

(1945) 06 CAL CK 0026
In the Calcutta High Court
Case No : Appeal No. 20 of 1944

Rai Tarit Bhusan Roy Bahadur and, on his death, his heirs and legal representatives Promode Kumar Roy and others APPELLANT

Vs

On the death of Pramatha Bhusan Mukhopadhyaya his heirs Nikhil Bhusan Mukhopadhyaya, minor by guardian mother and others RESPONDENT

Date of Decision : 15-06-1945

Acts Referred:

Citation : (1945) 06 CAL CK 0026

Judgement

Mitter, J.—On 10th February 1937, defendants 2 to 6 (hereafter called the Mukherjees) borrowed Rs. 1,20,000 from defendant 1, the Rangpore Loan Office Limited (hereafter called the Bank)-and as security for the loan mortgaged their zemindary property known as the Tushbhandar Estate. Compound interest at the rate of 8 1/4 per cent, per annum with six monthly rests was payable. The loan was made payable on 31st December 1927. On 15th September 1930 the Bank borrowed Rs. 50,000 from the plaintiff, Rai Bahadur Torit Bhusan Roy (hereafter called Roy), the father of the appellants before us. The security given for this loan was the mortgage which the Mukherjees had given to the Bank. Roy's loan carried compound interest at 8 per cent, per annum with yearly rests. The loan given by him was made payable on 31st March 1931. Roy thus became a sub-mortgagee. On 8th December 1931 Roy filed a suit to recover his dues. The Bank was made defendant 1 and the Mukherjees defendants 2 to 6. He prayed for a decree according to Form No. 11, Appendix D, Civil P. C. A preliminary decree in that form was passed on 29th April 1932. A sum of Rs. 1,43,211-14-6 was found due from the Mukherjees to the Bank on the original mortgage and a sum of Rs. 54,586-5-3 was found due from the Bank to Roy on the latter's derivative mortgage, calculated up to 29th August 1932, (the date of grace). The decree inter alia directed that

in default of payment by defendants 2 to 6 and defendant 1 within the period of grace the plaintiff may apply to the Court for a final decree for sale and on such

application the mortgaged property or a sufficient portion thereof shall be directed to be sold..... If defendant 1 pays to Court the amount due to the plaintiff but defendants 2 to 6 make default in payment of the amount due to defendant 1, defendant 1 shall be at liberty to apply for a final decree for sale.....

2. No payment having been made in terms of the preliminary decree either by defendants 3 to 6 or by defendant 1, a final decree for sale of the mortgaged properties was passed on 23rd June 1933 on the application of Roy. They were sold in execution of the said final decree and were purchased, by Roy, on 12th August 1935 for the sum of Rs. 48,400. The sale was confirmed on 6th August 1936 and possession was delivered to him on 19th August 1936. Thereafter, on 18th March 1939, Roy obtained a personal decree jointly against the Bank and the Mukherjees for the sum of Rs. 28,503. That personal decree was thereafter put into execution in the Court which had passed the decree. As this application for execution had been filed after 1st January 1939 the Bengal Money-lenders Act (10 [x] of 1940) became Applicable to the mortgage suit. That Act would hereafter be called "the Act." The Mukherjees made an application for relief under S. 36, sub-s. (6) cl. (a) (i) of the Act on 9th December 1940. Both Roy and the Bank opposed that application. On 20th June 1941 the learned Subordinate Judge delivered his judgment. Therein he held that all the decrees passed in the mortgage suit- the preliminary, the final and the personal decree-could be reopened. He accordingly directed accounts of the money due on the original mortgage as also on the sub-mortgage to be taken by a Commissioner in terms of S. 30 of the Act. After the submission of the Commissioner's report, another judgment was delivered by him on 21st July 1943, on the basis whereof the new decree was passed. A sum of Rs. 71,624-14-3 inclusive of all costs and interests was found to be due to Roy from the Bank on his sub-mortgage and the sum of Rs. 1,72,994-1-6 from the Mukherjees to the Bank on the original mortgage. This last mentioned sum was made payable by the Mukherjees in sixteen annual instalments, the first of such instalment being made payable within chaitra 1350 B. S. Restoration of possession of the mortgaged properties to the Mukherjees was ordered. In default of payment of any one of the instalments consequential order in terms of cl. (e) of S. 36(2) of the Act adapted to the circumstances of the case was made. Against this new decree Roy preferred this appeal. On his death during its pendency his legal representatives have been substituted. Both the Mukherjees and the Bank have filed memoranda of cross-objections.

