Privy Council Appeal No. 70 *of* 1947
Bengal Appeal No. 16 *of* 1943

Joy Chand Lal Babu - - - - - - - - - *Appellant*

v.

Kamalaksha Chaudhury 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 17TH MARCH, 1949

Present at the Hearing :

LORD PORTER
LORD MACDERMOTT
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from an Order of the High Court of Judicature at Fort William in Bengal passed in its civil revisional jurisdiction dated the 13th August, 1943, which set aside an Order of the Subordinate Judge of Burdwan dated the 18th July, 1942, rejecting the petition of the respondents Nos. 1 to 10 under sections 30 and 36 (6) (*a*) (ii) of the Bengal Money Lenders Act, 1940 (Act X of 1940) (hereinafter referred to as " the Act "), for re-opening a mortgage decree dated the 9th October, 1931, passed against the respondents in mortgage suit No. 198 of 1930.

The questions argued upon this appeal were first, a preliminary objection taken by the respondents that this appeal is incompetent; secondly, a preliminary objection taken by the appellant that the revision application to the High Court from which this appeal is brought was incompetent. Apart from these preliminary objections the only two matters urged against the Order of the High Court appealed from were first, that the loan to which the application of the respondents related was a " commercial loan " to which the Act did not apply; and secondly, that the suit in which the application of the respondents was made was not a " suit to which this Act applies " as defined by the Act, and consequently that the respondents were not entitled to any relief under the Act.

The material facts are these:—

On the 6th January, 1925, the respondents or their predecessors in title executed a registered karbarnama, or bond for obtaining loans for business, in favour of the appellant for securing loans up to a sum of Rs.25,000. The material provisions of this document will be referred to later. The appellant on the 15th August, 1930, instituted a mortgage suit, No. 198 of 1930, claiming a sum of Rs.40,600 and asking for the enforcement of the mortgage security. On the 5th October, 1931, a compromise decree was passed in the said suit for a total sum of Rs.45,825-8-0 with interest payable in sixteen instalments, and it was provided that on failure to pay one instalment the whole of the outstanding sum would be due and recoverable with interest at 10½ per cent. per

annum by sale of the mortgaged properties, and in case of deficiency by sale of the other properties of the mortgagors and also from the persons of the mortgagors by executing the decree.

Default was made in payment of the first instalment under the compromise decree, and on the 20th August, 1932, application was made by the appellant for execution of the decree. In succeeding years further applications in execution were made, and all the properties subject to the decree were eventually sold and purchased by the appellant. The last sale in execution was confirmed in July, 1938, and upon an application for possession made by the appellant on the 20th September, 1938, possession was ordered to be delivered by the court on the 1st November, 1938, but owing to failure on the part of the execution clerk to return the writ to the court no Order noting the fact of delivery of possession and finally disposing of the application for possession was entered on the records of the court until the 3rd June, 1940. Meantime, namely on the 29th November, 1938, there was an application by a third party under Rule 100, Order XXI, which was not disposed of until April, 1939.

On the 30th August, 1941, respondents Nos. 1 to 10 filed miscellaneous application No. 127 of 1941 in the court of the Subordinate Judge at Burdwan asking for relief under sections 30 and 36 of the Act.

The Act was passed on the 1st August, 1940, and the following provisions of it are relevant to this appeal :—

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

. . . . . .

(4) " commercial loan " means a loan advanced to any person to be used by such person solely for the purpose of any business or concern relating to trade, commerce, industry, mining, planting, insurance, transport, banking or entertainment, or to the occupation of wharfinger, warehouseman or contractor or any other venture of a mercantile nature, whether as proprietor or principal or agent or guarantor ;

. . . . . .

(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 ;

(b) for the enforcement of any agreement entered into before or after the commencement of this Act, whether by way of settlement of account or otherwise, or of any security so taken, in respect of any loan advanced whether before or after the commencement of this Act ; or

(c) for the redemption of any security given before or after the commencement of this Act in respect of any loan advanced whether before or after the commencement of this Act.

