

(1948) 07 CAL CK 0023
In the Calcutta High Court
Case No : A.F.O.D. No. 49 of 1942

Pasupatinath Maliah and another

APPELLANT

Vs

Devaprosanna Mukherjee

RESPONDENT

Date of Decision : 22-07-1948

Acts Referred:

Citation : (1948) 07 CAL CK 0023

Judgement

1. The facts necessary for deciding the controversies in the appeal are as follows: Mr. Bhagabati Charn Mitter was appointed receiver in a suit for partition instituted by Kumar Dakhineswara Malia against his co-sharers, Rameswaralal Malia, Rani Bhaba Sundary Devi and others. The said receiver with the permission of the Court granted on 10th August 1908 two mining leases, each for 999 years-one in respect of 5/16 shares (which was the share that belonged to parties and which will hereafter be called the leasehold interest of mouzas Monohar Bahal) and the other in respect of the entire village Marich Kota to a firm, which carried on business under the name and style of Laik Bannerjee and Company (hereafter called the firm). On the same day the said receiver with like leave executed a mortgage of the said properties to the said firm to secure a loan of rupees one lac advanced by latter on that date. The parties to the partition suit (hereafter called the Malias) to whom those properties belonged joined the receiver in executing the leases and the mortgage. The net result of these transactions was that the firm became lessees of the said two properties for a term of 999 years and the lessor's interest therein was given in mortgage to the firm to secure the said loan. Thereafter on 20th May 1909 the firm borrowed rupees two lacs from Taraprosanna Mukherjee, and as security for the said loan mortgaged their leasehold interest in the said two properties, as also their mortgagee-interest therein. Taraprosanna thus became a sub-mortgagee of the lessor's interest of the Malias and a mortgagee in respect of the leasehold interest of the firm.

2. In 1911 Taraprosanna filed Mortgage Suit No. 163 of 1911 to enforce his mortgage. The parties defendants to that suit were his mortgagors, namely, the

firm, the original mortgagors, namely, the Malias, and other persons who in the meantime had become interested in the mortgaged properties. On 11th January 1912 he obtained the final decree for sale.

3. Taraprosanna died on 14th January 1914 and was succeeded by his only son, Devaprosanna, who is the respondent before us. The respondent started proceedings for execution of the said final decree (Execution case No. 123 of 1918) and at the court sale held on 9th February 1920, purchased the mortgagee-interest of the firm. Thus he became the direct mortgagee of the lessor's interest in Monohar Bahal of which the Malias were the mortgagors. It is not necessary for this appeal to detail the circumstances under which the leasehold interest of Monohar Bahal and both the lessor's and the lessee's interest in Marich Kota went out of Taraprosanna's mortgage. The lessor's interest in Monohar Bahal ultimately vested by the inheritance in Raja Pramatha Nath Malia, who, it is admitted, became the sole "borrower" within the meaning of the Bengal Money-lenders Act, 1940.

4. The respondent filed his suit (Mortgage Suit No. 78 of 1922) to enforce the mortgage which the receiver Mr. Bhagabati Charn Mitter acting on behalf of the Malias had executed in favour of the firm, and which the respondent had purchased at the court sale on 9th February 1920. He obtained the preliminary decree for the sum of Rs. 1,58,734-7-1 on 31st July 1928 and the final decree for sale for Rs. 1,59,245-15-2 on 20th February 1929. The mortgaged property, which at that time was the lessor's interest in Monohar Bahal only, was put up to sale in execution of the said final decree and was purchased on 4th August 1930 by the decree-holder himself, namely the respondent, for the sum of Rs. 59,000. That sale was confirmed on 30th June 1931. Since then he is in receipt of the rent and royalty payable by the lessees of that mouza. Thereafter the respondent obtained on 30th October 1935 a personal decree under the provisions of O. 34, R. 6, Civil P.C., against Raja Promatha Nath Malia for the sum of Rs. 1,27,179-0-6. On 4th June 1936 he applied for execution of that decree in Money Execution Case No. 118 of 1936. In the course of that execution some properties alleged by the respondent to belong to the Raja were attached before 30th January 1937. The exact date of the attachment does not appear from the records of the appeal. On that date, namely 30th January 1937, the respondent with the concurrence of the judgment-debtor, the Raja, filed an application in the executing Court. This application has been marked Ex. 2. Therein the respondent stated that talks of settlement were going on between the parties, but some time would be necessary for arriving at a settlement, and that as the judgment debtor had paid him the costs of the execution proceedings and had asked him to give time he did not wish to proceed with the execution case for the "present". The prayer, however, was that "the Court may be pleased to strike off the execution case keeping the attachment in force." The order passed by the Court on this application on the same day is not on the record of this appeal but its substance is given in column 20 of the execution register, Ex. F. Both parties accept it to be a correct summary of the order.

