

(1945) 08 CAL CK 0019

In the Calcutta High Court

Case No : Appeal from Original Decree No. 17 of 1943

Mrs. D.J. Hill

APPELLANT

Vs

Rai Ramtaran Banerji Bahadur and Others

RESPONDENT

Date of Decision : 29-08-1945

Acts Referred:

Citation : (1945) 08 CAL CK 0019

Judgement

Mitter, J.—Mrs. Hill borrowed the sum of rupees ten thousand from the Respondent, Rai Ram Taran Banerji Bahadur, on a mortgage on the 24th February, 1933, agreeing to pay compound interest at the rate of 10 per cent, per annum with half-yearly rests. She paid a total sum of Rs. 2,104 and odd as interest on this loan. On the 8th June, 1933, she borrowed a further sum of two thousand rupees from the Respondent on a second mortgage agreeing to pay compound interest at 10 per cent, per annum with half-yearly rests. On this mortgage loan a total sum of Rs. 366 and odd was paid towards interest. The Respondent instituted the suit on the 21st June, 1939 (Suit No. 46 of that year) to recover his dues on both the said mortgage loans. On the 17th December, 1939, he obtained a preliminary decree for the sum of Rs. 19,755 and odd and the final decree for sale on the 12th April, 1940. He started execution for the sum of Rs. 20,192 and odd. The mortgaged properties were sold in the aforesaid execution on the 19th July, 1940, and purchased by the decree-holder, namely the Respondent, for the sum of Rs. 43,300. His dues under the decree were set off against the purchase money and he deposited the balance namely, Rs. 22,781 and odd in Court to the credit of the judgment-debtor, Mrs. Hill. The sale was duly confirmed. On the 30th August, 1941, Mrs. Hill filed a suit under sec. 36 of the Bengal Money-Lenders Act, 1940, (hereafter called the Act) for relief. In the said suit she prayed for re-opening the mortgage decrees and for the passing of a new decree in terms of the Act by calculating interest in terms of sec. 30 of the said Act and for restoration of possession of the mortgaged properties which had been purchased, as we have already said, by the decree-holder himself. The learned Subordinate Judge has held that the suit is not

maintainable. He further observed that if he had held the suit to be maintainable, he would not have allowed Mrs. Hill to proceed on with the suit except on terms. Mrs. Hill has preferred an appeal against the decree of the learned Subordinate Judge, which was a decree for dismissal. In coming to the conclusion that the suit was not maintainable the Subordinate Judge relied upon proviso (ii) to sub-sec. (1) of sec. 36 of the Act. He held that in order that a decree may be re-opened two conditions must be fulfilled: (1) that the decree must be in a suit to which the Act applied and (2) that the decree must be a decree which had been passed before the 1st day of January, 1939. We think that the learned Subordinate Judge is wrong in the view that he has taken.

2. The said proviso is a limitation on the powers given to the Court in the main enactment, that is to say, to what is contained in the different clauses of sub-sec. (1) of sec. 36. One of those clauses namely cl. (a), gives the Court power to re-open any transaction between the parties, and it has been laid down by the Judicial Committee in *Renula's case* 49 C. W. N. 491 (1945) that the word "transaction" includes a decree. If there had not been the aforesaid proviso, the Court would have had power to re-open any transaction between the parties irrespective of the nature of the transaction or irrespective of the time during which the challenged transaction took place. The two provisos (i) and (ii) put limitations on those powers by defining what transactions cannot be re-opened. Cl. (ii) says that a decree passed in a suit to which the Act does not apply cannot be re-opened. That is the effect of the first part of the proviso. It would follow from that part that if the decree is passed in a suit to which the Bengal Money-Lenders Act of 1940 applies, then that decree can be re-opened. That is the combined effect of cl. (a) and that part of the said proviso. But the proviso goes further and lays down that even if the challenged decree be a decree in a suit to which the Bengal Money-Lenders Act, 1940, applies, still the Court would have no power to re-open that decree if that decree had been satisfied by (that is on or before) the 1st day of January, 1939. That in our judgment is the effect of proviso (ii) of sub-sec. (1) of sec. 36. In this case as the mortgage suit itself had been instituted after the 1st of January, 1939, it could not have been satisfied on or before the 1st January, 1939. On the facts of this case that portion of proviso (ii), which is really an exception to the first part of the said proviso, is factually satisfied--in reality it is out of the picture. The learned Subordinate Judge is not, therefore, right on the reasons that he has given in holding that the suit is not maintainable. In fact Mr. Gupta who has appeared for the Respondent made no attempt to support this part of the judgment of the Subordinate Judge. For the purposes of this case, however, a further point has to be considered. The facts bearing upon that further point which we will presently state and decide are these: We have already stated that the mortgaged property was purchased by the mortgagee decree-holder at an amount much above the amount for which he got the mortgage decree, with the result that after setting off the decretal dues against the price at which he had purchased he had to deposit in Court the sum of Rs. 22,731 and odd. With the consent of the mortgagor Mrs. Hill, Defendants

