

**(1953) 05 CAL CK 0008**

**In the Calcutta High Court**

**Case No : A.F.O.O. No. 70 and Civil Revision No. 383 of 1953**

Radha Kisen Chamria and Others

APPELLANT

Vs

Keshardeo Chamria and Another

RESPONDENT

**Date of Decision : 27-05-1953**

**Acts Referred:**

Bengal Money Lenders Act, 1940 — Section 2(12), 30  
Civil Procedure Code, 1908 (CPC) — Section 2(2), 47, 96  
Evidence Act, 1872 — Section 103

**Citation : AIR 1954 Cal 105**

**Hon'ble Judges : Debabrata Mookerjee, J; Das, J**

**Bench : Division Bench**

**Advocate : A.C. Gupta, C.N. Laik, Amiya K. Mukherji, A.C. Mitra, Nirmal K. Ganguly, S.K. Roy and Radhapada Banerjee, for the Appellant; Purushottam Chatterjee, Bejoy Bhose, Rameswar Saha and Rabindra N. Chakrabarty, for the Respondent**

## **Judgement**

Das, J.—This appeal is directed against an order of Shri K. C. Sen, learned Subordinate Judge, 1st court, Howrah dated the 31st January, 1953.

2. The disputes between the parties spread over a long period and are varied.

3. For the purposes of this appeal the facts culminating in this appeal may be stated as follows.

4. The respondent No. 2, Durga Prosad Chamria purchased in execution of a decree the disputed property known as Rurmal Goenka's property for a sum of Rs. 8,61,000/-. Out of the purchase price Durga Prosad deposited on July 14, 1920 a sum of Rs. 2,15,250/- being one-fourth of the price and on August 20, 1920 a sum of Rs. 6,45,750/-, being the balance of the price.

5. It is the case of the appellants that in the same year, Durga Prosad agreed to sell the disputed property to the appellants for a sum of Rs. 8,61,000/- with interest at 6 3/4 p. c., p. a., from the aforesaid respective dates of payment of

the said sum by Durga Prosad and costs incurred by the latter.

6. On June 21, 1923, Durga Prosad instituted a suit, being Title Suit No. 61 of 1923 of the Court of the Additional Subordinate Judge, Howrah, against the appellants for a decree against the appellants to execute and register a proper conveyance and for other reliefs, the claim being laid at Rs. 11,03,063 as. 8 pies 3 only.

7. The above suit ended in a compromise.

8. A petition of compromise was signed by the party on April 17, 1926. The terms of the compromise are set forth at pp. 38-39 of the paper book.

The first part of paragraph (1) of the petition of compromise runs as follows :

"The defendants (i.e., the appellants) shall pay to the plaintiff (i.e., the respondent No. 2) the moneys paid by the plaintiff for purchase of Rurmal Goenka's Howrah property, as shown in Schedule "A", hereunder as also the expense actually incurred by him for such purchase and the confirmation thereof with interest upto payment or realisation at the rate of nine annas per rupees one hundred per sambat month from the respective dates of payment by the plaintiffs with yearly rests being calculated according to Sambat Miti up to the thirty-first December, in each year."

9. The petition then prescribed the mode of payment viz.,

"(a) The money in the hands of the receiver shall be paid at once to the plaintiff.

(b) The sum of Rs. 4,25,000/- to be paid on the execution of the petition of compromise.

(c) A sum of Rs. 35000/- to be paid every month on the 21st day of each month commencing from 21st April 1926 and will be continued to be paid for 18 months.

(2) In default of payment of any instalment on the due date or within 7 days thereafter, the remaining instalments will become payable.

(3) The disputed property shall remain charged with payment of the sums aforesaid. The plaintiff will be at liberty to execute the decree without enforcing the charge.

(4) The disputed property was declared to belong to Anardeyi Sethani from the date of the decree."

10. Schedule A is in these terms :

11. A decree recording the above compromise was passed on April 19, 1926.

12. A sum of Rs. 4,25,000/- was paid by the appellants to Durga Prosad on April 17, 1926 and a sum of Rs. 60,987 as. 15 pies 6 which was in the hands of the receiver was also paid to the plaintiff.

