

Promode Kumar Roy and anr. Vs. Benoy Krishna Chakravarty

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Court : Kolkata

Decided On : Mar-05-1941

Reported in : AIR1941Cal425

Appellant : Promode Kumar Roy and anr.

Respondent : Benoy Krishna Chakravarty

Judgement :

Derbyshire C.J.

1. This matter was re-reported to me by Sen J. under Rule 3 of chap. V of the Rules of the Original Side of this Court on the ground that it involves a substantial question of law as to the interpretation of the Government of India Act, 1935. Under the rule just mentioned, I appointed this Bench to hear the matter. Put shortly the question is are certain provisions of the Bengal Money-lenders Act, 1940, an Act of the Bengal Provincial Legislature which received the assent of the Governor-General in July 1940 and came into force on 1st September 1940, by order of the Governor of Bengal beyond the law-making powers of the Bengal Legislature under the Government of India Act, 1935?

2. The facts of the case are as follows : On 8th March 1933, Rai Bahadur Tarit Bhusan Roy, the father of the two plaintiffs, lent Rs. 50,000 to the defendant, Benoy Krishna Chakravarty. The loan was secured by an equitable mortgage of five properties in Calcutta the title deeds of which were deposited by the borrower

with the lender, the transaction was evidenced by a memorandum of the deposit, which was registered. It was a term of the mortgage that the mortgagor should pay to the mortgagee compound interest at eight per cent. per annum with half yearly rests on the money owing. On 21st January 1935, the mortgagee by a deed of gift assigned his right, title and interest in the mortgage to the two plaintiffs. On or about 21st June 1938 the plaintiffs instituted this suit against the defendant mortgagor claiming a decree in Form No. 5 in Appendix D to the schedule of the Code of Civil Procedure as amended by Act 12 of 1929. The rate of interest claimed in the plaint was eight per cent. per annum compound interest with half yearly rests. On 8th July 1938 a preliminary mortgage decree for sale in the form asked was made ex parte. On 4th August 1938 the plaintiffs obtained from the Court an order for the appointment of a receiver in the suit, such receiver however was by the terms of the order not to take possession of the mortgaged property if the defendant paid Rs. 400 monthly towards the plaintiffs' claim in the suit. The defendant has regularly paid the Rs. 400 per month. The Registrar took accounts in the suit and by his report dated 30th January 1939 found that on 13th September 1939 there would be due from the defendant to the plaintiffs under the mortgage Rs. 72,057-14-2 for principal and interest (compound with half yearly rests). On 22nd December 1939, a final mortgage decree for sale was made in favour of the plaintiffs who were however directed not to take any steps in the sale proceedings until after the then ensuing Easter vacation. Thereafter there were adjournments of the proceedings at the instance of the defendant and, eventually the Registrar fixed the sale for 13th November 1940.

3. In the meantime the Bengal Money-lenders Act, 1940, had come into force on 1st September 1940 and on 10th September the defendant petitioned the Court for relief under the Act alleging that the interest (eight per cent. compound) was in excess of that allowed by the Act (eight per cent. simple) for a secured loan (Section 30) and asking that the transactions between the mortgagor and the mortgagee should be reopened under Section 36 and that a new decree should be made in accordance with the provisions of the Act, giving the defendant such relief as he was entitled to under the Act. The plaintiffs filed an affidavit in reply in which they contended that the Act does not apply to the circumstances of this case, that there are no grounds for reopening the decrees, that they are assignees and

protected from the operation of the Act and finally, that

in view of the Government of India Act 1935, the Bengal Money-lenders Act, 1940 is, so far as it seeks to affect decrees already passed and the rights of decree-holders under the said decrees, is ultra vires of the Bengal Legislature and the defendant is not entitled to any relief thereunder.

4. Upon that contention being raised, Sen J. reported the matter and it falls to this Bench to deal with it. The Bengal Money-lenders Act, 1940 contains 45 sections. It is intituted 'an Act further to regulate transactions of money-lending in Bengal.' The Preamble reads:

Whereas it is expedient to make further and better provision for the control of money-lenders and for the regulation and control of money-lending.

5. In Section 2, the definition section, the terms 'borrower,' 'lender,' 'interest,' 'loan,' 'suit' and 'suit to which this Act applies' are defined. 'Suit to which this Act applies' means-

any suit or proceedings instituted or filed on or after 1st 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.

