Privy Council Appeal No. 3 *of* 1948

Jadunath Roy and Another - - - - - - - *Appellants*

v.

Kshitish Chandra Acharjya Choudhury and Others - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JUNE, 1949

Present at the Hearing:

LORD OAKSEY
LORD MACDERMOTT
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* SIR MADHAVAN NAIR]

This is an appeal from the judgment and decree of the High Court of Judicature at Calcutta, dated 29th June, 1944, affirming, with certain variations, the order dated 25th August, 1941, and the decree dated 10th May 1943—in Misc. Case No. 18/40—passed by the Subordinate Judge at Alipore.

The appeal arises from a petition made by the respondents for re-opening certain mortgage decrees obtained by the appellants respectively on 4th April, 1929, 13th September, 1929, and 13th December, 1937 (in Title Suit No. 121 of 1927). The right to re-open the decrees was claimed under section 36 of the Bengal Money Lenders Act (Bengal Act X of 1940) herein referred to as "the Act".

The material provisions of section 36 of the Act are these:—

"36.—(1) Notwithstanding anything contained in any law for the time being in force, if in any suit to which this Act applies . . . the Court has reason to believe that the exercise of one or more of the powers under this section will give relief to the borrower, it shall exercise all or any of the following powers as it may consider appropriate, namely, shall—

(*a*) re-open any transaction and take an account between the parties;

* * * * * * * * *

(*c*) release the borrower of all liability in excess of the limits specified in clauses (1) and (2) of section 30;

* * * * * * * * *

Provided that in the exercise of these powers the Court shall not—

(i) * * * * * * *

(ii) do anything which affects any decree of a Court, other than a decree in a suit to which this Act applies which was not fully satisfied by the 1st day of January, 1939. . . .

Explanation.—A decree shall not, for the purposes of this section, be deemed to have been fully satisfied so long as there remains undisposed of an application by the decree-holder for possession of property purchased by him in execution of the decree.

(2) If in the exercise of the powers conferred by subsection (1) the Court re-opens a decree, the Court—

(*a*) shall, after affording the parties an opportunity of being heard, pass a new decree in accordance with the provisions of this Act.

* * * * * * * * *

(4) This section shall apply to any suit, whatever its form may be, if such suit is substantially one for the recovery of a loan or for the enforcement of any agreement or security in respect of a loan or for the redemption of any such security."

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The question for decision in this appeal is whether in the circumstances of the case the respondents are entitled to have the aforesaid decrees re-opened under section 36 of the Act.

The father and predecessor-in-interest of the respondents obtained two loans, one for Rs.1,60,000, and another for Rs.73,000, from the opposite party No. 1, and predecessor-in-interest of opposite parties Nos. 2 and 3 (appellants) by executing two mortgages dated 16th August, 1918, at 8 per cent. interest per annum with yearly rests.

On 10th March, 1926, the mortgagees instituted in the Court of the Additional Subordinate Judge at Alipore a Suit which became Title Suit 121/1927, to enforce both the mortgages, and obtained a preliminary mortgage decree for sale under Order 34, rule 4, Code of Civil Procedure, for a total sum of Rs. 4,21,851—6—6 on 4th April, 1929.

The decree declared (1) that two sums which amounted to the above-mentioned sum were due to the mortgagees. After this declaration (2) the usual decree for sale was made of the properties specified in the schedules in default of payment by 3rd July, 1929. (3) The decree further provided that if the net proceeds of the sale were insufficient to pay the amount, subsequent interest and costs in full " the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance ".

On 13th September, 1929, a final decree for sale was passed under Order 34, rule 5, Code of Civil Procedure. That decree provided that, as the amount mentioned in the preliminary decree had not been paid, the properties specified or a part thereof be sold . . . and that if the net proceeds of the sale are insufficient to pay the decretal amounts and subsequent interest and costs in full " the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance ".

The respondents paid Rs.15,500 to the decree holders.

Subsequent thereto, execution proceedings were started. On 10th March, the mortgaged properties were sold in execution Case No. 38 of 1930, and bought by the decree holders (appellants) for the total sum of Rs.2,35,200. These sales were confirmed in 1932 and 1935, and the purchasers took delivery of possession of different items of properties on different dates ranging from 25th June, 1933, to 9th March, 1936.