Section 30. Notwithstanding anything contained in any law for the time being in force, or in any agreement,

(1) no borrower shall be liable to pay after the commencement of this Act—

(a) any sum in respect of principal and interest which together with any amount already paid or included in any decree in respect of a loan exceeds twice the principal of the original loan,

(b) on account of interest outstanding on the date up to which such liability is computed, a sum greater than the principal outstanding on such date,

(c) interest at a rate *per annum* exceeding in the case of—

(i) unsecured loans, ten *per centum* simple,

(ii) secured loans, eight *per centum* simple,

whether such loan was advanced or such amount was paid, or such decree was passed or such interest accrued before or after the commencement of this Act;

(2) no borrower shall after commencement of this Act, be deemed to have been liable to pay before the date of such commencement in respect of interest paid before such date or included in a decree passed before such date, interest at rates *per annum* exceeding those specified in sub-clause (c) of clause (1);

(3) a lender shall be entitled to institute a suit at any time after the commencement of this Act in respect of a transaction to which either or both of the preceding clauses applies or apply.

Section 36. (1) Notwithstanding anything contained in any law for the time being in force, if in any suit to which this Act applies, or in any suit brought by a borrower for relief under this section whether heard *ex parte* or otherwise, 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, . . ."

Then follow a list of powers which may be exercised by the court, with qualifications on the execution of such powers, including a power to re-open any transaction and take account between the parties, and a power to release the borrower from all liability in excess of the limits specified in clauses 1 and 2 of section 30. For the purposes of this appeal it is not necessary to consider these powers in detail. Section 40 (5) of the Act provides that in any suit or proceeding the burden of proving that a loan is a commercial loan shall be on the money-lender who advanced the loan.

The application was heard by the Subordinate Judge of Burdwan who gave judgment on the 18th July, 1942. He held that the loan made by the appellant to the respondents or their predecessors was a commercial loan within the meaning of the Act, and that such loan therefore did not come within the terms of the Act. Accordingly he dismissed the application. However, he went on to consider the question whether the suit in which the application was made was a suit to which the Act applied within the definition contained in section 2 (22) of the Act and came to the conclusion that it was. His view was that as no Order for delivery of possession was recorded till June, 1940, and as the proceeding for delivery of possession was a continuation of the application for execution, it followed that a proceeding in execution was pending on the 1st January, 1939.

From the Order of the learned Subordinate Judge an application was made in revision to the High Court at Calcutta, and such application was heard on the 18th November, 1942. The learned judges held, disagreeing with the learned Subordinate Judge, that the loan was not a commercial loan. They agreed with the learned Subordinate Judge in thinking that the suit was one to which the Act applied, basing their opinion largely on the fact that the said application under Rule 100, Order XXI, was outstanding on the 1st January, 1939. In the result they made the Rule absolute, set aside the Order of the Subordinate Judge and sent the case back to him in order that the decree might be re-opened in accordance with the directions given by the court. No objection to these directions has been raised before the Board.

The preliminary objection taken by the respondents is that leave to appeal to the Board was granted by the High Court under section 109 (*a*) of the Code of Civil Procedure and that that subsection only relates to appeals from decrees or final orders passed on appeal. The respondents contend that the subsection does not apply to Orders passed in revision,

and they point out that under section 115 a power of revision only arises in cases in which no appeal lies, so that there is a clear distinction between appeal and revision. The view that orders passed in revision do not fall within section 109 (*a*) has been accepted by High Courts in India other than the High Court at Calcutta, and their Lordships think it is correct. It appears from the record that the application for leave to appeal to His Majesty in Council was based on section 109 (*a*) and upon the hearing of the application the court discussed matters relevant to that subsection. But the certificate granting leave to appeal is not in the record. The certificate may have been granted under section 109 generally without specifying any particular subsection, and subsection (*c*) is clearly wide enough to cover an appeal from an Order made in revision. It was for the respondents to produce the certificate on which their objection to the competence of the appeal is founded, and as they have not done so their preliminary objection must fail.

The preliminary objection taken by the appellant is that the High Court had no power to interfere in revision under section 115 of the Code of Civil Procedure with the Order of the Subordinate Judge; an objection which was not taken before the High Court. Section 115 of the Code is in these terms:—

> "The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears—
>
> (*a*) to have exercised a jurisdiction not vested in it by law, or
>
> (*b*) to have failed to exercise a jurisdiction so vested, or
>
> (*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
>
> the High Court may make such order in the case as it thinks fit."