6. The other relevant provisions of the Act are contained in Sections 30, 34 and 36 which are set out below:

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 the 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,

34. (1) Notwithstanding anything contained in any law for the time being in force, or in any agreement, the Court shall-(a) in suits in respect of loans to which the provisions of Order 34 of Schedule 1, Civil P.C., 1908, apply, on the application of the defendant and after hearing the plaintiff, notwithstanding the limit of six months provided therein, direct at the time of the passing of the preliminary decree under Rule 2 or Rule 4 of the said order to the effect mentioned in Sub-clause (i) of Clause (c) of Sub-rule (1) of the said Rule 2,-(i) that the payment of the amount found or declared due under Sub-rule (1) of Rule 2 or Sub-rule (1) of Rule 4 of the said order, as the case may be, is to be made, subject to such conditions as the Court may impose in such number of annual instalments and on such dates as the Court thinks fit having regard to the circumstances of the plaintiff and the defendant and the amount of the decree; and (ii) that in default of payment of any such instalment the plaintiff shall, after giving to the defendant such notice as may be prescribed, be entitled to apply for a final decree under Sub-clause (ii) of Clause (c) of Sub-rule (1) of the said Rule 2 or under Sub-rule (1) of the said Rule 4, as the case may be, and the date of such default shall be deemed to be the date fixed under Sub-clause (i) of cl, (c) of Sub-rule (1) of the said Rule 2 for payment of the whole amount found or declared due under or by the preliminary

decree: Provided that nothing in this clause shall affect the power of the Court to allow extension of time under Sub-rule (2) of Rule 2 or Sub-rule (2) of Rule 4 of the said order:

Provided further that if the defendant, after receiving the notice referred to in Sub-clause (ii) and before a final decree is passed, makes payment into Court of the amount due from him in respect of any such instalment, the payment of such instalment shall not be deemed to be in default and the Court shall not pass a final decree; (b) in suits in respect of loans advanced before the commencement of this Act other than those referred to in Clause (a)-(i) on the application of a defendant and after hearing the plaintiff, order at the time of passing of the decree, or (ii) on the application of a judgment-debtor against whom a decree in such suit has been passed whether before or after the commencement of this Act and after notice to the decree-holder, order at any time after the decree has been passed,

that the amount of the decree shall, subject to such conditions as the Court may impose, be payable without interest in such number of annual instalments, on such dates and within such period not exceeding 20 years as the Court thinks fit having regard to the circumstances of the plaintiff and the defendant or the decree-holder and the judgment-debtor and the amount of the decree, and that, if default is made in making payment of any instalment, that instalment and not the whole of the decretal amount shall be recoverable; (c) during the pendency of any enquiry under Sub-clause (ii) of Clause (b) order, subject to such conditions as the Court may impose, the stay of execution of the decree.

(2) In default of payment of any instalment referred to in Clause (b) of Sub-section (1), the decree-holder shall, after giving to the judgment-debtor such notice as may be prescribed, be entitled to apply for execution of the decree in respect of such instalment together with interest thereon at the rate of not more than six per centum per annum from the date of such default:

Provided that nothing in this sub-section shall affect the power of the Court to allow, prior to an order for execution of the decree, an extension of time of not less than one year for the payment of any instalment, and that if such extension of time is allowed, the payment of such instalment shall not be deemed to be in default:

Provided further that if the judgment-debtor after receiving the notice referred to in this subsection and prior to an order for execution of the decree, makes payment into Court of the amount due from him in respect of any such instalment, the payment of such instalment shall not be deemed to be in default and the Court shall not order execution of the decree.

(3) Any order made under Sub-clause (ii) of Clause (b) of Sub-section (1) shall be deemed to have been passed under Section 47, Civil P.C., 1908.

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, namely, shall -

(a) reopen any transaction and take an account between the parties;

(b) notwithstanding any agreement, purporting to close previous dealings and to create new obligations, reopen any account already taken between the parties;

(c) release the borrower of all liability in excess of the limits specified in Clauses (1) and (2) of Section 30;

(d) if anything has been paid or allowed in account on or after the first day of January, 1939, in respect of the liability referred to in Clause (c), order the lender to repay any sum which the Court considers to be repayable in respect of such payment or allowance in account as aforesaid:

Provided that in the case of a loan to which the provisions of Sub-section (2) of Section 29 apply the lender or money-lender and each of his assignees shall be liable to repay the sum which the Court considers to be repayable in respect of and in proportion to the sum received by such lender or money-lender and such assignee;

(e) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the lender has parted with the security, order him to indemnify the borrower in such manner and to such extent as it may deem just:

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, or

(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 first day of January 1939, or anything which affects an award made under the Bengal Agricultural Debtors Act, 1935.