13. It is the case of the appellant that they paid to Durga Prosad a sum of Rs. 35,000/- on April 21, 1926, that they paid further Instalments of Rs. 35,000/- per month till July 1927 and that the total payments thus made to Durga Prosad amounted to Rs. 10,10,987 as. 15 pies 6 only.

14. As Durga Prosad did not certify payment of the above sum of Rs. 10,10,987 as. 15 pies 6 an application was filed by Sm. Anardeyi Sethani under Order XXI Rule 2 of the CPC for certifying the said payments. Durga Prosad objected to certifying payments made beyond 90 days.

15. By an order dated January 25, 1928, the Court certified payment of only Rs. 1,05,000 which was made within 90 days.

16. Sm. Anardeyi Sethani then brought a suit against Durga Prosad for recovery of the said uncertified sum of money, viz., Rs. 9,05,987 as 15 pies 6 and obtained a decree on May 24, 1929.

17. The decretal dues viz., Rs. 9,31,984 as. 9 pies 2 were set off against the decree in Title Suit No. 61 of 1923 on November 18, 1929.

18. The appellants paid two further sums of Rs. 1,93,712 as. 12 pies 9 and Rs. 1,25,000/- on October 10, 1931 and November 14, 1931 respectively.

19. Meanwhile Durga Prosad had executed the consent decree in Title Suit No. 61 of 1923. This was registered as Title Execution case No. 89 of 1929. Several petitions of objection were filed by the judgment-debtors (the appellants). By order No. 43 dated 15th June 1931, the objections filed by the judgment debtors were disallowed. The judgment-debtors made some payments towards the decree ultimately by order No. 81 dated 30th March 1931 the said execution case was dismissed on part satisfaction.

20. On March 17, 1932 Durga Prosad assigned the said consent decree in Title Suit 61 of 1923 in favour of Kesardeo Chamria, the contesting respondent in this appeal.

21. A further payment of Rs. 1,93,712 as. 12 pies 9 by the appellants on May 28, 1934 was credited by the consent decree on July 4, 1941.

22. On October 10, 1936, Kesardeo filed an application for execution of the consent decree in Title Suit No. 61 of 1923, on the strength of the said deed of assignment dated March 17, 1933 executed by Durga Prosad. The application was duly registered as Title Execution Case No. 68 of 1936. The claim in the execution case was Rs. 4,20,693 as. 8 pies 9 together with interest and costs.

23. In this execution case, the judgment debtor filed a petition of objection u/s 47 of the CPC giving rise to Misc. case No. 1 of 1937 renumbered as 25 of 1937. This Miscellaneous case was dismissed upto this Court on appeal on the finding that Kesardeo was not a benamdar of Durga Prosad but was a bona fide assignee.

24. The judgment debtor filed 2 other petitions of objection giving rise to Misc.

Cases Nos. 31 of 1942 and 5 of 1943. Both these cases were dismissed.

25. Meanwhile on July 17, 1941, Sm. Anardeyi Sethani died and appellant No. 3 was substituted in her place.

26. The appellants paid further sums of Rs. 77,809 as. 14 pies 9, Rs. 1,00,000/- and Rs. 75,000/- respectively on August 17, 1942, February 2, 1945 and February 19, 1945.

27. Thus the appellants paid in all a sum of Rs. 17,68,507 as. 4 pies 8 only towards the consent decree in Title Suit No. 61 of 1923 upto February 19, 1945.

28. The aforesaid Title Execution Case No. 68 of 1936 was dismissed for default on March 5, 1945.

29. On an application by Keshardeo for restoration of the execution case to file, the case was restored to file on April 25, 1945.

30. The order for restoration was challenged by the appellants. After certain proceedings, the order for restoration made by the learned Subordinate court on April 25, 1945 was maintained by a decision of the Supreme Court dated October 30, 1952 reported as -- Keshardeo Chamria Vs. Radha Kissen Chamria and Others, (A).

31. On December 11, 1952, the respondent Kesardeo filed an application in the said execution case for arrest and detention of appellants Nos. 1-2. In the Schedule to the petition Kesardeo stated that he was entitled to realise Rs. 4,57,321 as 3 pies 9 only.

32. A petition of objection was filed by the appellants on December 13, 1952. The petition was purported to be u/s 47 CPC and the Bengal Money Lenders Act.

