(1950) 04 CAL CK 0001

In the Calcutta High Court

Case No : Appeal from Appellate Order No. 66 of 1948

Satish Chandra Dinda APPELLANT

Vs

Rajani Kanta Maiti RESPONDENT

Date of Decision : 27-04-1950

Acts Referred:
Bengal Money Lenders Act, 1940 — Section 35

Citation : (1951) 1 ILR (Cal) 624

Hon'ble Judges : Harries, C.J;S.B. Sinha, J

Bench : Division Bench

Advocate : Bhutnath Chatterjee and Saroj Kumar Maiti, for the Appellant; Purnendu Sekhar Basu and Basanta Kumar Panda, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—This is an appeal against an order made in a mortgage suit.

2. The Appellant was the purchaser of the equity of redemption in two lots of mortgaged properties, namely, lots Nos. 2 and 3.

3. A final mortgage decree was made on April 30, 1945, which provided inter alia that lot No. 1 should be sold first and then lot 4 and lots 2 and 3.

4. When the matter came up for settlement of sale proclamation in execution of the final decree, the learned Munsif made an order that lot No. 3 should be first put up to sale at Rs. 14,350 which was the price he fixed under the provisions of Section 35 of the Bengal Money-lenders Act. He excluded all other lots from sale in that proceeding and ordered that if the bid did not fetch the decretal dues and costs, the decree-holders, if they bid at the sale, would have to forego the dues that fell short of the decretal dues and costs by a petition, before the decree-holder''s bid was accepted. Against this order the Appellant filed an appeal. It was objected that the order of the learned Munsif, to which I have referred, altered the final decree inasmuch as it altered the order fixed by the final decree for sale of the mortgaged properties. The lower appellate court was of the

opinion that the order was not appealable and therefore, dismissed the appeal on that ground. It did not go into, or consider the order, on the merits. Against that order this appeal has been filed.

5. It is contended before us that the final decree having provided for sale of the mortgaged properties in a particular order, it was not open to the learned Munsif to order sale of the mortgaged properties in any other order.

6. It, however, appears from Section 35 of the Bengal Money-lenders Act that the Court which is executing the decree has got the power, when settling the proclamation of sale, to find out which property of the judgment-debtor should be sold at a price sufficient to satisfy the decree and it has to specify that property in the proclamation of sale. That necessarily involves interference with the final decree and I do not think it can be rightly said that in making an order u/s 35 the terms of the final decree must be followed. The provisions of Section 35 have operation "notwithstanding "anything contained in any other law for the time "being in force". At the time of the settlement of the sale proclamation, the executing court has to consider what portion of the property of the judgment-debtor could be sold at a price sufficient to satisfy the decree and has to specify such property in the proclamation of sale. If the executing court has got that power and exercises it, then the final decree is necessarily interfered with. I do not think therefore that there is any substance in the contention that the Munsif having ordered the sale of the properties in a particular order, which did not accord with the order specified in the final decree, the order is bad.

7. It however appears that the Munsif said in his judgment that he "excluded all other lots from sale in this proceeding". The lower appellate court understood this passage as meaning that the other lots of the mortgaged properties were altogether excluded from sale in the sense that they could not be put up for sale again in execution of the mortgage decree, even though the properties specified u/s 35 did not sell at all. I however do not think that that is the true construction of the order of the learned Munsif. What he meant to say in the order, in my opinion, is that the other lots would not be sold in that particular sale. If lot No. 3 could not be sold at all, the other lots could be sold in a future execution proceeding.

8. The learned Munsif exercised his discretion u/s 35 and in my opinion, properly. Lot No. 1 is a residential house. Lot No. 2, it appears, is too small to satisfy the decree. So is lot No. 4. In those circumstances I think the learned munsif was right in fixing upon this lot No. 3 to be sold in the first instance.

9. I have not been able to understand the portion in the learned Munsif''s judgment where he says that the decree-holders, if they bid at the sale, would have to forego the dues that fell short of the decretal dues. Section 35 provides that if at a given sale the highest amount bid for the property specified was less than the price specified in the proclamation, the court may sell such property for such amount if the decree-holder consented in writing to forego so much of the

amount decreed as was equal to the difference between the highest amount bid and the price so specified.

10. The question of foregoing the difference between the highest bid and the specified price would arise after the sale has been held and after the decree-holder is in a position to ascertain what was the short fall. That question, in my opinion, does not arise at the time of the settlement of the proclamation of sale and I do not think that the Munsif should have made an order in advance that if the decree-holders bid at the sale they must forego the dues that fell short of the decretal dues.

11. In my opinion, therefore, this appeal should be dismissed, subject to the observations I have made in the judgment, with costs--the hearing fee being assessed at two gold mohurs. There will be only one set of hearing fee for the two sets of contesting Respondents.

12. No order is necessary on the application in the alternative.

Harries, C.J.

13. I agree.