

(1945) 01 CAL CK 0012
In the Calcutta High Court

Surendra Nath Sarkar

APPELLANT

Vs

Kumar Khali Banking Corporation Ltd. (Kusthia Branch) and
Others

RESPONDENT

Date of Decision : 08-01-1945

Acts Referred:

Bengal Money Lenders Act, 1940 — Section 36(1), 36(2)(c)

Citation : AIR 1945 Cal 333

Hon'ble Judges : Ellis, J; B.K. Mukherjea, J

Bench : Full Bench

Judgement

B.K. Mukherjea, J.—This appeal is on behalf of the defendant borrower and it is directed against a new decree in a mortgage suit made by the Subordinate Judge, Nadia, under the provisions of the Bengal Money-Lenders Act. The material facts are not in controversy and may be shortly stated as follows: The appellant before us borrowed money from the respondent bank on three different promissory notes executed on 23rd February 1921, 22nd August 1921 and 22nd September 1922 respectively. The first promissory note was for Rs. 250 and the stipulated interest was 15 per cent. per annum. The other two were for advances of Rs. 2000 and Rs. 750 respectively, and both carried interest at 12 per cent. per annum. All the three promissory notes were renewed later on after deducting certain payments made by the borrower. The first promissory note was renewed on 9th Falgoon 1330 B. Section for a sum of Rs. 225 after payment of Rs. 105. The date of the renewal of the second handnote was 3rd Bhadra 1331 B. Section and it was for a sum of Rs. 2230 after deduction of a sum of Rs. 527-8-0 already paid by the borrower. The third handnote was renewed for Rs. 700 on 16th Bhadra 1332 B. Section and the payment already made by the borrower towards this loan was Rs. 320. On 9th April 1927, the dues on all these three promissory notes were amalgamated and a simple mortgage bond was executed by the appellant on that date, for a sum of Rs. 4000 which was to carry interest at 12 per cent. per annum with six monthly rests.

2. On 10th November 1930, the mortgagee bank instituted a suit in the Court of the Subordinate Judge at Nadia, (being mortgage Suit No. 147 of 1930), to recover the dues on the mortgage bond and the claim was laid at Rs. 5670 and annas odd. On 7th February 1931, there was decree on compromise for Rs. 6395 and annas odd. After certain payments were made by the mortgagor in part satisfaction of the decree, the decree-holder took out execution for the balance of its decretal dues. On 7th December 1939, the mortgaged property was sold and the property was purchased by the decree-holder for Rs. 5600. On 16th May 1940, the purchaser took delivery of possession, and on 11th June 1940, the decree-holder sold it to respondent 2 for a sum of Rs. 5800. On 13th July 1940, the decree-holder obtained a personal decree under Order 34, Rule 6, Civil P. C., for a sum of Rs. 3538 and annas odd against the judgment-debtor. On 25th August 1941, the application u/s 36(6)(a)(ii), Bengal Money-Lenders Act, was filed by the borrower for reopening of the decree and for obtaining other reliefs. The learned Subordinate Judge came to the conclusion that as the interest allowed by the decree was in excess of what was contemplated by Section 30, Bengal Money-Lenders Act, the decree was liable to be reopened. The learned Subordinate Judge held, however, that as the mortgaged property was already sold by the decree-holder to a third person and was in possession of the latter, the judgment-debtor was not entitled to restoration of possession of this property u/s 36(2)(c), Bengal Money-Lenders Act. The Court, therefore, reopened the personal decree and made a new decree for Rupees 1574 and annas odd. It is against this new decree that the present appeal has been filed.