On 13th December, 1937, the decree holders obtained a personal decree under Order 34, rule 6, for Rs.3,30,903, the balance due under the final decree. The Court declared that " *the balance now due to him under the aforesaid* (*i.e. the final*) *decree is Rs.*3,30,903 ". (The italics are by their Lordships.)

The above decree was transferred for execution to the Court of the Subordinate Judge at Mymersingh, and was registered as execution Case No. 18 of 1938 on 10th May, 1938. It was put into execution and some personal properties of the mortgagors were sold to the decree holders on 8th August, 1939, for Rs.3,899, and delivery of possession was made to them on 6th July, 1940.

It is undisputed that the personal decree has not been satisfied.

The Act came into force on 1st September, 1940. It was passed " to make further and better provision for the control of moneylenders and for the regulation and control of moneylending."

During the pendency of the execution proceedings, on 9th December, 1940, the respondents applied under section 36 of the Act to re-open the transaction and decree passed in T.S. No. 121 of 1927, on the ground (1) that compound interest at 8 per cent. per annum with yearly rest was allowed instead of 8 per cent. simple ; (2) that interest after the decree was allowed ; and (3) that the total amount decreed excluding cost of the suit is more than double the amount of the original loan taking into account the amounts paid from time to time towards principal and interest—(see section 30 of the Act).

Before proceeding further, attention may be drawn to the following provisions of section 2 of the Act : —

" Section 2.—In this Act, unless there is anything repugnant to the subject or context—

* * * * * * * * *
* * * * * * * * *

(22) " Suit to which this Act applies " means any suit or proceeding instituted or filed on or after the 1st day of January, 1939, or pending on that date and includes a proceeding in execution—

(*a*) for the recovery of a loan advanced before or after the commencement of this Act ; "

* * * * * * * * *

Section 30 of the Act relates to " Limitations as to amount and rate of interest recoverable." It is not disputed that the application made on 9th December, 1940, was properly made under the Act. What is disputed is whether or not the relief asked for under section 36 of the Act can be granted.

Under the Act, a decree can be re-opened, provided it relates to a suit to which the Act applies, and it has not been fully satisfied before the 1st day of January, 1939 (section 36 (1), proviso ii). In view of the expression " a suit to which the Act applies " which is defined in section 2 (22) as meaning any suit or proceeding instituted or filed on or after the 1st day of January, 1939, or pending on that date, including a proceeding in execution for the recovery of a loan advanced before or after the commencement of the Act (in this case it was advanced before the commencement of the Act) the Subordinate Judge held that the Act applies to T.S. 121/1927 inasmuch as the proceeding in execution was pending. He also held that the decree in that suit had not been fully satisfied by the 1st day of January, 1939. In holding so, he over-ruled the argument that " as soon as the mortgaged property is sold and the sale is confirmed, the mortgage decrees have been fully satisfied." It was conceded that the personal decree being a decree for money and not a decree for sale, is liable to be re-opened ; the distinction was drawn that the preliminary decree and the final decree were decrees for sale, while the personal decree was a decree for money and was outstanding. As regards this, the Subordinate Judge expressed the view that a preliminary mortgage decree directing sale of the mortgaged properties in the event of the non-payment of decretal dues within the specified date is substantially a decree for money, whether there is a direction to pay personally or not. To anticipate, the argument over-ruled by the Subordinate Judge is substantially the argument pressed before the Board on behalf of the appellants.

In the result, the Subordinate Judge re-opened all the decrees, and passed a new decree on 10th March, 1943, for payment to the decree holders of a sum of Rs.3,76,324—12—6 in 15 equal instalments. Some other reliefs which the respondents were entitled to under the Act were also granted to them. These need not be referred to as they do not arise for consideration in the appeal before the Board.

From the above decree the appellants appealed to the High Court and the respondents filed cross-objections. The new decree passed by the Subordinate Judge re-opening all the decrees passed in T.S. No. 121/27

was confirmed by the High Court, but variations with which their Lordships are not concerned were made in the connected and subsidiary reliefs granted by the Subordinate Judge. The correctness of the amount found payable was not challenged before the High Court, nor has it been challenged here—assuming that the decision of the Courts in India re-opening the previous decrees is held to be correct.