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 exercise of the powers conferred by Sub-section (1) the Court reopens 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, and may award to the decree-holder such costs in respect of the reopened decree as it thinks fit;

(b) shall not do anything which affects any right acquired bona fide by any person, other than the decree-holder, in consequence of the execution of the reopened decree;

(c) shall order the restoration to the judgment-debtor of such property, if any, of the judgment-debtor acquired by the decree-holder in consequence of the execution of the reopened decree as may be in the possession of the decree-holder on the

date on which the decree was reopened;

(d) shall order the judgment-debtor to pay to the decree-holder, in such number of instalments as it may think fit, the whole amount of the new decree passed under cl, (a); and

(e) shall direct that, in default of the payment of any instalment ordered under Clause (d), the decree-holder shall be put into possession of the property referred to in Clause (c) and that the amount for which the decree-holder purchased such property in execution of the reopened decree shall be set off against so much of the amount of the new decree as remains unsatisfied.

(3) In this section the expression 'suit to which this Act applies' includes a proceeding in respect of any application relating to the admission or amount of a proof of a loan advanced before or after the commencement of this Act in any insolvency proceedings.

(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 for the redemption of any such security.

(5) Nothing in this section shall affect the rights of any assignee or holder for value if the Court is satisfied that the assignment to him was bona fide, and that he had not received the notice referred to in Clause (a) of Sub-section (1) of Section 28.

(6) Notwithstanding anything contained in any law for the time being in force -

(a) the Court which, in a suit to which this Act applies, passed a decree which was not fully satisfied by the first day of January 1939, may exercise the powers conferred by Sub-sections (1) and (2) -

(i) in any proceedings in execution of such decree, or

(ii) on an application for review of such decree made within one year of the date of commencement of this Act, and the provisions of Rules 2 and 5 of Order 47 of Schedule 1, Civil P.C., 1908, shall not apply to any such application;

(b) any Court before which an appeal is pending in respect of a decree referred to in clause (a) may either itself exercise the like powers as may be exercised under Sub-sections (1) and (2), or refer the case to the Court which passed the decree directing such Court to exercise such powers and such Court shall after exercise thereof return the record with the additional evidence, if any, taken by it and its findings and the reasons therefor to the appellate Court and thereupon the provisions of Rule 26 of O.41 of Schedule 1, Civil P.C., 1908, shall apply.

7. These sections will, without doubt, be the subject of much litigation and will fall to be construed and applied to various kinds of cases arising out of money-lending transactions in all their different stages. It would be unwise and indeed, in my view, improper to attempt to analyse them here, but it is clear that they give the Courts power in certain cases, where the rates of interest or the sum total of the interest in transactions between a borrower and a lender exceed the rates or amount laid down in Section 80, to reopen transactions, and in certain cases to set aside decrees passed before the Act came into operation, and thereupon to assess what is payable under the provisions of the Act and pass new decrees accordingly. Mr. S. N. Banerji who appears for the plaintiffs admitted to the Court that if the Act is valid the Court may give the defendant all the relief he claims, except that the defendant may not have relief in respect of any costs or interest on costs awarded already in the suit; costs, contends Mr. Banerji, are not loans or interest. We are therefore at this stage only concerned with the question whether the provisions of this Act which have been challenged are valid. Mr. Banerji contended that the Act is beyond the law-making power of the Bengal Legislature for three reasons : (1) The subject-matter of the Act does not come within any of the Legislative Lists contained in Schedule 7 to the Act; (2) the plaintiffs' decree is their property and the Act purports to deprive them of it; no Indian Legislature, certainly no Provincial Legislature, has power to take away property from any subject of His Majesty; and (3) the provisions of the Act by which the plaintiff's decree may be set aside are retrospective and such retrospective legislation is beyond the powers of the Provincial Legislature. Section 100 (3), Government of India Act enacts that

Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof

with respect to any of the matters enumerated in List 2 in the said schedule (hereinafter called the 'Provincial Legislative List').