5. The negotiations for settlement terminated successfully. In accordance with the terms of the settlement a conveyance was executed on 4th January 1939 by Raja Pramatha Nath Malia and his two sons, Kumars Pasupati Nath Malia and Khitipatinath Malia, in favour of the respondent. The conveyance has been marked Ex. B. The respondent remitted a part of his dues under the personal decree and the balance was satisfied by the sale to him by the said conveyance of a property called Senapati Mahal.

6. By a separate agreement of even date he, the respondent, agreed to reconvey the said property to the said sons of Raja Pramatha Nath Malia for a price of Rs. 96,000 if paid within 2 years from that date.

7. Senapati Mahal originally belonged to Raja Pramatha Nath Malia but had been transferred by him to his said sons some time before. Raja Pramatha joined in the conveyance because a suit instituted by some of his creditors to avoid the said transfer to his sons under S. 53, T.P. Act, had been decreed by the learned Subordinate Judge, but the matter was then the subject-matter of a pending appeal in this Court. The conveyance contained suitable terms to meet the event of the said appeal being dismissed. The case which is before us proceeded in the lower Court on the footing that the title to that property was at the date of the conveyance in the said sons of the Raja, and so we will proceed on that assumption. The position, therefore, is that for the purpose of discharging their moral obligation to repay their father's debt, the two sons of the Raja conveyed their own property to their father's creditor, the respondent. After the execution of the conveyance, Ex. B, an application was made on 2nd June 1939 by the respondent in the said Money Execution case No. 118 of 1936 for withdrawal of the attachment on the ground that there was then no necessity to continue it, as his dues under the personal decree had been adjusted and satisfied. The executing Court on the same day recorded the following order:

Heard learned pleaders for the parties. They jointly ask me to cancel the attachment (existing by special order) in Money Execution 118 of 1936, though that case was dismissed.

Order.

The said attachment is cancelled and the decree in question is recorded as adjusted, as stated by the learned pleader for the decree-bolder and the pleader of the judgment-debtor, according to the adjustment mentioned but not defined in the petition of to-day. Make necessary cotes and send this petition to the District Record Room.

8. Raja Pramatha Nath Malia died in August 1940 and his aforesaid two sons succeeded him. They in their character as the legal representatives of their father therefore are "borrowers" within the meaning of the Bengal Money-lenders Act, 1940 (hereafter called the Act). On 2nd January 1941 they filed the suit in which this appeal arises under S. 36 of the Act.

9. The plaint proceeds upon the footing that the respondent's mortgage suit No. 78 of 1922 was a suit to which the Act applies on the ground that execution of the personal decree passed in that suit (Money Execution No. 118 of 1936) was pending on 1st January 1939. It is their case that only further proceedings therein were "suspended for a time" by reason of the aforesaid order passed by the executing Court on 30th January 1937. The plaintiffs further allege that more than double the principal of the loan, advanced to the mortgagors, the Malias, had been paid to or realised by the respondent before the execution of the said conveyance, Ex. B.

