calcutta High Court

Mohini Mohan Roy Chowdhury and Others — APPELLANT

Vs

Rai Ashutosh Ghose Bahadur and Another — RESPONDENT

Date of Decision : 19-08-1941

Acts Referred:

Bengal Money Lenders Act, 1940 — Section 2(8), 30, 34

Citation : AIR 1942 Cal 367

Hon'ble Judges : Sen, J

Bench : Division Bench

Judgement

Sen, J.—The point which arises for decision in this application is whether the interest awarded to the mortgagee by the preliminary decree in this suit on the principal sum found due for the period between the date of the preliminary decree and the date fixed therein for payment is interest within the meaning of Section 2(8), Bengal Money-lenders Act, The matter arises in this way. The petitioners borrowed money on a mortgage, the interest fixed in the bond being 7 per cent, per annum with quarterly rests reducible to 6J per cent, per annum with quarterly rests if the dues were regularly paid. The dues were not regularly paid and the mortgagee instituted a suit. The preliminary decree was passed on 9th February 1939 and the final decree on 29th January 1940. The sale pursuant to the final decree has been made absolute and on 22nd April 1941 the sheriff was directed to make over possession to the plaintiffs. The amount of interest Sue on the bond calculated up to the date of the passing of the preliminary decree is not in excess of the maximum allowed by Section 30, Bengal Money-lenders Act, but the amount of interest calculated upto the date fixed for payment is admitted before me to be in excess of the maximum. The mortgagors apply u/s 36, Bengal Money-lenders Act, for relief from the payment of this excess of interest and claim that the decree should be reopened and a new instalment decree passed. Mr. Ghosh appearing for the respondents contends that interest payable after the date of the preliminary mortgage decree is not interest within the meaning of the Bengal Moneylenders Act and that the mortgagors cannot get any relief from the payment of such interest. Interest is defined in Section 2(8), Bengal Money-lenders Act thus:

''Interest'' includes any sum by whatsoever name called, in excess of the principal paid or payable to a lender in consideration of, or otherwise in respect of, a loan whether the same is charged or sought to be recovered specifically by way of interest or otherwise, but does not include any sum lawfully charged by a lender in accordance with the provisions of this Act or any other law for the time being in force for or on account of costs, charges or expenses.

2. I leave out of consideration the latter part of the sub-section which excludes any sum charged for costs, etc., as it is not relevant to the matter under discussion. The section says that anything paid in excess of the principal is interest if it satisfies any one of the following two conditions, viz. : (a) It is payable in consideration of the loan, (b) It is otherwise payable in respect of the loan. It is clear from this definition that even if the sum is not payable in consideration of the lotto it will still be interest, if it is payable in respect of the loan. Now can it be said that the interest awarded by the preliminary decree for the period between the date of the preliminary decree and the expiry of the period of grace is a sum payable in respect of the mortgage loan. Mr. Ghosh says it cannot and his argument is this : The preliminary, decree declares the sums which were payable as principal and interest on the date of the decree. When this is done, the liability of the mortgagor passes from the domain of contract into the domain of judgment and the amount declared due as principal loses the character of a loan and becomes a decretal due. The interest awarded on such an amount is not a sum payable in respect of a loan and is therefore not interest within the meaning of Section 2(8). An examination of the preliminary decree does not support this view. The preliminary decree directs the Registrar to take an account of what is due for principal and interest on the mortgage at the date of the preliminary decree.

3. He is also directed to take accounts of certain other matters with which I need not deal as they relate to matters with which this application is not concerned. All these accounts are to be taken for the period up to the date of the preliminary decree. The Registrar is to make a report of these accounts to the Court and in that report he is given liberty to state what will be due on such accounts six months from the date on which the report is submitted to the Court for countersignature. In other words, he is to calculate, inter alia, the amount which will be due for interest on the principal from the date of the preliminary decree upto a date six months subsequent to the date on which the report is submitted. The Registrar is further directed to take thereafter as occasion arises such subsidiary accounts and make such enquiries as may be necessary for the purpose of finally adjusting the amount to be paid to the plaintiff or any other party under the decree. The decree goes on to say that on the report being confirmed the judgment-debtor shall pay into Court (1) the amount found due on the report within six months of the date of the countersignature and (2) thereafter on such date as may be fixed such other amounts as the Court may

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award under Rules 10 and 11 of Order 34, Civil P.C. This is the preliminary decree.