33. The petition after reciting the facts prayed for an order that (a) the execution case be disposed of on full satisfaction in terms of Section 30 of the Bengal Money Lenders Act, because double the principal of the original loan has been paid.

(b) If necessary, the transaction of April 17, 1926 and for the compromise decree dated April 19, 1926 be reopened and a new decree in accordance with the Bengal Money Lenders Act be passed and a sum of Rs. 46,507 as. 4 pies 3 be directed to be refunded.

(c) If further necessary the respondent No. 2 Durga Prosad Chamria be directed to indemnify the appellants against the claims of the respondent No. 1 Kesardeo Chamria.

(d) Alternatively the execution case be dismissed on the ground that the consideration and object of the transaction dated April 17, 1926 is unlawful and void, being hit by the provisions of Section 30 of the Bengal Money Lenders Act. Prayers (e) to (i) are incidental or interim prayers.

34. On January 2, 1953 the respondent No. 1 Kesardeo Chamria filed a petition of objection inter alia to the following effect.

"(a) The petition filed by the judgment debtors appellants is not maintainable.

(b) the said petition is barred by res judicata.

(c) the said petition is barred by limitation.

(d) the said petition alleging over-payment is devoid of substance and a sum of Rs. 4,59,566 as. 1 pies 3 was due on January 2, 1953 and that the dues of the judgment-debtor were daily increasing at the rate of Rs. 86 as. 2."

35. It may be noted that the payment of Rs. 17,68,507 as. 4 pies 8 as set forth in Annexure A of the petition of objection filed by the judgment-debtor appellants was not specifically denied. The Court below proceeded on the footing that the said payments were made. The payment of the said sum was not disputed in this appeal.

36. On January 17, 1953, the Court took up the hearing of the question of the maintainability of the application u/s 47 CPC filed by the judgment-debtor and the objections thereto filed by the decree-holder (vide order No. 349 dated January 17, 1933).

37. On January 31, 1953, Sri K. C. Sen learned Subordinate judge, 1st court Howrah decided the point in favour of the decree-holder being of opinion that the judgment-debtor's petition for relief u/s 30 of the Bengal Money Lender's Act is not maintainable.

38. The judgment-debtors have preferred this appeal against the said order.

39. Mr. Chatterji who has appeared for the respondent No. 1 Keshardeo has raised a preliminary objection that no appeal lies against the said order. Reliance is placed on the said decision in -- Promode Nath Sinha Roy and Others Vs. Sm. Raseshwari Dassi and Another, ; -- Sk. Budhan Mia Vs. Jotindra Mohun Dutt, .

40. In my opinion, an appeal lies. The order appealed from disposed of an objection filed by the judgment-debtor to the execution of the decree based on the Bengal Money Lenders' Act that the decree was already satisfied and that further execution of the decree was not available to the decree-holder. The order decides a cardinal matter in controversy between the parties and clearly comes within Section 47 of the CPC and is a decree within Section 2(2) of the Civil Procedure Code. See -- "Bhup Indar Bahadur Singh v. Bijai Bahadur" 27 Ind App 209 (PC) (D), -- Khatemannessa Bibi Vs. Upendra Chandra Mandal and Others, .

41. In Promode Nath Sinha Roy and Others Vs. Sm. Raseshwari Dassi and Another, the appeal was filed against an order made on an application filed in execution proceedings, u/s 36(6)(a)(ii) of the Bengal Money Lenders Act. The order was not passed on a petition of objection filed by the judgment-debtor to the execution of the decree. I have satisfied myself from the paper-book of the

appeal that this was the position. The case is therefore distinguishable.

42. In *Sk. Budhan Mia Vs. Jotindra Mohun Dutt, (C)*" the application was filed by the judgment-debtor u/s 36(6)(a)(ii) of the Bengal Money Lenders Act for relief under the Act. The case is also distinguishable.

43. The view taken by me is supported by a Bench decision of this Court in -- "*Satish Chandra v. Riyasat Hossain*" ILR (1949) Cal 487 (F), where on a review of the cases, it was held that an order rejecting an application u/s 38 of the Act on the ground that the transaction was not a mortgage but a lease was held to be appealable.