8. No question here arises as to the application of Sub-sections (1) and (2) of Section 100. Item 27 of List 2, the Provincial Legislature List of Schedule 7, Government of India Act, 1935, is 'Trade and commerce within the Province; markets and fairs; money-lending and money-lenders.' The Bengal Money-lenders Act patently deals with money-lending a wide subject, and also money-lenders, a somewhat narrower subject. It is clear that the subject-matter of the Bengal Moneylenders Act comes within Item 27 of List 2 in Schedule 7, Government of India Act, 1935, and is a proper subject for the Bengal Provincial Legislature to legislate with regard to.

9. As regards contention (2) a decree is undoubtedly property; so are a person's rights under a contract. Law-makers in all countries at various times in history have interfered with the rights a lender of money has under his contract with the borrower: the law of damdupat forbids the recovery at one time of interest exceeding the amount of the principal. In England the Moneylenders Act, 1900, gave the Courts power, when the interest charged was excessive, to reopen the transaction and relieve the borrower from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of the principal, interest and charges. The Usurious Loans Act, 1918, an all India Act passed by the Indian Legislative Council, gave Indian Courts somewhat similar powers, including the power to order the creditor to repay to the borrower excessive interest paid. The Bengal Money-lenders Act, 1933, passed by the Bengal Legislature of 1933, the Preamble of which is 'Whereas it is expedient to make better provision for the control of money-lending and to give additional powers to Courts to deal with money-lending in Bengal,' provided that if in a suit in respect of money lent by a money-lender before the commencement of the Act it was found that the arrears of interest amounted to a sum greater than the principal of the loan, the Court might limit the interest recoverable to an amount equal to the loan. These were all instances of the Legislature's interference with the contractual rights of the money-lender which were his property. It is true that no statute affecting all India, or Bengal or England directly gave the Courts power to set aside decrees for money

lent and interest. There is in essence no difference between interfering, by legislation with rights under a contract and interfering with a decree.

10. Unsatisfied decrees for money lent and interest are a feature of India to an extent not known in England where the bankruptcy laws are applied with greater stringency and effect than the insolvency laws are in India. It must be remembered that English Bankruptcy Courts sometimes go behind a decree to determine the nature of the liability in which the decree is founded; in particular a transaction with a money-lender may be re-opened if it is harsh and unconscionable, even though the debtor did not apply for relief in the action (suit), the judgment (decree), in which is the basis of the petition : see Halsbury's Laws of England, Edn. 2, Vol. 2, page 82. Interference with decrees passed may or may not be injurious to some of His Majesty's subjects; it depends on the circumstances. In *Bank of Toronto v. Lambe* (1887) 12 AC 575, (a case before the Privy Council under the British North America Act, 1876) at p. 586, Lord Hobhouse said:

Their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of self government on great countries such as Quebec it intended to limit them on the speculation that they might be used in an injurious manner.

11. Section 100(3), Government of India Act, read with item 27 of List II, provides that 'the Provincial Legislature has power to make laws for a Province ... on money lending and money-lenders.' There is no restriction (since Sub-sections (1) and (2) are not in question) on the Provincial Legislature's power to make laws as to money-lending and money-lenders. The intendment of the Government of India Act, 1935, and the plain purpose of Section 100 (3) and Item 27 of List II, is to confer such law-making powers as are necessary in the opinion of the Provincial Legislature to deal with the evil to be remedied. In *Reg v. Burah* (1878) 3 AC 889, which was heard by the Privy Council on appeal from the Calcutta High Court, the legislative powers of the Governor-General in Council under the Indian Councils' Act, 1861, were in question. The judgment of their Lordships was delivered by Lord Selborne, who said at page 906:

Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial Legislature, they may (in their Lordships' judgment) be

well exercised, either absolutely or conditionally.

12. In 1938 the Madras Agriculturists' Relief Act was passed by the Madras Legislature. By Section 8 of that Act in the case of debts incurred before 1st October 1932, where an agriculturist has paid to any creditor twice the amount of the principal, whether by way of principal or interest or both, the debt including the principal is deemed to be wholly discharged. By Section 19 of the same Act, the Court may apply the provisions of the Act to a decree for the re-payment of a debt obtained against an agriculturist before the commencement of the Act, and not with standing anything contained in the Code of Civil Procedure amend the decree or enter satisfaction as the case may be. Not only did the Act empower Courts to alter decrees passed, but it applied retrospectively to debts incurred and decrees made between 1932 and 1938. The validity of that Act was challenged both in the Madras High Court, where the debtor claimed relief under the Act, and also in the Federal Court (Case No. Subrahmanyam Chettiar v. Muttuswami Goundan Reported in , on the ground that it was repugnant to the provisions of an existing Indian law, namely the Negotiable Instruments Act, 1881: see Section 107 (1), Government of India Act, 1935, and Item 28 of List. 1 of Schedule 7. The Federal Court upheld the validity of the Madras Act. The Chief Justice of India in his judgment said inter alia:

That the provisions of the Act in their application to the decree obtained by the appellant were within the competence of the Madras Legislature to enact does not seem to me open to doubt.