3. In support of the appeal the following points have been pressed, namely :

I. That the mortgagors, the Mukherjees, cannot make an application under S. 36 of the Act, because as against them no suit or application for execution was pending on or after 1st January 1939; II. That the preliminary and the final mortgage decrees cannot be reopened;

III. That at any rate the decrees passed in the mortgage suit cannot be reopened inasmuch as Roy was a bona fide assignee of the original mortgage;

IV. That in any event the sub-mortgage cannot be reopened inasmuch as (a) the sub-mortgagor (the Bank) is not the applicant, and (b) the loan advanced to the Bank was a commercial loan, and

V. That in any event proper directions should have been given for the preservation of the mortgaged properties.

4. The Mukherjees have pressed two points only in support of their cross objections, namely:

(A) That Roy should have been held liable for mesne profits, and the amount thereof should have been deducted from the new decree; (B) That at least twenty yearly instalments ought to have been given.

5. The Bank has pressed its cross-objections and in support thereof has urged two points only. The first point is the same as the first point urged by the Mukherjees in support of their cross-objections and the second point that a lesser number of instalments ought to have been given by the new decree.

6. Point I. We do not find any substance in this point. The personal decree was a joint decree against both the Bank and the Mukherjees. As this decree was passed after 1st January 1939 the Act applies. Moreover it was put into execution after 1st January 1939 against the Mukherjees (S. 2, sub-s. (22) of the Act).

7. Point II. The advocate for the appellants contends that as the final mortgage decree for sale was satisfied by the sale of the mortgage properties before 1st January 1939, that decree cannot be reopened in view of proviso (ii) to S. 36 (1) of the Act, and as the reopening of the preliminary mortgage decree would necessitate the eventual passing of a new final decree, the preliminary decree cannot also be reopened. He urges that at most only the personal decree passed under O. 34, R. 6, Civil P. C., can be reopened. This contention found favour with two Division Benches of this Court (46 C. W. N. 457 Naresh Chandra v. Lal Mamud ("42) 29 A. I. R. 1942 Cal. 379 : I. L. R. (1942) 2 Cal. 243 : 202 I.C. 843 : 46 C. W. N. 457 and 47 C. W. N. 524 Bhabani Prosad v. Satyendra Nath ("43) 30 A. I. R. 1943 Cal. 372 : 209 I. C. 34: 47 C. W. N. 524) but a Full Bench has decided otherwise in 48 C. W. N. 361 Mritunjoy Mitter v. Satish Chandra Banerjee ("44) 31 A. I. R. 1944 Cal. 193 : I. L. R. (1944) 2 Cal 376 : 213 I. C. 273:48 C. W. N. 361 (F.B.). As we are bound by the decision of the Full Bench we cannot uphold this contention.

8. Point III. Two questions have to be considered for deciding this point, namely, (a) whether the assignee of a loan advanced before the Bengal Money-lenders Act of 1940, that is to say, of a pre-Act loan where the assignment is also a pre-Act assignment is protected by reason of sub-s. (5) of S. 36 of the Act, and (b) whether a sub-mortgagee is an assignee within the meaning of that sub-section.