Before the High Court it was argued that the Subordinate Judge was not right in re-opening the preliminary and final mortgage decrees passed in the suits. The learned judges held that the Subordinate Judge decided the point correctly on the ground that it " is now concluded by the decision of the Full Bench in *Mritunjoy Mitra* v. *Satish Chandra Banerjee*" (48 C.W.N. 361). No discussion of the question beyond this reference to the Full Bench decision appears in the judgment.

It was decided by the Full Bench (Nasim Ali, Mitter, and Akram JJ.) that " where, in a suit for recovery of money lent upon a mortgage, the final decree was executed by the sale of the mortgaged property before 1st January, 1939, but a personal decree for the unrealised balance remained unsatisfied on that date, the Court can in the exercise of the powers under section 36 of the Bengal Money Lenders Act, 1940, re-open the preliminary decree, and the final decree, as well as the personal decree, so as to affect all the three ". Reference to the Full Bench was occasioned because the decisions of the High Court were in conflict on this point. In *Naresh Chandra Gupta* v. *Lal Mahmud Bhuiya* (I.L.R. 1942, 2 Cal 243), it was decided by Sen and Mukherjea JJ. that, " in a case where the preliminary, final and personal decrees were all passed and possession of the property delivered to the decree holder purchaser before January, 1939, but a proceeding in execution of the personal decree was pending on that date—the final decree having been fully satisfied before the statutory date cannot be re-opened, by reason of the bar laid down in prov. (ii) to section 36 (1) and since the preliminary decree, though not fully satisfied, cannot be re-opened without affecting the final decree, it cannot be re-opened either ; the personal decree however is liable to be re-opened . . . " (see the summary given in the F.B. reference). In a subsequent case, in *Abdul Wahed Howladar* v. *Sukumari Debi* (1942, 75 C.L.J. 299), it was held by Derbyshire C.J. and Gentle J. that it was the duty of the Court " to re-open the transaction between the lender and the borrower and to take account of what had been paid and what ought to have been paid according to the Bengal Money Lenders Act and on such re-opening and taking of account to give the borrowers such relief as they are entitled to under the Act ". The previous decision was not noticed in this case. In a later decision, in *Barbani Prosad Maitra* v. *Satiyendra Nath Mukherji* (I.L.R. 1943, 2 Cal 417), Mukherjea and Blank JJ. followed the first decision, observing that it does not seem to have been cited before the learned Judges who decided the second case and " is certainly not noticed and much less dissented from in the judgment ". The conflict in the views evidenced in the above decisions has now been solved by the Full Bench decision.

Generally stated, the question for decision in all the above cases was—the situation being similar in all the cases, which were suits for recovery of money lent upon mortgages—whether or not the decree in a suit to which the Act applies, could be said to be fully satisfied when all the mortgaged property has been sold in execution of the final decree before 1st January, 1939, within the meaning of proviso (ii) of section 36 (1) of the Act, the personal decree remaining unsatisfied at the time.

Proviso (ii) of the section in so far as it relates to this case states in effect that the decree of a Court to which the Act applies cannot be re-opened under section 36 (i) (*a*) if the decree has been fully satisfied, i.e., it can be re-opened only if the decree has not been fully satisfied. Sir Herbert Cunliffe, the learned Counsel for the appellants, stated frankly that " he does not deny that this is a suit to which the Act applies ". Therefore, the only question remaining for decision under proviso (ii) is: Can it be held in the circumstances of the case that the decree in the

suit T.S. 121/1927, has been fully satisfied when the mortgaged property had been sold before 1st January, 1939, the statutory date? The learned Counsel for the appellants answers the question in the affirmative. He has also stated that no question except this arises for decision in this appeal.