10. The prayers are for reopening the transaction and for taking accounts in terms of the Act and for a reconveyance of Senapati Mahal without any further payment. In short they want the preliminary and final decrees for sale, as well as the personal decree, passed in the said mortgage Suit No. 78 of 1922 to be reopened, as also the adjustment evidenced by the said conveyance, Ex. B, dated 4th January 1939 and for reconveyance of Senapati Mahal. In para. 15 of the plaint they say that as nothing was due to the respondent on the date of the said conveyance if calculations be made in terms of the provisions of S. 30 of the Act there was no consideration for the said conveyance. The respondent raises many pleas in his written statement. On the pleadings a number of issues were framed.

11. The learned Subordinate Judge proposed to decide some of those issues as preliminary issues. One of those issues, namely Issue No. 2, is worded thus: "Does the plaint disclose any cause of action." In form that issue was answered by him in the negative, but in effect the learned Subordinate Judge decided: (1) that the said mortgage suit was not a suit to which the Act applies; (2) that all the decrees passed in the mortgage suit, including the personal decree, had been satisfied before 1st January 1939; so for each one of those reasons proviso (ii) to S. 36(1) of the Act stood in the plaintiffs' way; (3) that S. 30(1)(a) of the Act had no retrospective operation and so the plaintiffs were not entitled to any relief; and (4) that the plaintiffs were not entitled to get back Senapati Mahal without any payment, as at the date of the conveyance they were not "borrowers." They had conveyed that property to the respondent when their father was alive to satisfy their father's debt in discharge of their moral obligation. The parties were allowed to and did adduce all the evidence bearing upon the aforesaid four questions (vide orders Nos. 8, 11, 14, 15 and 18 recorded in the order sheet). The question before us is whether those conclusions of the learned Subordinate Judge are right. There is nothing wrong in the procedure adopted by the learned Subordinate Judge. It is substantially in accordance with the provisions of O. 14, R.2 read with O. 15, R. 3, Civil P.C.

12. We may at once say that we cannot agree with the view expressed by the learned Judge that the personal decree passed in the mortgage suit had been satisfied before 1st January 1939, the relevant date mentioned in proviso (ii) of S. 36(1) of the Act. In our view it was satisfied on 4th January 1939, the date on

which the conveyance was executed, and not earlier, for the title to Senapati Mahal, which was given for satisfying the said decree passed to the respondent on that date, and could not have passed to him before the date of that registered conveyance. We do not also agree with the conclusions of the learned Judge on what we have indicated above as point No. 3. We need not examine that point further, for the learned advocate appearing for the respondent has stated before us that he cannot support this part of the Judge's judgment. The substantial points to be considered are the first and the fourth points noticed above. An additional point raised by the learned advocate for the respondent, namely, whether his client can claim the protection given by sub-s. (5) of S. 36 of the Act, has also to be considered.

13. It is quite apparent that the plaintiffs will not be able to get any relief unless they are able to reopen the decrees passed in Mortgage Suit No. 78 of 1922, and that in view of the provisions of proviso (ii) to S. 36(1) of the Act they could claim to have those decrees reopened only if the said mortgage suit is "a suit to which the Act applies". The phrase "suit to which the Act applies" has been defined in S. 2(22) of the Act. As that mortgage suit had terminated in decrees passed before 1st January 1939, that suit would be a suit to which the Act applies only if "a proceeding in execution" for the recovery of the mortgage loan or a proceeding for enforcement of any agreement, whether by way of settlement, or any account or otherwise was instituted after, or was pending on 1st January 1939. The application of the respondent decree-holder (Ex. 2-a) filed on 2nd June 1939 for withdrawing the attachment cannot, in our judgment, be regarded by any stretch of language to be an application for enforcing such an agreement. Nor can we accept the contention advanced by the Learned Counsel for the appellant that receipt of money or anything by way of accord and satisfaction of his decree out of Court amounts to execution. The plaintiffs can succeed in bringing the said mortgage suit within the definition only if "a proceeding in execution" can be said to have been pending on 1st January 1939.