9. In chap. 5 of the Act a distinction has been made between pre-Act and post-Act loans, in the matter of assignment. A bona fide assignee or holder for value,

who is not himself a money lender and who has taken the assignment without notice that the loan is affected by the operation of the Act is not to be affected by the provisions of the Act if the loan assigned be a post-Act loan. But where the loan is a pre-Act one, the assignee would be affected in all cases, although if the assignment be a pre-Act one, he would have no notice as contemplated in S. 28, and in the case of a post-Act assignment of such a loan, where he had in fact no such notice from the assignor or otherwise. The result would be that such an assignee of a pre-Act loan would be successfully met with a defence founded on S. 30 of the Act. This would follow by a comparison of sub-ss. (1) and (2) of S. 29. In 49 C. W. N. 491 *Renula Bose v. Rai Manmatha Nath Bose* ('45) 32 A. I. R. 1945 P. C. 108:72 I. A. 156: 222 I.C. 1 : 49 C. W. N. 491 (P.C.) Lord Goddard pointed out that S. 30 by its terms contemplates a defence by the borrower, that the right of a borrower to reopen a decree passed on a loan whether a pre-Act or a post-Act loan, rests only on S. 36 of the Act, and that sub-s. (5) of that section saves a pre-Act assignment from the operation of the Act. No doubt in that case he was considering the case of a pre-Act assignment of a decree and not of a loan where the contract was still executory, and so reserved his opinion on Ss. 28 and 29, but the general effect of sub-s. (5) of S. 36 was determined. That subsection according to the language employed is in effect a proviso to the other parts of S. 36 only and not to S. 29 of chap. 5 of the Act. Seeing that S. 36 contemplates also the reopening of transactions, while the contract is still executory, at the instance of the borrower, an anomaly would result, namely, where a bona fide assignee or holder for value of a pre-Act loan moves the Court to enforce his claim he would be affected by the provisions of S. 30 whereas if the borrower moves against him for relief under S. 36, S. 30 would not affect his claim in spite of sub-s. (1), cl. (c) of S. 36. That anomaly cannot be avoided. It is for the legislature to remove the anomaly. It would be doing violence to the language of sub-s. (5) of S. 36 to treat that sub-section as creating an exception to S. 29, also, or to limit its operation to post-Act loans only. In the case before us a decree on the loan has been passed and as the borrowers have moved the Court for relief under S. 36 by reopening the decree Roy would be saved from the operation of the Act if he is to be regarded as an assignee within the meaning of sub-section (5) of S. 36, in spite of the fact that the loan was also a pre-Act loan and his sub-mortgage was a pre-Act one. The fact that the pre-Act assignment was of the loan while the contract was executory and not of a decree passed on the loan is in our judgment immaterial, inasmuch as at the time of the application under S. 36, a decree had been passed and that decree has to be reopened for giving the judgment-debtors relief. This view is supported by the decisions in 46 C. W. N. 368 *Bhopenendra Nath v. Debendra Nath* ('42) 29 AIR 1942 Cal 370 : 201 I.C. 237 : 46 C.W.N. 368 and 46 C. W. N. 673 *Praphulla Kumar Das v. Kamini Kumar* ('42) 29 A. I. R. 1942 Cal 476 : ILR (1942) 2 Cal. 389:206 I.C. 253 : 46 C.W.N. 673 and support is also lent to it by the judgment of the Judicial Committee in 49 C. W. N. 491 *Renula Bose v. Rai Manmatha Nath Bose* ('45) 32 A. I. R. 1945 P. C. 108:72 I. A. 156: 222 I.C. 1 : 49 C. W. N. 491 (P.C.). The material point therefore is whether a sub-mortgagee is an "assignee"

within the meaning of sub-s. (5) of S. 36, seeing that he does not acquire the totality of the rights of the original mortgagee, for in India a mortgage is the transfer of an interest only (S. 58, T. P. Act).

