(1943) 02 CAL CK 0010

In the Calcutta High Court

Sm. Kumud Bashini Guha Biswas and Others — APPELLANT

Vs

Faridpur Loan Co., Ltd. — RESPONDENT

Date of Decision : 08-02-1943

Acts Referred:

Bengal Money Lenders Act, 1940 — Section 36

Citation : AIR 1943 Cal 223

Judgement

1. This rule is directed against an order made by the Subordinate Judge, First Court, Alipur, dismissing the petitioner''s application for re-opening of a mortgage decree u/s 36, Bengal Money-Lenders Act. The suit on the mortgage bond was instituted on 30th April 1935 and the final decree was passed on 22nd April 1936. On 22nd April 1937, the mortgage property was sold and it was purchased by the decree-holder himself. The sale was confirmed on May 1937 and the execution case was dismissed on part satisfaction. Sometime in September 1939, the decree-holder auction purchaser started a proceeding for delivery of possession of the property purchased under Order 21, Rule 95, Civil P.C., and this application was allowed on 1st October following. The whole controversy centres round the point as to whether the decree sought to be reopened was passed in a suit to which the Act applies within the meaning of Section 2(22), Bengal Money-Lenders Act. The Court below was of opinion that as no proceeding was pending on or after 1st January 1939 the suit could not be taken to be a suit to which the Act applies and in that view of the case dismissed the application. It is against this order that the present rule has been obtained.

2. In our opinion, the view taken by the Court below is not right. According to the explanation attached to the proviso to Section 36(1), Bengal Money-Lenders Act, a decree is deemed not to have been fully satisfied so long as there remains undisposed an application by the decree-holder for possession of the property purchased by him in execution of the decree. Whatever may be said of a third party purchaser, it seems to us that when the purchaser is the decree-holder himself, and he does not get really his decretal dues but is only allowed to set-off the same against the purchase-money the execution case cannot be said to be

completed unless and until the possession of the property is actually delivered to him. We hold therefore that the application for delivery of possession which was made by the decree-holder auction purchaser was really a proceeding in execution of his decree and it was actually so made as it appears from the application which is in the records. In the circumstances, we think that as a proceeding in execution for recovery of the loan was actually pending after 1st January 1939 the suit must be deemed to be a suit to which the Act applies within Section 2(22), Bengal Money-Lenders Act, and consequently, prima facie, the decree is liable to be reopened, if the other conditions requisite under the Act are fulfilled. The result therefore is that the order of the Court below is set aside and the case is sent back so that it may be disposed of in accordance with law after disposing of the other points that arise for determination. There will be no order as to costs.

