(1943) 07 CAL CK 0003

In the Calcutta High Court

Monomohan Das APPELLANT

Vs

Parswanath Das Sarkar and Others RESPONDENT

Date of Decision : 02-07-1943

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26G

Citation : AIR 1943 Cal 588

Judgement

1. This rule has been issued against an order in appeal of the Additional District Judge of Dacca, confirming an order of the Munsif of the Fourth Court, Munshiganj passed u/s 26G, Ben Ten. Act, 1885, granting to applicant 1 before him joint possession to the extent of eight annas share 6 in the disputed lands along with opposite party 2. The rule has been issued on the ground that Section 26G as amended by Act 18 of 1940 is ultra vires of the Provincial Legislatrue and has been obtained at the instance of the mortgagee. It is fairly clear that no question of ultra vires can arise in this matter for it cannot be contended that the subject matter of Section 263 as it stands after jamendment is not included in some or other (of the items in the Provincial List or the Concurrent List III of Schedule 7, Government of India Act. The form of the rule is therefore strictly speaking incorrect. The only question that can arise is whether any of the provisions of the amended section deal with matters in the Concurrent List in and are void as being repugnant to any existing Indian law or any law of the Indian Legislature. The Acts containing the provisions of the amended section have not been reserved for the consideration of the Governor. General and have not received his assent. The case arises out of two mortgage bonds entered into by applicant 1 and the husband of applicant 2 by the terms of which the mortgaged properties were given in possession to the mortgagees in lieu of interest. The original mortgagee was the father of opposite parties 1 and 2. The mortgagors were to pay up the mortgage money within a stipulated date, and on failure the properties were to remain in possession of the mortgagee; if dispossessed by the mortgagors the mortgagee was to get interest from the date of dispossession. There was also a term that if the entire mortgage money could not be realised

out of the mortgaged properties, the mortgagee would be at liberty to cause the other properties of the mortgagors to be sold. Opposite party 2 has purchased the eight annas share of applicant 2. Accordingly joint possession with opposite party 2 has been ordered in respect of the remaining eight annas share in favour of applicant 1.

2. In this Court two points were urged, first a that Section 266 does not apply to the case of anomalous mortgages, those under consideration in the suit being of this character, and secondly, that Section 26G does not make provision for granting partial recovery of possession to a co-mortgagor, such as has been granted by the lower Courts. These contentions have no connection with the question of the repugnancy of the provisions of Section 26G to any law and are of no assistance to the petitioner. The learned Advocate-General appeared in support of the validity of the section and was, in the circumstances not able to be of much assistance to the Court beyond stating that he failed to see what difficulty there was in the question, and that clearly the provisions of the impugned section were covered by item 21 of the provincial list II, ''transfer of agricultural land,'' being excluded so far as any ''contract relating to agricultural land'' is concerned from item 10 of the concurrent list in, and were also covered by item 27 of the provincial list II ''money lending.'' He further pointed out that whatever might be contended as to the validity of Section 26G in extinguishing debts due and secured by the mortgages therein referred to, there could be no question that the terms which -provide for return of the land to the mortgagor are certainly within item 21 of list II, and that in the present case we are only concerned with that question : it is not strictly necessary for us to decide the other question. We are of opinion that the latter branch of the contention of the learned Advocate-General is sound; we decide the rule expressly on the ground that the provisions of Section 26G relating to re-transfer of the mortgaged property are matters wholly within the legislative competence of the Provincial Legislature as provided by item 21 of list of Schedule VII, Government of India Act, 1935. The provisions are easily severable from those relating to the extinguishments of the debt secured by the mortgages dealt with, so that even if it were held that the latter provisions were void for repugnancy to any existing Indian law, this would not affect validity of the former provisions.

3. The question of the validity of Section 26G as it stood before amendment in 1940 came up for consideration in Panchanan Mandal and Another Vs. Sashi Bhusan Pradhan and Others, Rau, J. considered that the mortgage in question was covered by the terms of the section as it then stood although in his view it contained a personal covenant for payment. He raised a query whether the provisions of Section 26G providing for extinguishment of the debt might not be repugnant to the provisions of Section 68(1)(a), T.P. Act, but pronounced no opinion on the point, leaving it for decision when, if ever, a party might claim a right of repayment. In a later case Sheikh Akbar Ali and Others Vs. Sheikh Mafijuddin of Islampur, to which one of us was a party, a different view of the nature of the terms of the covenant considered by Rau J. was taken. It was

considered that the term was one outside the mortgage altogehter, being in the nature of an indemnity, and it was held that Section 26G as it stood before amendment in 1940 would not cover the case of a mortgage with a personal covenant to pay, to which the provisions of Section 68(1)(a), T.P. Act, might be applicable. The question whether the indemnity given in the bond really purported to give relief against loss occasioned by acts done under express provisions of law (such as those in Section 26G), and, if so, whether the provisions of the law would nullify the indemnity so given, were left open. It was also pointed out that in this connexion the terms of Section 37, Contract Act, would have to be considered. The effect of this section has indeed been considered by the Federal Court in Megh Raj v. Allah Rakhia AIR 1942 F.C. 27 in considering the Punjab Restitution of Mortgaged Lands Act (4 of 1938), the provisions of which have some resemblance to those of Section 26G, Ben. Ten. Act. It is there pointed out that Section 87, Contract Act, has, like Sections 4 and 9, Civil P.C. a self-effacing provision which makes it difficult to see how a law which excuses performance of any particular kind of contract can be said to be inconsistent with the section which must be taken as a whole.

4. In Sheikh Akbar Ali and Others Vs. Sheikh Mafijuddin of Islampur, it was stated that no opinion was expressed as to the validity of the amendments made in Section 26G by the Act of 1940. The principal change introduced by that Act is that (subject to certain qualifications) all mortgages in which delivery of possession has been given, which wore entered into before the commencement of the Act of 1940, shall be deemed to have taken effect as complete usufructuary mortgages. It is further provided that BO mortgage (other than a complete usufructuary mortgage) entered into after the commencement of the Act in which delivery of possession is given shall have any force and effect. The result is that so far as mortgages entered into before the amendment of 1940 are concerned, if they contain a personal covenant to pay this will not be enforceable. The position then is the same as that considered by Rau, J. in Panchanan Mandal and Another Vs. Sashi Bhusan Pradhan and Others, referred to above and the question of. the effect of the provision vis-a-vis Section 68(1)(a), T.P. Act, will have to be considered at a suitable time, but there is no reason why this question should affect the validity of the new section so far as it permits and requires the return of the mortgaged property to the mortgagor under the prescribed conditions, which is the only point we are concerned with in this rule.

5. It is clear that the terms of the section as now amended cover anomalous mortgages in which possession of the mortgaged property has been delivered; the contention of the petitioners to the contrary is unsound. Though the point was not raised in argument we are of opinion that a second appeal lies to this Court in respect of the order of the District Judge in this case by virtue of the provisions of Section 26G(7) of the Act; the rule is liable to be discharged on this ground also This rule is accordingly discharged. There will be no order as to costs. Certificate u/s 205(1), Government of India Act, 1935, is granted.< /p>