10. The word "assignee" ordinarily means "one to whom a right or property is legally transferred or made over." It and its analogue "assign" may also mean "the person substituted for another by an act of some kind or other," (per Parke, B., in (1842) 9 M & W. 662 *Doe de Lewis v. Lewis* (1842) 9 M. & W. 662 : 11 L. J. Ex. 305 at p. 664). For reasons hereafter appearing we think that the word "assignee" in chap. 5 and sub-s. (5) of S. 36 of the Act has been used by the legislature in the last mentioned sense, and so an "assignee" would be that transferee only who has got by the act of the transferor all the rights of the latter. As there is nothing in the context to the contrary the word "assignee" must have the same meaning in Ss. 28, 29 and 36 (5) of the Act. The provisions of S. 28 indicate that the legislature contemplated assignments not only of loans, but of benefits of agreements between the lender and the borrower and of the security taken by the lender, but it would not necessarily follow therefrom that in speaking of an assignment of the security the legislature meant to include a sub-mortgagee in the term "assignee". Other relevant provisions of the Act must be taken into consideration. We have already pointed out that respecting the rights of an assignee a distinction has been made in Chapter 5 of the Act between pre-Act and post-Act loans agreements and securities in respect of pre-Act and post-Act loans, and an important saving has been made in favour of bona fide assignee of a post-Act loan, agreement or security in respect of a post-Act loan who at the time of the assignment had no notice of any defect in the subject matter of the assignment due to the operation of the Act. Where the lender parts with all his rights in the post-Act loan, agreement or security in favour of such a transferee no inconsistency would result by reason of the other provisions of the Act as, for instance, S. 38, for the transferor drops out and the powers given to the Court for affording relief to the borrower in spite of his contract could not be exercised as against such a transferee in view of the provisions of proviso (a) to S. 29 (1), but where the transfer to a bona fide transferee without that notice is a transfer of some and not of all the rights of the lender, as in the case of a sub-mortgage, serious inconsistencies would result, if such a transfer is regarded as an assignment and the transferee as an assignee within the meaning of S. 29 (1).

11. A borrower has the right to make an application under S. 38 of the Act, for taking accounts, and for declaring the amount due to the lender. A proceeding under that section is a proceeding entirely between the borrower and the lender. It would follow that to such an application made by the original mortgagor, his mortgagee, namely the original mortgagee, and not the sub-mortgagee would be the opposite party, for the application would relate to the applicant's loan and not to the loan advanced by the sub-mortgagee to the sub-mortgagor. In taking accounts and in declaring the amount due in terms of sub-s. (2) the Court is required to and would have to exercise the powers given in S. 36 as may be appropriate and the order declaring the amount in terms of sub-s. (2) would be

res judicata between the parties to that application. The original mortgagee, in spite of his sub-mortgage, has the right to institute a suit to enforce his mortgage, the only limitation being that he cannot appropriate to himself the fruits of his suit to the detriment of his sub-mortgagee. The result would be that if a suit be instituted by the original mortgagee to enforce his mortgage, the Court in giving him the mortgage decree would have to proceed on the basis of the declaration given in terms of S. 38 (2) and on no other basis. A sub-mortgagee has the right to enforce his mortgage by making both the original mortgagor and the original mortgagee parties defendants and to pray for a decree in form No. 11 of Appx. D, Civil P. C. If he institutes his suit in that form and with that prayer, the amount mentioned in that part of the decree passed in form No. 11 of the said Appendix where the amount due to the original mortgagee from the original mortgagor up to the date of grace would have to be declared, (and the amount so declared is vital to the sub-mortgagee, for the satisfaction of his dues according to the form of the decree is intimately connected with it), may be different from that declared in the order passed under S. 38 of the Act, if the sub-mortgagee be held to be the assignee of the original mortgage in the case which we are considering, namely where the sub-mortgagee had taken his sub-mortgage bona fide and without notice of any defect in the original mortgage due to the operation of the Act. If after the decree passed in Form No. 11, the original mortgagee paid to the sub-mortgagee within the period of grace what was found to be due on the sub-mortgage, and the original mortgagor made no payment, he, the original mortgagee, would be entitled to get a final decree against the original mortgagor for the sum so declared to be due in that decree on the original mortgage. There may thus be a direct conflict between that final decree and the order passed in terms of S. 38 (2) of the Act. This would be avoided if the word "assignee" used in S. 29 (1) be taken to mean only the transferee of a complete transfer, a person who by the act of the transferor was substituted in his place.

