

(1944) 03 AHC CK 0027
In the Allahabad High Court
Case No : First Civil Appeal No. 122 of 1939

Mst. Hasina Begam and Others	Vs	APPELLANT
Pt. Parbhoo Dayal and Others		RESPONDENT

Date of Decision : 16-03-1944

Acts Referred:

Agriculturists Relief Act — Section 4
Encumbered Estates Act, 1934 — Section 45

Citation : (1944) 03 AHC CK 0027

Hon'ble Judges : Misra, J; Madeley, J

Bench : Division Bench

Advocate : Hyder Husein, for the Appellant;

Final Decision : Dismissed

Judgement

Misra and Madeley, JJ.—In this case under the Encumbered Estates Act the application u/s 4 of the landlords has been dismissed for default. It was, however, dismissed after an objection u/s 11 had been dismissed. The objectors have come in appeal to this Court against this decision for fear it should operate as res judicata against them in any subsequent judicial proceedings. The Respondents are not represented.

2. The facts of the case are extremely complicated, and as we feel certain that this appeal does not lie, we do not think it is necessary to enter into them in detail.

3. Briefly we find that Farzand Husain owned 4 biswas share in Dharampur. On the 13th July, 1882, he mortgaged 1 biswa 5 biswansis share to Farzand Ali and Nawazish Ali. On the 8th July, 1886, he mortgaged the entire 4 biswas share to Sankata Din. His son Lachmi Narain obtained a decree for sale of the 4 biswas and purchased it himself on the 23rd December, 1895. It was not necessary for him to implead the prior mortgagees, and he did not do so. The prior mortgagees then brought a suit for sale of their 1 biswa and 5 biswansis and purchased it

themselves on the 25th July, 1896. They omitted to implead the subsequent mortgagee. The prior mortgagees failed to get possession and brought a suit against the subsequent mortgagee which was compromised on the 31st December, 1897, and decreed in the terms of the compromise. Possession was given to the prior mortgagees but the right to redeem the property was reserved to the subsequent mortgagee. The present applicants u/s 4 of the Agriculturists' Relief Act showed in their written statement u/s 8(1)(b) this 1 biswa 5 biswansis as their own absolute property. This property after a long series of successive transfers and legal proceedings, into the details of which we do not intend to enter, came down to them from Farzand Ali and Nawazish Ali and their title is derived from them. The legal representatives of Lachmi Narain have filed an objection that the applicants u/s 11 are not the full owners of the property but that the property belongs to the objectors. The trial Court has held that this property is subject to the right of redemption reserved to Lachmi Narain in the compromise of the 21st December, 1897, i.e., it is not the absolute property of the applicants u/s 4 who have only mortgagee rights in it. The special Judge further held that owing to intervening transfers Article 134 and not Article 148 govern limitation for 5/6th of the property in suit but Article 148 for the remainder. He therefore allowed the objections with respect to 1/6th of the property only.

4. It was argued before him and is argued before us that in view of the fact that the heirs of Farzand Ali and Nawazish Ali ultimately got back the property, Article 148 should be applied to the whole property and not Article 134. Since we think that this appeal does not lie and the matter must remain *res integra* for any subsequent suit which may be brought, we express no opinion upon the questions of fact and law argued before us on the merits.

5. On the 5th September, 1939, the trial Court dismissed the case for default of the applicants who were taking no steps in the case. This appeal was filed on the 11th September, 1939. Other creditors were not impleaded, and Appellants' learned Counsel argues that there was no occasion to implead them as there were at that time no creditors in the Encumbered Estates Act case which had finally terminated by the order of dismissal for default. We are satisfied that this order of dismissal made over four years ago has now become final. The question is what effect it has upon the right of appeal given u/s 45 of the Encumbered Estates Act and upon the finality of orders made u/s 11 of the Act. Section 11(4) says "Any orders passed by the Special Judge under this section shall be deemed to be a decree of a Civil Court of competent jurisdiction". It was for this reason that this appeal was filed. u/s 14(7) it is provided that a decree passed by a Special Judge in respect of a debt shall be deemed to a decree of a Civil Court of competent jurisdiction but no decree against the landlord shall be executable within the United Provinces except under the provisions of this Act." If the dismissal of a suit for default after the passing of a decree u/s 14 did not wipe out the decree passed under that section, any applicant could get out of his obligations by defaulting and so getting the case dismissed after some such

decrees had been passed. Once he defaulted and the case was dismissed, the decrees could not be sent to the Collector because the case could never be finished. It could scarcely be argued, however, that Section 14(7) would act as a bar against any other decree being executed against him. We notice also that after the Collector has made an order u/s 6 forwarding the application u/s 4 to the Special Judge all the consequences u/s 7 follow. These impose disabilities both on the creditors and on the landlord. The former are only removed in the circumstances mentioned in Section 43 and the latter in the circumstances mentioned in Section 44. Section 43 provides that dismissal u/s 8(3) or quashing of the proceedings u/s 20 are sufficient to remove the disabilities of the creditors. It does not seem to contemplate dismissal for default under Order 9.

6. It is not necessary for us to consider the propriety of the Judge's order dismissing this case for default. That dismissal is now a fait accompli. There is no chance of the applicants after all these years attempting to get the order set aside nor could they succeed if they did. We consider that the effect of an order of dismissal for default must be the same for whatever reason it is passed and whether it is legally correct or otherwise. Section 43 provides that on the passing of an order u/s 8(3) "the whole of the proceedings under this Act shall be set aside". The same must be the effect of dismissal for default under Order 9 if it goes unchallenged and is allowed to become final. To hold otherwise would involve also the proposition that the landlord and his creditors must still remain under the disabilities detailed in Section 7. Since the whole proceedings under this Act must be held to have been set aside, the decisions of the learned Special Judge in the matter of the claim u/s 11 is also set aside with them and cannot operate as res judicata. Similarly no appeal lies against it because (1) it has no further legal effect and there is nothing to appeal against and (2) Section 45 of the Encumbered Estates Act has no application because there is no longer any existing case under the Encumbered Estates Act.

7. We dismiss this appeal as incompetent. No order as to costs.