14. The Learned Counsel appearing for the plaintiffs appellants contends that execution case No. 118 of 1936 must be taken to be pending on that date, because (a) the application for execution which was numbered as execution case No. 118 of 1936, was not finally disposed of by the order dated 30th January 1937, the substance of which we have recited before, but it was kept in suspense pending settlement, being merely removed for a time from the list of ready cases, and alternatively, (b) if it be held that the said execution case was dismissed for non-prosecution on 30th January 1937 the subsistence of the attachment, which was not withdrawn till 2nd June 1939, kept "proceeding in execution" pending on 1st January 1939.

15. For the purpose of supporting his first contention he draws our attention to a number of reported cases. The cases cited by him are (1) Venkata Rao Bapu v. Bejoy Singh, 10 Bom. 108; (2) Pearilal Singh v. Chandi Charn Singh, 5 C.L.J. 80 : (11 C.W.N. 163); (3) Gobinda Chandra Pal v. Dwarka Nath Pal, 33 Cal. 666;

(4) Jagadish Bhattacharjee and Others Vs. Bama Sundari Dasya and Others, ; (5) Chhattar Singh and Another Vs. Kamal Singh and Others ; (6) Kristo Kamini Debi Vs. Girish Chandra Mondal and Others, ; (7) Sheik Qamar-ud-Din v. Jawahir Lall, 32 I.A. 102 : (27 ALL. 334 (P.C.)) and (8) AIR 1939 80 (Privy Council) . These cases in our opinion do not help the appellant. In the second, third and fourth cases the question was whether an attachment can be kept alive by a special order after the dismissal of the execution case. These cases related to execution proceedings either started when the CPC of 1882 was in force or before the amendment by this Court of O. 21, R. 57, Civil P.C. of 1908. The amendment has settled the question. The fifth and the sixth lay down the proposition that what appears on the face of it to be fresh application for execution can be considered for the purpose of limitation to be an application for the continuance or revival of an earlier application for execution where the former application could not be proceeded with, not by reason of the default of the decree-holder, but by reason of its course being interrupted by objections or claims subsequently found to be groundless, or which had been obstructed by reason of an injunction or a like obstruction subsequently dissolved. In these circumstances the earlier execution would be held to be merely suspended during the period when the injunction or obstruction lasted or the order on the claim or objection adverse to the decree-holder held the field. The other cases noticed above were cases where the question was whether a later application for execution could be considered as an application for revival of an earlier execution proceeding for meeting the plea of limitation. In the first case the question was whether a later application for execution could be considered to be an application for revival of an earlier application for execution. The Court held it to be so. In that case on the application of the parties the earlier execution case was "struck off" pending negotiations for settlement on the express understanding that if the negotiations failed the decree-holder would present another application for execution. The judgment is a short one, with practically no reasons being given. The case was also decided on another independent ground, That decision can be supported on the ground that it was a case of the type where an irregular order had been made by the Court in the earlier execution case, which is to be given by the Court a temporary operation for saving a later application for execution from being met with the plea of limitation. In Qamar-ud-Din's case (32 I.A. 102 : 27 ALL. 334 P.C.) the execution Court, after ordering the execution to proceed, ordered, on 29th November 1889, the transfer of the execution case to the Collector as the property sought to be sold was the judgment-debtor's ancestral property. That was the procedure provided for in the Civil Procedure Code. By the same order the execution case was "struck off." By a later order, dated 23rd December 1889, the Court ordered that the copy of decree be not sent to the Collector as the decree-holder did not deposit the sum of Re. 1 being the costs of transmission. Other proceedings which would have had obstructed the course of execution intervened and after the termination of these proceedings in favour of the decree-holder the latter applied on 23rd November 1897 for revival of the execution case that was ordered to be sent by the