After careful consideration their Lordships are unable to accept the appellants' argument that the decree is fully satisfied in this case, when the mortgaged properties were all sold in execution, while the personal decree remains unsatisfied. To answer the question propounded above, it is necessary to inquire what is the nature of the preliminary decree passed in Suit No. 121/27, and the place of " the decree for sale " in the scheme provided to effectuate that decree. On one side, it is argued it is a decree essentially for money, while on the other side it is said that it is a decree for sale pure and simple ; and when once the sale is completely carried out the decree is fully satisfied. Shortly stated, a plaint in a suit to enforce a simple mortgage under section 58 (2) of the T.P. Act—in the present case it is to enforce two such mortgages—would commence ordinarily with a statement of the total amount of money due to the plaintiff under the claim, and end with the prayer that a decree be passed for the amount and that the amount decreed should be ordered to be realised by the sale of the mortgaged property, and if necessary, by passing a personal decree in case the amount realised by the sale proves insufficient to meet the decretal amount. The plaint has not been filed in this case, but the nature of the claim which determines the nature of the decree appears clearly from the preliminary decree wherein it is stated: " This is a suit for recovery of money due under two mortgage bonds . . ." and above it appears " claim for Rs.2,45,625—7—6p. and Rs.76,205—2—3p." The suit is thus clearly one to recover a specified amount of money, and as such, section 36 of the Act under which relief is claimed becomes applicable to it. Sub-section 4 of that section states that,

> " This section shall apply to any suit, whatever its form may be, if such suit is substantially one for the recovery of a loan . . ."

Thus, for the purposes of the Act the suit though for the enforcement of mortgages is substantially a suit for money, and this aspect of it should be kept in mind in considering the question whether the decree is fully satisfied by the mere sale of the property. That what is contemplated as the satisfaction of the decree under the Act, in cases such as the present, has reference to the amount of money realised in execution of the decree appears to follow inferentially from the wording of section 35 of the Act. This section relates to the " sale of property in execution of decrees in respect of loans," and is as follows :—

> " Notwithstanding anything contained in any other law for the time being in force, the proclamation of the intended sale of property in execution of a decree passed in respect of a loan shall specify only so much of the property of the judgment-debtor as the court considers to be saleable at a price sufficient to satisfy the decree, and the property so specified shall not be sold at a price which is less than the price specified.
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> * * * * * * * * *
>
> * * * * * * * * * "

The words in the section " Price sufficient to satisfy the decree " used with reference to the sale would in their Lordships' view support the inference indicated above.

Just as the suit is one for money, so the decree passed in the suit is substantially a decree for money, though the preliminary decree for sale directs the sale of the mortgaged properties in the event of non-payment of the decretal amount. The decree declares (see the decree already quoted) that the amount decreed is due from the defendants and should be paid within a specified time, and if not so paid the property or sufficient part thereof should be sold. It is to be noticed that the decree ends with the provision that " if the net proceeds of the sale are insufficient to pay

such amount . . . in full, the plaintiff should be at liberty to apply for a personal decree for the balance." The last provision appears in the final decree also. The preliminary decree after declaring the decretal amount lays down the manner in which the decree is to be worked out. It is to be worked out in three stages indicated in the decree which cannot be severed from one another. They are not independent, but constitute different stages in a single degree. All the decrees show on their face that they are connected. For the purposes of the Act the decrees passed in the suit to which the Act applies should be treated as a single money decree. As already stated, the three decrees should not be treated as severable and independent decrees, each standing out by itself unrelated with the other. The personal decree drawn up in the terms of Form No. 8 Appendix D., Code of Civil Procedure, shows that money is still due under the decree. Where there is a preliminary decree, a final decree and a personal decree which is being executed, the decree is not fully satisfied since all the decrees must be taken together.

Their Lordships approve the reasoning of the Full Bench decision in *Mritunjoy Mitra* v. *Satish Chandra Banerjee* (*supra*).

In the course of the arguments reference was made to " Mesne profits." Besides the recovery of possession of the properties, the respondents were granted the further relief of Mesne profits. Their Lordships think they are entitled to this further relief. They do not propose to interfere with the order passed by the High Court.

For the above reasons, their Lordships will humbly advise His Majesty that the appeal fails, and should be dismissed with costs.

(65109) Wt. 8084—42 180 6/49 D.L.

In the Privy Council

JADUNATH ROY AND ANOTHER

v.

KSHITISH CHANDRA ACHARJYA CHOUDHURY AND OTHERS

DELIVERED BY SIR MADHAVAN NAIR

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