Mr. Pringle for the appellant admitted that no appeal lay from the Order passed by the Subordinate Judge, and he did not challenge the revisional jurisdiction on that ground. Their Lordships accept this admission and express no opinion upon its correctness. Mr. Pringle based his objection on the principle laid down by this Board in *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh* (11 I.A. 237) and *Balakrishna Udayar* v. *Vasudeva Aiyar* (44 I.A. 261) and now firmly established, that a subordinate court does not act illegally or with material irregularity because it decides wrongly a matter within its competence. A court has jurisdiction to decide a case wrongly as well as rightly. Mr. Pringle maintained that the learned subordinate judge had jurisdiction to decide that the loan was a commercial loan, and in so doing he did not act illegally or with material irregularity, and the High Court had no power to interfere in revision merely because it disagreed with his decision. So far Mr. Pringle is on safe ground, but the learned Subordinate Judge, having held that this was a commercial loan, was bound to go on to consider what effect that decision had upon the respondents' application, and, since the Act in terms does not apply to commercial loans, the learned Judge was bound, upon his finding, to dismiss the application without determining whether or no the respondents brought themselves within sections 30 and 36 of the Act as they claimed to do. In so doing, on the assumption that his decision that the loan was a commercial loan was erroneous, he refused to exercise a jurisdiction vested in him by law, and it was open to the High Court to act in revision under subsection (*b*) of section 115. There have been a very large number of decisions of Indian High Courts on section 115, to many of which their Lordships have referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a subordinate court does not by itself involve that the subordinate court has acted illegally or with material irregularity so as to justify interference in revision under subsection (*c*), nevertheless, if the erroneous decision results in the subordinate court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under subsection (*a*) or subsection (*b*), and subsection (*c*) can be ignored. The cases of *Babu Ram* v. *Munna Lal*, I.L.R. 49 All. 454, and *Hari*

Bhikaji v. *Naro Vishvanath*, I.L.R. 9 Bom. 432, may be mentioned as cases in which a subordinate court by its own erroneous decision (erroneous that is in the view of the High Court), in the one case on a point of limitation and in the other on a question of res judicata, invested itself with a jurisdiction which in law it did not possess, and the High Court held, wrongly their Lordships think, that it had no power to interfere in revision to prevent such a result. In the present case their Lordships are of opinion that the High Court, upon the view which it took that the loan was not a commercial loan, had power to interfere in revision under subsection (*b*) of section 115.

The next question to be decided is whether the High Court was right in holding that the loan in this case was not a commercial loan. Under the definition in the Act a commercial loan is one advanced to any person to be used by such person solely for the purpose of business, etc. The matter therefore has to be regarded from the point of view of the lender, and it has to be determined for what purpose the loan was advanced, the burden of proving that the loan was a commercial one being on the lender. Where, as in this case, the loan is secured by an instrument in writing, the terms of such instrument must have an important, and it may be a decisive, bearing upon the question. The mortgage of the 6th January, 1925, which is exhibit A, recites that the borrowers execute this deed of karbarnama (bond for obtaining loans for business) on mortgage of immovable properties to the following effect: —

> "We are running rice business and rice mill at Katwa. For the said business and for other expenses, we require large sums of money from time to time. Such amounts are not being supplied from ourselves, and so the business is not running well. Hence, we execute this *karbarnama* (i.e. bond for loan transactions for business) on mortgage of immovable properties to carry on money-lending business to the extent of Rs. 25,000 . . ."

The appellant relies strongly on the description of the loan as "a bond for obtaining loans for business," but such a description is not inconsistent with a part of the loan being required for other purposes. The learned judges of the High Court considered that on the construction of the document it was clear that the loan was required for business and other purposes, and that therefore the money was not advanced solely for business purposes. The appellant contends that the recital that the money was required for business and other expenses and that they had not got the money was merely a recital of historical facts explaining why the business was not running well, and does not qualify the purpose for which the loan was obtained, which appears from its description as *karbarnama*. Their Lordships are not able to accept this view. They agree with the learned judges of the High Court in thinking that the reference to "other expenses" cannot be explained on any hypothesis which confines the loan exclusively to business transactions. In the result their Lordships are satisfied that the appellant has not discharged the burden of proving that this was a commercial loan.

There remains the further question of whether the mortgage suit in the present case is a suit to which the Act applies within section 36 of the Act. Section 2 (22) defines such a suit as being a suit or proceeding instituted or filed on or after the 1st January, 1939, or pending on that date. The mortgage suit in this case was filed long before 1939, and the only question is whether there was any suit or proceeding pending on the 1st January, 1939. As already noted the learned Subordinate Judge based his view that there was a suit or proceeding pending on the fact that the Order disposing of the application for possession made by the decree holders had not been noted on the records of the court until after 1st January, 1939, though possession had been given before that date. The High Court did not differ from this view, though they displayed for it no marked enthusiasm, and based their decision rather on the fact that the application under Rule 100 Order XXI was pending on the 1st January, 1939. Their Lordships hesitate to disagree with the opinion of the learned Subordinate Judge on a matter relating to the practice of his own court. They are, however, unaware of any provision in the Code of Civil Procedure which