4. If the decree be read with Order 34, Rules 2, 4, 10 and Rule 11 of the Code it becomes manifest that what the Court decreed so far as the principal and interest thereon is concerned is this : The judgment debtor is to pay to the mortgagee (a) the principal found due and interest on the principal calculated upto the date fixed for payment in the preliminary decree; (b) thereafter he has to pay subsequent interest on an amount made up of the principal and interest payable up to the aforesaid date of payment and certain other sums representing costs expenses and items other than the principal or interest thereon.

5. I am not now concerned with the interest payable at the stage (b). It is quite clear from the decree that the interest referred to above which is payable up to and before stage (b) is interest calculated on the amount of the principal due and on no other amount. Mr. Ghose concedes, as he must do, that this is so but he says that the amount found due as principal ceased to be a loan on the date of the preliminary decree as on that date the decree finally determined what the contractual rights and liabilities of the parties were and converted them into decretal rights and liabilities. I am unable to accept this view. In the first place, on the date of the preliminary decree the amount due for principal and interest was not ascertained. It was ascertained later after accounts had been taken. On the date of the preliminary decree the Court directed certain enquiries to be made and did not finally decide what the liabilities of the parties were. In my opinion, under the preliminary decree matters continue in a state of flux till the date appointed for the payment of the amounts found due on the several accounts mentioned therein. It is on this latter date that the rights and liabilities of the parties are given final shape and form as decretal rights and liabilities. On the date of the preliminary decree what the Court says is this:

I shall have accounts taken by my officer and on receiving his report shall determine the liability of the mortgagor up to the date which I shall fix for the payment of such liability and that date shall be six months from the date on which the report of my officer is sign/ed by me as being correct.

6. The decree begins to operate against the judgment-debtors on the date fixed for payment : If this view be correct then the liability of the judgment-debtors does not pass into the domain of judgment till the expiry of the period of grace and therefore the amount found due for principal retains its character of a loan. That being so, the interest payable on the principal is a sum payable in respect of the loan and is therefore interest within the meaning of Section 2(8), Bengal Money-lenders Act. Mr. Ghosh referred to the following cases in the course of his arguments : AIR 1927 1 (Privy Council) and AIR 1936 63 (Privy Council) . In both these cases it was held that in mortgage suits the contract remained effective until the expiry of the period of grace and that it is only after that date that the matter passed from the domain of contract into the domain of judgment. The view that I have taken finds support in these decisions. Mr. Ghosh argued

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that the cases were decided before the amendment of Order 34 Rule 2 in 1929 and he says that the amendment of Rule 2 has made a difference. Formerly the preliminary decree directed an account to be taken of the amount that would be due for principal and interest and for costs on the expiry of the period of grace. There was no provision like a provision in the present Rule 2 of Order 34 for an account to be taken of what would be due on the date of the preliminary decree. Mr. Ghose''s argument is that the present form of preliminary decree indicates that the intention was to convert the liability under the mortgage into a decretal liability on the date of the preliminary decree. I am unable to see how the amendment of E. 2 of Order 34 can have this effect. On the contrary, the view taken by the Judicial Committee in AIR 1936 63 (Privy Council) is that the amendment of the Rule in 1929 did not introduce any change in the law but merely gave legislative recognition to the Judicial interpretation of the rule as it stood before the amendment.

7. There is no decision which supports the view propounded by Mr. Ghosh and in my opinion that view cannot be upheld on principle, I hold, therefore, that the petitioners are entitled to relief under the Bengal Money-lenders Act. The decrees passed are reopened, the sale is set aside and a new decree is passed in accordance with the provisions of Section 34, Bengal Money-lenders Act. The mortgagee will get interest at the rate of 8 per cent, simple from the date of the mortgage till the date fixed for the payment of the first instalment under this decree. The decretal amount shall be paid in five equal annual instalments. The first instalment shall be paid a week after the reopening of the Court. The parties shall bear their own costs of this application. The plaintiffs shall be entitled to all the costs incurred in the suit up to date in addition to the costs which shall be incurred by reason of the reopening of the decree and the passing of this decree.

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