44. In. my opinion, there is no substance in the preliminary objection.

45. I now proceed to deal with the merits of the case. The argument of Mr. Gupta proceeded on the basis that the decree dated April 29, 1925 created a loan in substance.

46. The term loan is defined in Section 2(12) of the Act to mean

"an advance, whether in money or in kind, made on condition of repayment with interest and includes any transaction which is in substance a loan".

Clauses (a) to (i) of Section 2(12) exclude certain transactions from the category of a Code.

47. Thus the essentials of a loan according to the Act are (1) An advance, which may be in money or in kind (2) The advance must carry interest (3) There must be a condition of repayment.

48. It cannot be disputed that conditions (2) & (3) are satisfied. The question is whether there was an element of advance attending the transaction, it was urged that the advance may be actual or notional, as the expression "in substance a loan" sufficiently indicates.

49. Our attention was drawn to certain cases -- The case of -- *Saradindu Sekhar Bannerjee Vs. Lalit Mohan Mazumdar and Another*, , does not lay down any principle.

50. Reference was made to the following observations in -- *Kunja Behari Pal Vs. Rai Satyendra Nath Das Bahadur and Another*, .

"The Legislative has for reasons of policy thought it fit not to define the term "loan" in an inelastic or rigid manner and in every case we have got to look to the substance or the essential nature of the transaction for the purpose of determining as to whether or not it is a "loan" within the meaning of the Act. If a vendor of property feeling unable to rely on the personal credit of the purchaser merely takes a bond or security from him in respect of unpaid purchase money the transaction by itself cannot rank as a loan because there is no element of advance involved in it."

51. In -- Fateh Chand Mahesri Vs. Akimuddin Chaudhuri, , the test was said to be whether the transaction was an interest-bearing investment.

52. The above cases proceed on the footing that if the unpaid purchase money was left outstanding as an investment, the same may be regarded as a loan.

53. The question is whether there was a notional advance, in the facts of the present case and if so, when?

54. Mr. Gupta learned Advocate for the appellants contended that the notional advance was made on the date of the decree.

55. In the present case, the petition of compromise was executed on April 17, 1926. I have recited the terms of the compromise. Interest was made payable retrospectively from 14th July 1920 and 20th August 1920 in respect of Rs. 2,15,250 and Rs. 6,45,750 respectively.

56. If a notional advance has to be spelt out, such advance must be deemed to have been made on the aforesaid dates. I find it hard to accept the position that on the date of the decree, the parties agreed to a notional advance of the said two sums of money to carry interest retrospectively from two different dates. The terms of the compromise show that the money in the hands of a receiver were regarded as moneys to which the appellants had title and the said money was agreed to be and in fact was appropriated towards the said two sums.

57. Assuming that the effect of the compromise was to substitute the relationship of debtor and creditor for that of an intending purchaser and intending vendor, such relationship in the facts of this case, must be deemed to have arisen if at all retrospectively from the aforesaid respective dates of payments of the two sums by Durga Prosad i.e. on July 14, 1920 and August 20, 1920 or at any rate on the date of the execution of the petition of compromise viz., April 17, 1926.

58. The above conclusion is supported by the conduct of the parties.

59. According to the appellants the new relationship was created on April 19, 1926 and not on any anterior date.

60. The Bengal Money Lenders' Act came into force on September, 1, 1940. On that day, the present Execution case No. 68 of 1936 was proceeding at the instance of the respondent Kesardeo Chamria. The Appellant's petition of objection u/s 47 of the CPC raising a plea of full satisfaction of the decree, being Misc. Case No. 1 of 1937 S. C. No. 25 of 1937 was awaiting final adjudication. If relief under the Bengal Money Lenders Act was available to the appellants, as is their case now, they would have got substantial relief and execution would have been directed to proceed for an amount much less than what was claimed by the decree-holder Kesurdeo.

61. It must be noted that the appellants filed another petition of objection u/s 47 Civil Procedure Code, giving rise to Misc. Case No. 31 of 1942, on July 18, 1942,

and still another petition of objection, being Misc. Case No. 5 of 1943 on January 18, 1943.

62. In these petitions of objection, a plea under the Bengal Money Lender's Act was not taken.

63. It is true that double the principal of the original loan was not paid till February 19, 1945. At the same time, the amount for which execution was proceeding was in excess of double the principal of the original loan less the admitted payments towards the decree and a plea under the Bengal Money Lenders Act would have been an admissible and necessary plea, if the Act was available to the appellants.