execution Court to the Collector. The Judicial Committee held that that application was a good one. Sir Arthur Wilson pointed out that the earlier execution case had not come to an end at the close of the year 1889, as the order of 29th November 1889 was an order in aid of execution, and the second order dated 23rd December 1889 was in no sense a final order. This case has no bearing on the question which we have to decide. The Judicial Committee of the Privy Council threw a doubt on the regularity of the first mentioned order which had used the words "execution case struck off," but proceeded on to say that that order did not terminate the execution proceedings as by the same order the execution case was transferred to the Collector in order that that officer may proceed to sell the property of the judgment-debtor sought to be sold in execution by the decree-holder. In the AIR 1939 80 (Privy Council) a final decree for sale had been passed on 22nd January 1916. The learned Subordinate Judge who had passed the decree transferred it in 1917 for execution to the Court of the Subordinate Judge at Fyzabad where the decree-holder applied for sale of the properties of the judgment-debtor on 3rd July 1917. The properties sought to be sold being ancestral the proceedings were transferred to the Collector by the last mentioned Judge as a notification had been issued by the Local Government under S. 68, Civil P.C., requiring sales of that class of property by the Collector. While the proceedings were pending before the Collector the judgment-debtor made large payments. As a result of the correspondence between the Collector and the Subordinate Judge, the latter without reference to the decree-holder "consigned the execution case to records." Thereafter, adjustment of the decree was made by the parties, by which the judgment-debtor agreed to pay a certain sum of money out of the decretal amount at certain interest and in instalments. There being default in payment of the instalments the decree, holder applied to the Subordinate Judge for execution on 24th March 1930 on a tabular statement for the balance of the money due under the adjustment. The judgment, debtor pleaded that that execution application was barred by reason of the provisions of S. 48, Civil P.C., Sir George Rankin in delivering the judgment of the Judicial Committee remarked that the form of the application, namely that it was for execution on a tabular statement, did not matter. The application was really one for reviving the execution that was started in 1917. At p. 100 of the report he observed thus:

The question of the character of the application has to be judged upon the circumstances of each case, and in the present case the bargain of the parties is a circumstance of great importance, as is the fact that the Fyzabad Court acted by inadvertence contrary thereto. The substance of the matter must prevail over the form of the application, which in their Lordships' opinion, is not a fresh application as contemplated by S. 48.

16. That decision can only be quoted as laying down a proposition, for which no authority is needed, that Courts would look to the substance and not to the form. Sir George Rankin, however, pointed out that each case must be judged by its own facts and circumstances. In the case before us, there is no ambiguity in the

prayer made by the respondent in his petition, Ex. 2. In view of the negotiations for settlement he stated in effect that he was not desirous of proceeding with the execution case. The Court understood him in that way and passed an unambiguous order. The execution case was dismissed for non-prosecution, but the attachment was maintained by a special order in terms of the last part of O. 21, R. 57, Civil P.C. Both the parties also understood the matter in that way, namely, that the execution case No. 118 of 1936 was dismissed for non-prosecution, but the attachment was kept in force by a special order passed in terms of that rule of the Civil Procedure Code. This is apparent also from the introductory part of the order passed by the executing Court on 2nd June 1989 on the respondent's application, Es. 2(a), for withdrawal of the attachment. We accordingly overrule the first contention of the appellants.

17. The further question is whether the mortgage suit (No. 78 of 1922) could be held to be a suit to which the Act applies by reason of the attachment, which was continued by the special order passed in terms of the last portion of O. 21, R. 57 after the application for execution had been dismissed for non-prosecution.

18. According to the definition given in S. 2(22) of the Act a suit to which the Act applies is a suit (which includes also an appeal from the decree passed in the suit) for recovery of a loan instituted after or pending on 1st January 1939; We are referring only to the portion relevant to the case before us. The definition is enlarged by the addition of the words "or proceeding." The word "proceeding" in that part of the definition would have ordinarily meant an "original" proceeding for the recovery of a loan - a proceeding in the nature of a suit, - but to avoid that construction the legislature added the words "and includes a proceeding in execution." What follows in the following cls. (b) and (c) do not by their very nature apply to a "proceeding in execution." Clause (a) only can fit in with the phrase "a proceeding in execution." According to grammatical construction "a proceeding in execution" must therefore be for the recovery of a loan advanced before or after the commencement of the Act: *Kalish Chandra Shah v. Bemola Sundari*, 50 C.W.N. 359. The phrase "a proceeding in execution" taken along with cl. (a) therefore means "a proceeding for execution" of a decree passed for the recovery of a loan advanced before or after the commencement of the Act. If such a proceeding is not started after 1st January 1939, it must be "pending" on 1st January 1989 if the suit is to be a suit to which the Act applies. In one sense a matter is said to be pending when it is "undecided" or "is awaiting decision". That is how it has been put in the Special Bench decision in *Aparna Kumari v. Grish Chandra Choudhury*, 48 C.W.N. 406 at p. 409. In substance, however, a proceeding can be said to be pending on a certain date, if it had been instituted before that date, had continued up to that date and was alive at that date, and could have proceeded further, either successfully or unsuccessfully, to its desired end if not temporarily obstructed by stay or injunction or things of that nature.