prevents delivery of possession given by the court from being effective until the fact of delivery has been noted on the records of the court. Nor do they see any convincing reason for such a rule, particularly when, as in the present case, the delay in completing the record of the court was due to default on the part of an officer of such court. Nor do their Lordships attach much importance to the fact that the application under rule 100 of Order XXI was pending. They share the difficulty felt by Mr. Justice Henderson in *Jitendra Nath Bera* v. *Makham Lal Bera*, A.I.R. 1942 Cal. 452 in holding that the action of a third party can be regarded as a proceeding in execution within section 2 (22) of the Act. Mr. Khambatta however, on behalf of the respondents, has relied on a different ground for establishing that the suit was pending on the 1st January, 1939. He contends that at any time within three years from November, 1938, when the last application in execution was disposed of, the decree holder could apply for a personal decree under Order 34, Rule 6, and that the suit was pending so long as such right was open. For this proposition he relies on a decision of the High Court at Calcutta *Muhammad Kazim Ali* v. *Ramesh Chandra Sil* A.I.R. 1947 Cal. 270. Mr. Pringle for the appellant conceded, rightly as their Lordships think, that the suit was pending so long as there was a right to obtain a personal decree which was not barred under section 181 of the Limitation Act, but he contended that the compromise decree of the 5th October, 1931, itself contained a personal decree, and there could therefore be no right to obtain such a decree in the future. For some unexplained reason the compromise decree has not been printed in the record, but an office copy with an English translation has been lodged with the Registrar, and their Lordships have referred to it. The decree was passed in terms of the compromise between the parties. The compromise states that the decree shall be considered to be the final decree in the suit and provides that on failure to pay an instalment the plaintiff shall be competent to realise the amount due by auction sale of the property attached in execution of the decree and if the entire amount is not realised thereby, to realise the balance by attachment and sale of the other properties belonging to the defendants and " from their persons by executing the decree ". Mr. Pringle's contention is that these last words amount to a personal decree for payment.

Suits for the sale of mortgaged property are dealt with in Order 34 of the Code of Civil Procedure. The scheme of the Code is that a preliminary decree is passed under Rule 4 by which the amount due is ascertained and in default of payment the plaintiff is given liberty to apply for a final decree directing sale of the mortgaged property or a sufficient part thereof. See Form 5 in Appendix D. A final decree is passed under Rule 5 and directs that if the amount due has not been paid the mortgaged property or a sufficient part thereof shall be sold and the proceeds brought into court and dealt with as directed in the preliminary decree. See Form 6 in App. D. The final decree does not contain an order for payment, but Rule 6 provides that where the proceeds of sale are insufficient to pay the amount to the plaintiff the Court on application by him may if the balance is legally recoverable from the defendant otherwise than out of the property sold pass a decree for such balance. Form 8 in App. D contains the form of a personal decree and orders payment of a specific sum.

The argument of Mr. Pringle is that in this case the compromise decree embodies the terms of a preliminary decree, a final decree, and a decree for personal payment, and that this could be done by agreement. The decree no doubt embodies the terms of a preliminary decree and a final decree, and goes beyond a final decree in directing sale of the property of the mortgagors not included in the mortgage, property which in the absence of agreement could have been reached only in execution of a personal decree. But at the date of the compromise decree, the court was not in a position to determine whether any balance would be legally recoverable after the sales. It could only have passed a decree for payment of such balance if any as might ultimately be found due. A decree for payment of a balance, unascertained and unascertainable till a large number of sales have been completed, and possibly then found to be non-existent, would be, to say the least of it, an unusual form of decree,

and one which could hardly fail to cause serious embarrassment to a court asked to execute such a decree against future property of the judgment debtor not included in the compromise decree. Their Lordships are not prepared to hold that the court which passed the compromise decree intended to make, or did make, any such Order. They think that the words on which Mr. Pringle relies amount to no more than a submission by the mortgagors to consent to a personal decree for payment of the ultimate balance if and when any such balance should be found to be due, and legally recoverable. In their Lordships' view all the points urged by the appellant against the judgment of the High Court fail.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs.

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In the Privy Council

JOY CHAND LAL BABU

v.

KAMALAKSHA CHAUDHURY
AND OTHERS

[DELIVERED BY SIR JOHN BEAUMONT]

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