64. In my opinion, no loan was created, on April 19, 1926 by the decree in Title Suit No. 61 of 1923, The contention raised by the appellant must be overruled.

65. I have proceeded on the footing that the essence of the transaction between the appellants and the respondent Durgaprosad partook of the character of a loan.

66. Mr. Chatterji, learned Advocate for the respondent Kesurdeo has pressed before us the view which found favour with the learned Subordinate Judge that

"the transaction by Itself cannot be treated as a loan because there is no element of investment in it."

67. The appellants seek to defeat the execution of the decree on a plea under the Bengal Money Lender's Act. The burden lies on them to prove the plea, viz., that the decree created the relationship of debtor and creditor. No oral evidence was led by the appellants or the respondent. The pleadings of Title Suit No. 61 of 1923 which culminated in the consent decree dated 19-4-1926 have not been produced. An application for appointment of a receiver was made in that suit and a receiver was in fact appointed. The pleadings of the suit, the application for appointment of a receiver and the petition of objection thereto and the order of the Court may have thrown some light on the question before us. These papers might have revealed the cases then made by the parties as regards their mutual relationship. The plea is a belated plea taken in execution of a decree which was passed more than a quarter of a century ago. I do not therefore think it proper to allow the appellants a further opportunity to substantiate their plea.

68. The materials on records are incomplete. On behalf of the appellants an inference is sought to be drawn merely from the petition of compromise dated April 17, 1926. Such an inference is more or less conjectural. I cannot hold that the reasonable Inference to be drawn from the suit petition is to hold that the relationship of debtor and creditor was created on the day of the decree passed on the basis of the petition. In my opinion, the facts of this case do not unmistakably show that the transaction between the parties partook of the character of a loan within Section 2(12) of the Bengal Money Lender's Act and that the sum of Rs. 8,61,000 was an advance made on the date of the decree for

purposes of investment. In my opinion the compromise decree merely provided for an adjustment of their outstanding disputes as on that day. The decree settled the liabilities inter se and provided for payment of the same in the way mentioned in the decree.

69. The above finding concludes the appellants in this appeal.

70. I may note that Mr. Chatterji argued that the decree dated April 19, 1926 cannot be regarded as a transaction within the Bengal Money Lender's Act. In support of his contention, he referred us to the decisions in -- *Accowrie Mukherjee Vs. Sailendra Mohan Dey and Another*, and in -- AIR 1949 15 (Federal Court) .

71. "*Accowrie Mukherjee's case (J)*", did not decide that the word "transaction" does not include "a decree".

72. "*Padmakamini's case (K)*", does not also assist Mr. Chatterji in his contention. On the other hand, the implication of the following passage in -- AIR 1945 108 (Privy Council) , viz., "in spite of the obscurity of the language of Section 33, Bengal Money Lender's Act. It is clear that the Legislature intended that the power of reopening a transaction should extend to the reopening of a decree", which was cited with approval in -- "*Padmakamini's case (K)*", is that the word "transaction" in Section 36 of the Bengal Money Lender's Act includes a decree.

73. Proviso to Section 36(1) and Sub-section (2) of Section 36 also support the view that the word transaction includes a decree.

74. I do not think that a decree cannot under any circumstances create the relationship of lender and borrower.

75. I accordingly overrule the above contention of Mr. Chatterji.

76. The learned Subordinate Judge was of opinion that as the respondent Kesurdeo was a pre-Act assignee of the decree, the judgment-debtors appellants cannot get any relief under the Bengal Money Lender's Act as against the appellant.

77. The assignment in favour of Kesurdeo is dated March 17, 1933, long before the Bengal Money Lender's Act. It is no longer disputed that this assignment is bona fide. The question which has been argued is whether the respondent Kesurdeo is protected by Section 36(5) read with Section 28 of the Bengal Money Lender's Act. The learned Subordinate Judge was of the opinion that the respondent Kesurdeo was so protected in view of the decision of the Judicial Committee of the Privy Council in -- AIR 1945 108 (Privy Council) (L)", which held that a pre-Act bona fide assignment of a consent decree was protected.