Nos. 3, 4 and 5, who were puisne mortgagees, withdrew a sum of Rs. 15,896 and odd out of Court to satisfy the money claims they had against Mrs. Hill, and Mrs. Hill herself withdrew the balance, namely Rs. 6,684 and odd, Those withdrawals were made on or after the 3rd September, 1940, after the Bengal Money-Lenders Act, 1940, had come into force; the date on which it came into force being the 1st September, 1940. In these circumstances the question is whether she would be allowed to proceed on with her suit till she brings into Court the said sum of Rs. 22,781 and odd, part of which she herself withdrew and the rest went to her benefit because with that her liability to others were satisfied. The Bengal Money-Lenders Act of 1940 does not furnish a direct answer on this question, but certain provisions of sec. 36 of that Act have a bearing on it. The provisions of that section are that if a decree is re-opened, the Court must pass a new decree giving the judgment-debtor the right to pay by instalments and if the property had been purchased in execution of the re-opened decree by the decree-holder himself, the judgment-debtor is to get restoration of possession. The question as to what would be the state of title during the time when the judgment-debtor is in possession in pursuance of an order for restoration passed under sub-sec. (2) of that section till the amount of the instalments under the new decree are paid has been considered by a Division Bench of this Court. It has been held that during that time the title to the property would remain in the decree-holder auction-purchaser and the right of the judgment-debtor to whom possession has been restored would be in the nature of re aliance, that is if he failed to carry out to pay the instalments under the new decree, the decree-holder auction-purchaser would retain the title which was in him from the time when he purchased the property at the Court sale. But if the judgment-debtor paid all the instalments under the new decree and thereby satisfied the new decree, the sale to the decree-holder auction-purchaser would automatically go and the title to the property would revert to the judgment-debtor. The question before us has to be examined keeping in view the aforesaid propositions of law. The position then is this that if the decree is reopened without requiring Mrs. Hill to deposit the said sum of Rs. 22,781 odd in Court and if she ultimately pays up the new decree, the title which has been acquired by the Respondent by reason of the purchase at the Court sale would disappear and the property which was burdened with mortgages to Defendants Nos. 3, 4 and 5 who were puisne mortgagees would revert to Mrs. Hill free from those mortgages also. The Respondent would not be able to recover from the puisne mortgagees (Defendants Nos. 3 to 5) by suit the portions of the said money which had been taken out of Court by them (Defendants Nos. 3 to 5) with the consent of Mrs. Hill. The position would be in that case that by receiving the amount of the new decree the Respondent would not only lose the benefit of his purchase at the Court sale but would be left with a precarious remedy, namely against Mrs. Hill, in respect of the sum of Rs. 22,781, the balance of the price which came out from his own pocket. That is a point which must be kept in view in deciding this question.

3. By reason of the purchase by the Respondent at the Court sale held on the 19th July, 1940, for the price of Rs. 43,300 which exceeded the amount due to the decree-holder. Mrs. Hill has obtained a benefit because the said sum of Rs. 22,781 has gone to relieve her of her liabilities to others. In these circumstances it would be inequitable to drive the Respondent to a suit against Mrs. Hill. We hold that she must deposit the said sum of Rs. 22,781 or to be more precise, Rs. 22,781-1-6 p. in the lower Court before she would be allowed to proceed further with her suit under sec. 36. We accordingly set aside the decree made by the learned Subordinate Judge and in lieu thereof pass the following decree, namely, that the case is remanded to the lower Court. The suit would be kept in abeyance for a period of six months from to-day. If the Plaintiff, Mrs. Hill, deposits the said sum of Rs. 22,781-1-6 p. in the Court below to the credit of the suit, the suit would proceed on and the learned Subordinate Judge would decide it on its merits. If however the said sum is not deposited by Mrs. Hill within the aforesaid time, the Subordinate Judge would dismiss the suit and in that event with costs. In case the suit is proceeded with on the terms that we have laid down, the Respondent would be entitled to withdraw the said sum of money but only after the new decree is passed.

4. In paragraph 12 of the written statement filed by the Defendant No. 1 it is stated that he had spent seven thousand rupees on repairs after he had purchased the mortgaged properties. He claimed that sum by way of reimbursement in the present suit. In view of the reasons given by a Division Bench of this Court to which one of us was a party, namely, Subashini Poddar v. Srinath Chakravarty 49 C.W.N. 714 (1945), this question cannot be gone into in any proceedings under sec. 36 of the Bengal Money-Lenders Act. The said Defendant, therefore, must be left to his remedies (if he has any) in other proceedings.

5. Each party would bear its own costs. If a new decree is passed but there is default in the payment of instalments under the new decree, then the mortgagee, Rai Ram Taran Banerjee Bahadur, would have to bring the said sum of Rs. 22,781 into Court for payment to Mrs. Hill.

Akram, J.

I agree.