19. If an application for execution is dismissed on a particular date it can in no sense be said to be pending after that date, for the decree-holder could not by

reason of the order of dismissal take any further steps in that proceeding for the purpose of realising his decree. No doubt an attachment is a process in execution, but, after the dismissal of the execution case in which the attachment was effected, the attachment, if kept in force by a special order passed under the last portion of R. 57 of O. 21, would by itself afford no means to the decree-holder to realise his decretal amount in that proceeding. It would no doubt have the effect of preventing the judgment-debtor from making a private transfer of the property attached, or of any interest therein, to the prejudice of the decree-holder, or of the eventual purchaser at the court sale, in the meantime before or after another application for execution is made. The fact that when the later application for execution is made, no further attachment of the selfsame property is needed and the proceedings in execution started by that application would proceed from the stage of the attachment does not in our opinion affect the question we are now Sealing with.

20. We have already held that the application filed on 2nd June 1939 withdrawing the attachment cannot be held to be a proceeding to enforce an agreement within the meaning of cl. (b) of S. 2(22) of the Act. We accordingly hold that the mortgage suit (Suit No. 78 of 1922) is not a suit to which the Act applies. On this ground the plaintiffs cannot get the reliefs they have asked for, for the decrees passed in that suit cannot be reopened. In view of this conclusion the other points raised are not material for the disposal of the appeal. We would, however, express our views on the matter briefly.

21. The respondent's father in his character as sub-mortgagee of the Malia's cannot be called an "assignee" of the original mortgagees, Laik Banerjee and Company, within the meaning of sub-s. (5) of S. 36 of the Act. The word "assignee" means a person to whom the totality of the interest of the transferor is vested. *Promode Kumar Roy v. Nikhil Bhusan Mukherjee*, 50 C.W.N. 407 : (A.I.R. 1946 Cal. 370). Nor can the respondent be taken to be assignee of that firm by reason of his purchase of its mortgagee interest on 9th February 1920, for the transfer to him was not by act of parties but by reason of a sale held in invitum.

22. If we had held the mortgage suit (No. 78 of 1922) to be a suit to which the Act applies we would not (have?) held the prayer for reconveyance of Senapati Mahal to be inadmissible on the grounds set forth by the learned Subordinate Judge. In substance the conveyance, Ex. B, represented an adjustment between the then "borrower", Raja Pramatha Nath Malia, and the lender, the respondent. By the transaction the respondent's decree against the Raja was satisfied. Even if it cannot be held to be an adjustment at the date of the suit the plaintiffs were borrowers, in their capacity of legal representatives of their father, and in that capacity could have claimed for reopening the decrees passed in the said mortgage suit, if that suit was one to which the Act applied. If after reopening the decrees and on taking accounts nothing was found due at the date of the said conveyance, Ex. B, they could claim to have property back on the

allegations made in para. 15 of their plaint. At most it could be said that there was joinder of two causes of action, one on the basis of the right given by S. 36(1) of the Act, and the other under the general law, which entitles a party to get back his property from the purchaser on failure of consideration. There would have been no objection to the joinder of these two causes of action, for the plaintiffs and the defendant in respect of each one of these two causes of action were the same set of persons. As we hold that mortgage Suit No. 78 of 1922 is not a suit to which the Bengal Money-lenders' Act, 1940, applies the appeal must be dismissed with costs.