78. Mr. Gupta sought to get round the decision by submitting that in the present case, the loan is evidenced by the decree itself. In -- "*Renula's case (L)*", there was a pre-existing loan on a mortgage. A suit was brought to enforce the

mortgage. The suit ended in a decree on consent. The effect of the decree was to merge the contractual liability into a liability under the decree, substituting thereby the relationship of judgment debtor and judgment creditor for that of borrower and lender. Reference was made to the following passage.

"They (Sections 28 and 29) deal with the assignment of loans, when the relation of lender and borrower still exists; while, that is, the contract is still executory. They do not apply where there has been a judgment. The contract is then merged in the judgment and the relationship between the parties is that of judgment-creditor and judgment-debtor and no longer that of lender and borrower."

79. It was contended that the above principle which underlies "Renula's case, (L)", cannot apply because the loan in the present case was one created by the decree and there was no preexisting relationship of lender and borrower which merged in the decree substituting therefore the relationship of judgment creditor and judgment debtor.

80. I have already held that in the present case, the loan was not created by the decree but was a pre-existing one. Hence it is difficult to hold that the case is not covered by -- "Renula's case (L)".

81. There are other difficulties in the way of accepting the contention of the appellant that the loan was created by the decree.

82. In the first place, if the decree did not substitute the relationship of judgment debtor and judgment creditor for that of lender and borrower and was merely executory, it is difficult to see how could the decree holder execute the decree and how could a plea be raised by the appellants u/s 36(6)(a)(i) of the Bengal Money Lender's Act which contemplates the pendency of proceeding in execution of the decree.

83. In the second place, a decree on consent presupposes a pre-existing agreement or adjustment which the Court sanctions.

84. Even if we assume that the decree created the loan, the loan must be taken to have been incurred on the date of the decree. It is not disputed that the sum due to the respondent on the date of the decree was Rs. 12,63,149. This sum must be the amount of the original loan and the liability of the appellants in terms of Section 30 of the Bengal Money Lender's Act would be double the sum. The liability of the appellants would be, on this basis Rs. 25,26,298 less payment which come up to Rs. 17,68,507 as. 4 pies 8. The appellants would be still liable for Rs. 7,57,796 as. 11 pies 4. The claim in the Schedule in present execution case was Rs. 4,57,321, as. 3 pies 9.

85. Mr. Chatterji contended that the principle embodied in -- AIR 1945 108 (Privy Council) (L)", was extended to the case of a pre-Act assignment of a mortgage debt which had not merged in a decree. In support of his submission he referred us to the decision of the Judicial Committee of the Privy Council in -- AIR 1949

183 (Privy Council) , on appeal from -- "Tarit Bhusan Roy v. Pramatha Bhusan" AIR 1946 Cal 370 (N). In this case, the mortgage was dated February 2, 1927 and the assignment of the mortgage was dated September 15, 1930. The Sub-mortgage was held to be protected by Section 36, the assignment being a pre-Act one.

86. Even if we assume that the loan was incurred on the date of the decree and the decree evidenced the loan, the respondent Kesurdeo would be a pre-Act assignee of the loan. On the principle accepted in -- "Promode Kumar Roy's case (M)", the respondent Kesurdeo would be protected by Section 36 of the Bengal Money Lender's Act.

87. I cannot therefore, accept the argument of Mr. Gupta on this point.

88. Mr. Mitra, learned Advocate for the appellant No. 3, who followed Mr. Gupta urged a different ground.

89. Mr. Mitra's contention was that Section 30 of the Bengal Money Lender's Act which is based on public interest affords an independent ground of relief to which the borrower is entitled apart from his remedy provided for in Section 36(1), 36(6)(a)(i) or (ii) or Section 38 of the Act. Such a relief the borrower can claim by way of a defence.

90. Reliance was placed on the decision in -- R.D.K. Venkatalingama Nayanam Bahadur Varu, Rajah of Kalahasti Vs. Rao Muni Venkatadri Rao Garu, (O). Our attention was drawn to the following observations made by Odgers J. :

"Although a final decree may be passed without objection or even by consent, still the parties have no power by their act, nor Indeed has the Court power to evade the clear provisions of a statute if it is passed in the interest of public policy and not merely to benefit a particular class or individual."

