
(1941) 12 CAL CK 0019
In the Calcutta High Court

Sashi Bhusan Misra and Others

APPELLANT

Vs

Madhu Sudan Mondal

RESPONDENT

Date of Decision : 22-12-1941

Acts Referred:

Bengal Tenancy Act, 1885 — Section 189, 26G(5)
Civil Procedure Code, 1908 (CPC) — Section 115, 141

Citation : AIR 1942 Cal 522

Judgement

1. This rule is directed against an order made by the Munsif, Second Court, Contai, allowing an application of the mortgagor, opposite party, for restoration of possession of the mortgaged property u/s 26 (G)(5), Ben. Ten. Act. Two points have been taken before us by the learned advocate who appears on behalf of the mortgagees, petitioners. It is contended in the first place that Section 26G (5), Ben. Ten. Act, is ultra vires of the Provincial Legislature and consequently cannot create any rights in the mortgagor. The second point taken is that as there was a previous application u/s 26G (5) presented by the mortgagor before a revenue Officer which was dismissed for default, a fresh application to a civil Court is not maintainable.

2. So far as the first point is concerned, it is concluded by the decision of a Division Bench of this Court in Sheikh Akbar Ali and Others Vs. Sheikh Mafijuddin of Islampur, . It cannot be disputed that the mortgage in question is a pure usufructuary mortgage. Under its terms, the mortgagee was to remain in possession of the mortgaged property till the mortgage money was paid, and he was to enjoy the usufruct in lieu of interest. There was indeed a covenant to indemnify the mortgagee in case of dispossession, but as has been repeatedly held, such a covenant does not affect the nature of the mortgage.

3. The second argument put forward by the learned advocate raises a question of some nicety. Section 26G (5), Ben. Ten. Act, lays down, inter alia that on expiry of the period of 15 years from the date of the registration of the mortgage deed, the consideration for a complete usufructuary mortgage would be deemed to be extinguished and the mortgagor shall be entitled to possession of the mortgaged

holding; and he may, if he is not forthwith given possession, apply to the Court or a revenue officer to be restored thereto. The proceeding is of a purely summary character, and it seems to me that the intention of the Legislature was that the mortgagor will have an option in the matter either to approach the revenue officer or a civil Court, but once he has made his choice, and had his claim dismissed by a revenue officer, he cannot apply to the civil Court again for the same relief. A principle akin to that of election of remedies can, in my opinion, be invoked in such cases against the mortgagor. This principle, however, cannot assist the mortgagee in the present case. Here the matter was neither heard nor decided; the application was simply dismissed for default, and there was no decision against the mortgagor. The mortgagee can in my opinion succeed, only if the fresh application filed before the Munsif comes within the mischief of Order 9, Rule 9, Civil P.C.

4. As there was no suit which was dismissed wholly or partially for default, Order 9, Rule 9 has no direct application to the present case, but the learned advocate for the petitioner relies upon Section 141, Civil P.C., and contends that as the proceeding is of a civil nature, the procedure provided in the Civil Procedure Code, should be applied to this case also. I am extremely doubtful whether the Revenue Officer was a Court exercising civil jurisdiction within the meaning of Section 141, Civil P.C. The learned advocate has in this connexion drawn our attention to certain decisions to wit *Nilmoni Singh v. Taranath* ('83) 9 Cal. 295, *Madhoprakash v. Murli Manohar* 5 All. 406 and *Adhirani Narain Kumari v. Raghu Mahapatro* 12 WB. 50 which lay down that the provisions of the CPC are applicable to Revenue Courts on such matters upon which the special Acts are silent. These were all Courts having jurisdiction under special or local laws to entertain suits or proceedings for the rent, revenue or profits of land. The special Acts which created these Courts laid down the procedure that was to be followed, and for the most part it was modelled on the provisions of the Civil Procedure Code. On such matters for which there were no provisions in the Special Act, they were held to be guided by the CPC itself. Section 26 G (5), Ben. Ten. Act, however, uses the expression Revenue Officer as contradistinguished from Court and the implication seems to be that the Revenue Officer is not a Court at all. Section 189, Ben. Ten. Act, provides that:

The local Government may from time to time, by notification in the official gazette make rules consistent with the Act--(1) to regulate the procedure to be followed by Revenue Officers in the discharge of any duty imposed upon them by or under this Act, and may by such rules confer upon any such officer (a) any power exercised by a civil Court in the trial of suits....

5. No rules have, as yet been framed by the Local Government and no authority has been conferred on Revenue Officers to exercise the powers of a Civil Court. It was held in *Sarat Chandra Chakraborty Vs. Sashi Bhusan Manna and Others*, that the order of a Revenue Officer under 26G, Ben. Ten. Act, was not revisable by this Court u/s 115, Civil P.C. I am inclined to hold therefore that the Revenue

Officer was not a Court within the meaning of Section 141, Civil P.C., and consequently Order 9, Rule 9 has no application to the facts of the present case. But even assuming that the Revenue Officer was a Court exercising civil jurisdiction, I do not think that the provision of Order 9, Rule 9, Civil P.C., is attracted to the case before us. u/s 26 G (5) as soon as the period specified in that section expires, the consideration for the mortgage must be deemed to be extinguished, and the mortgagor gets the right to recover possession of the mortgaged property. In case the mortgagee does not deliver up possession of the property to the mortgagor, the latter can avail himself of the summary proceeding provided by the section and apply for possession, to a Revenue Officer or the Civil Court as he thinks proper. The right to recover possession is a recurring right and continues so long as possession is not restored to him. If the right to recover possession is negated by a competent tribunal, it cannot certainly be reagitated in the same Court or another Court, but if the application is merely dismissed for default, a subsequent application cannot be barred, as the latter is not based on the same cause of action. The position is the same as in the case of partition suits, and so long as the right to partition remains the mere dismissal of a previous suit for non-prosecution is no bar to a subsequent suit. In my opinion, therefore the view taken by the Court below is right. The rule is discharged without any order as to costs. Certificate is given u/s 205, Government of India Act.