3. It seems to us on hearing the learned advocates on both sides that the learned Judge was quite right in holding that the judgment-debtor was not entitled to restoration of possession of the mortgaged property sold at the mortgage sale u/s 36(2)(c), Bengal Money-Lenders Act, inasmuch as it was not in possession of the decree-holder at the date when the decree was reopened, but had already been transferred to a third party. No evidence was adduced by the judgment-debtor to show that the third party purchaser was a mere benamidar of the decree-holder or, as a matter of fact, the possession of the third party purchaser was really the possession of the decree-holder itself. The main question for our consideration is whether in calculating the amount for which the new decree was passed, the Court should take, as principal of the loan, the amount mentioned in the mortgage bond of 1927 or the sums actually advanced on the three original promissory notes. The learned Subordinate Judge is of opinion that in taking accounts, the Court was not competent under the proviso (i) to Section 36(1), Bengal Money-Lenders Act, to reopen the mortgage transaction which was more than twelve years prior to the date of the filing of the application by the borrower u/s 36(6)(a)(ii), Bengal Money-Lenders Act. The question is whether the view taken by the learned Subordinate Judge is right. Section 36(1) proviso (i) reads as follows:

Provided that in the exercise of these powers the Court shall not (i) reopen any adjustment or agreement, purporting to close previous dealings and to create

new obligations, which has been entered into at a date more than twelve years prior to the date of the suit by the parties or any person through whom they claim.

4. The whole controversy centres round the point as to what is the suit contemplated by the words "the date of the suit" as used in the proviso. In our opinion, the suit referred to in the proviso is the suit contemplated by Section 36(1); that is to say, it is either a suit to which the Act applies and in connexion with which relief is claimed by the borrower or a suit expressly brought by the borrower for relief under the sub-section itself: *Prafulla Kumar Roy and Others Vs. Sm. Bibhabati Roy and Others*, ; and *Biadyanath Dutt Vs. Mritunjoy*, . In the present case, no suit was brought by the borrower u/s 36(1), Bengal Money-Lenders Act; he made an application by way of review in the mortgage suit itself in which a decree was passed and it was admittedly a suit to which the Act applies. The review application itself cannot, in our opinion, be taken to be a suit for the purposes of the proviso, and we would hold accordingly that the period of twelve years laid down in proviso (i) is to be counted from the date of the commencement of the mortgage suit, and as the mortgage bond is within twelve years from that date, it can certainly be reopened under proviso (i) to Section 36(1), Bengal Money-Lenders Act. The three original handnotes which were executed in the years 1921 and 1922 are all within twelve years from the date of the mortgage suit. Consequently, the principal of the loan should be taken as Rs. 3000 which was the actual amount advanced on these promissory notes.

5. Our attention has been drawn to a decision of a Division Bench of this Court where it was held by Roxburgh and Akram JJ. that when an application by the borrower is made in an execution proceeding u/s 36(6)(a)(i), Bengal Money-Lenders Act, the date of the suit referred to in the proviso must be taken to be the date of the commencement of the execution proceeding. In other words, the execution proceeding is to be regarded as a suit for the purpose of the proviso. On this point, a different view was taken in another decision to which I was a party: *Biadyanath Dutt Vs. Mritunjoy*, . Neither of these two decisions, however, is material for our present purpose. In the case before us, there was no proceeding in execution in connexion with which an application for relief under the Bengal Money-Lenders Act was made, and consequently the question does not arise as to whether an execution proceeding is to be regarded as a suit within the meaning of Section 2(22), Bengal Money-Lenders Act. Here, the application was by way of review in the mortgage suit itself, and as we have said above, the review application itself cannot be regarded as a suit for the purpose of the proviso. The view we are taking is supported by a decision of Mitter and Khundkar JJ. in *Ashalata Devi v. Dinajpur Trading and Banking Co. Ltd.* A. F. O. D. No. 2 of 1942 which was decided on 22nd November 1944.

6. Mr. Das argued before us that his client is entitled to a refund of money u/s 36(1)(d), Bengal Money-Lenders Act. We have got no material before us as to whether the requirements of that clause are fulfilled here or not. If so advised, it

would be open to the borrower to make suitable applications before the trial Judge. The result, therefore, is that this appeal is allowed. We set aside the decree that has been passed, and send the case back in order that a new decree may be passed in accordance with the directions given above. We make no order as to costs in this Court. Further costs will abide the result.

Ellis, J.

7. I agree.