91. The above observations have to be read in the light of the facts of that case. In the case cited the Bench upheld an objection by the -judgment debtor that a final decree could not be executed by a sale of the properties forming part of an impartible estate, in view of the express provision in Section 8 of the Madras Impartible Estates Act (2 of 1904) which imposed an imperative bar to a sale of the impartible estate or part thereof. The decision proceeded on the basis that the bar was absolute and prevented a sale in execution and the fact that a decree had been passed did not matter. The case is clearly distinguishable.

92. Reliance was also placed on the decision in -- Govinda Mohapatra Vs. T. Venkatakrishnayya and Others, (P). The decision turned on a construction of Section 2(1) Exception 3 of the Orissa Money Lender's Act (in of 1939). The language of the Orissa Act is more stringent and can afford no useful guide for construing Section 30 of the Bengal Money Lender's Act.

93. In my opinion, Section 30 of the Bengal Money Lenders Act is available so long as a suit for recovery of the loan is pending. But after a decree is passed in

such a suit Section 30 cannot per se avail the borrower. The benefit of Section 30 can then be available to the borrower in conjunction with Section 36.

94. The scope of Sections 30 and 36 was considered by the Judicial Committee of the Privy Council in -- "Renula's case (L)", already cited.

95. After quoting Section 30, Lord Goddard observed :

"The effect of this section is to afford a defence to a borrower as to the amount for which he is liable, and that is all that it does. It does not affect judgments already obtained, but merely provides that the amount of a judgment already obtained is to be taken into account in calculating the final amount for which a borrower may be liable. This section therefore, cannot of itself avail a judgment-debtor against whom a decree has been regularly obtained and remains unreversed" ..... (Pages 109-110).

96. Lord Goddard then proceeded to discuss the effect of Section 36 and observed that Section 36 confers the power also of reopening decrees in certain conditions specified in Section 36.

97. Referring to the declaration made by the High Court in -- "Renula's case (L)", that the borrower is not liable to make any further payment under the mortgage, as he had paid double the amount of the loan, Lord Goddard observed :

"In whatever form such a declaration might be expressed, it would have the effect of restraining a judgment creditor who had obtained a regular and final decree from proceeding to execution" (page 110).

98. A close perusal of the decision in --"Renula's case (L)", already shows that once a decree is obtained and remains unreversed a judgment-debtor cannot get rid of his liability for the amount of the decree merely because the decree is in excess of his liabilities determined u/s 30. The judgment-debtor can get a release from his liability under the decree only by a resort to Section 36 and by reopening of the decree on the conditions mentioned in that section.

99. I do not agree with Mr. Mitra, learned advocate for the Appellant No. 3 when he says that the observations made by Lord Goddard in -- "Renula's case (L)", must be read as limited to a case where the judgment-debtor seeks to reopen the decree. The observations are general and equally apply when the judgment-debtors raises a plea u/s 30 in proceedings for execution of a decree.

100. The decision in -- Durga Sankar Sukul and Others Vs. Prafulla Chandra Nag and Others, , related to a plea u/s 30 of the Bengal Money Lender's Act which was raised in the suit itself. The observations at page 301 to which reference was made must be read in the context of the facts of the case.

101. I accordingly hold that the appellants cannot independently of Section 36, get advantage of Section 30 and contend that their liability under the decree must be limited to double the sum of Rs. 8,61,000 less payments made by them.

102. In the present case, no question of reopening the decree u/s 36 can arise.

103. The plea raised by the appellants on the basis of the Bengal Money Lenders Act must be overruled.

104. Mr. Chatterji, learned Advocate for the respondent No. 1 raised a plea of res judicata and the bar of limitation. These questions were not canvassed in the Court below.

105. As I have negated the contentions urged in support of the appeal, it is not necessary to give my decision on these questions.

106. In the result this appeal fails and is dismissed with costs.

107. It appears that the judgment-debtors appellants also filed a petition u/s 115 of the CPC disputing the validity of the order complained of in the appeal. By the judgment just now delivered we have held that an appeal lies against the order complained of. In this view, the petition of revision is not maintainable.

108. The Rule accordingly fails and is discharged. As we have made an order for costs in the appeal, there will be no order for costs in the Rule.

Debabrata Mookerjee, J.

109. I agree.