12. Section 36 covers the case of both pre-Act and post-Act loans, agreements and securities. It empowers the Court to re-open transactions, which are still executory as well as those which have merged in decrees and to scale down the loan in terms of sub-s. (1) (c). In proceedings under that section sub-s. (5) thereof would be applicable, whether the subject-matter be the transaction in its executory stage or had merged into a decree and whether the loan be a pre-Act or a post-Act one. If the word "assignee" in that sub-section be also held to be the transferee of some and not of the totality of the rights of the lender, as for instance a sub-mortgagee, the adjudication in proceedings under S. 36 would have to be made on two different basis—one on the basis of the provisions of S. 30 so far as transferor (the lender) was concerned, and the other on the basis of the contract between the borrower and the lender so far as the sub-mortgagee was concerned, if the latter was a bona fide transferee without notice of any defect in the original mortgage due to the operation of the Act. This position would be avoided if the word "assignee" in sub-s. (5) be interpreted in the

manner indicated above. Following the rule that where two interpretations are possible that interpretation which does not result in anomalies should be preferred to the one which would produce anomalies, we hold that a sub-mortgagee cannot be regarded as an assignee within the meaning of sub-s. (5) of S. 36 of the Act.

13. Point IV. The Mukherjees are entitled to have the decree on their mortgage reopened as interest allowed has contravened S. 90. That is the decision we have arrived at above. They are not, however, interested in seeing what would be the dues of the sub-mortgagee from the original mortgagee. Moreover in the case before us the loan advanced on the sub-mortgage is *prima facie* a commercial loan, because it was advanced by Roy to a Bank. That part of the original decree by which the dues of the Bank to Roy were declared cannot be touched. The difference we are told would be about Rs. 800. To avoid further accounting we add that figure to the amount that has been declared to be due to the sub-mortgagee in the new decree, as the parties before us agree to that procedure.

14. Regarding the cross-objection, the claim for mesne profits up to 20th June 1941, the date of the order of the Subordinate Judge wherein he held that the original decrees (the preliminary, final and personal decrees) were liable to be reopened, is not admissible for the reasons given in 49 C. W. N. 30 *Jadu Nath Roy v. Khitish Chandra* ("45) 32 A. I. R. 1945 Cal. 177: 220 I.C. 85: 49 C.W.N. 30. The claim between that date and 21st July 1943 when the order for restoration of possession was made is also not admissible because the proceedings for ascertainment of the amount that would be due in terms of the order of the Subordinate Judge dated 20th June 1941 were not stayed or interrupted at the instance of Roy. We do not also think it right to interfere with the order of the learned Subordinate Judge in the matter of instalments, as there are not sufficient materials on the record which would justify us to modify his order in that respect.

15. Point V. In 46 C. W. N. 153 *Promode Nath Singh Roy v. Rasheshwari Dassi* ("42) 23 A. I. R. 1942 Cal. 128: I.L.R.(1942) 1 Cal. 414: 204 I.C. 502: 46 C.W.N. 153 it has been held that the Court has power in passing a decree under the Bengal Money Lenders Act to impose suitable conditions for the preservation of the mortgaged property pending the payment of instalments directed by the new decree. As the mortgaged property in the case before us is revenue-paying property we think it proper to safeguard it. The additional condition that we impose is that the Mukherjees must pay revenue at least seven days before they become payable and deposit the challans in the Court below in the proof of payment except the revenue payable for kist June 1945, which the Roys undertake to pay. If the Roys pay the same and produce the challan in the Court below the amount paid by them would be added in the new decree. On the breach of this condition also the Roys would be entitled to be restored to possession. Subject to this modification and the modification regarding the amount payable to the appellant the decree of the Subordinate Judge is affirmed.

As one of the main points is of first impression we direct the parties to bear their respective costs of this appeal. Let the records be sent down as early as possible.

Waight, J.

16. I agree.