13. In Case No. Atiqah Begum Reported in ('41) 28 AIR 1941 FC 16 in the Federal Court the Chief Justice said:

It must always be remembered that in their own sphere the powers of the Indian Legislature are as large and ample as those of Parliament itself: Reg v. Burah (1878) 3 AC 889, and the burden of proving that they are subject to strange and unusual prohibitions against retrospective legislation must certainly lie upon those who assert it.

14. That completely disposes of Mr. Banerji's second and third contentions. It is clear that the provisions of Sections 30,34 and 36, Bengal Money-lenders Act, 1940, so far as they concern the matters in issue, are within the law making powers of the Bengal Legislature, and I so hold. There will be a decree in terms of the form put in. The order for the appointment of a receiver dated 4th August 1938, is superseded by the decree now passed. The plaintiffs will have the costs of the suit upto and including 9th September 1940, and the defendant will have the costs of the application, i. e., costs of the subsequent proceedings from 10th September 1940 down to the drawing up of the decree herein. Certified for two counsel. Certificate under Section 205, Government of India Act, 1935, is granted.

Panckridge, J.

15. I agree and I have nothing to add.

Nasim Ali, J.

16. This is an application by a borrower for relief under the Bengal Money-lenders Act, 1940. The facts which are not in dispute are these: (1) On 8th March 1933, petitioner borrowed from the father of the opposite parties Rs. 50,000 on equitable mortgage of certain immovable properties in Calcutta. The rate of interest provided by the said mortgage was 8 per cent. per annum with half-yearly rests. (2) On 21st January 1935 the father of the opposite parties made a gift to the said opposite parties of his right, title and interest in the said mortgage. (3) On 21st June 1938, the opposite parties instituted a suit against the petitioner in the original side of this Court to enforce this mortgage. The rate of interest claimed in the plaint by the opposite parties was 8 per cent. per annum compound with half-yearly rests. (4) On 8th July 1938, an ex parte preliminary mortgage decree in Form No. 5 in Appendix D to the Schedule of the Code of Civil Procedure was passed in this suit. By this decree interest at the rate claimed in the plaint was allowed. (5) On 22nd December 1939, this decree was made final. (6) On 11th June 1940, the mortgage properties were ordered to be sold in execution of the final mortgage decree, by the 2nd week of November 1940. (7) On 27th July 1940, the Governor General assented to the Bengal Money-lenders Act, 1940. (8) On 1st September 1940, this

Act came into force. (9) On 10th September 1940, the petitioner made the present application. The petitioner in this petition prays inter alia (a) That the decrees made in this suit on 8th July 1938, and 22nd December 1939 be reopened and a new decree or decrees be passed in accordance with the provisions of the Bengal Money-lenders Act, 1940; (b) That he may be given the liberty to pay the decretal amount by 20 annual instalments or by such other instalments as this Court may deem fit and proper.

17. On 12th September 1940, the mortgagee decree-holders opposed this application on the following amongst other grounds:

That in view of the Government of India Act, 1935 the Bengal Money Lenders Act, 1940 in so far as it seeks to affect decrees already passed and the rights of decree-holders under the said decrees is ultra vires of the Bengal Legislature and the petitioner is not entitled to get any relief thereunder.

18. On 27th September 1940, my learned brother Sen J. made the following order:

Whereas it appears to me that this application involves a substantial question of law as to the interpretation of the Government of India Act, 1935, I report to the Hon'ble the Chief Justice to constitute a bench of two or more Judges to hear this application.

19. The present bench was accordingly constituted to hear this application. The first contention on behalf of the decree-holder opposite parties is that in view of the provisions of the Government of India Act, the Bengal Money-lenders Act, 1940 in so far as it seeks to affect decrees already passed and the rights of the decree-holders under such decree is ultra vires of the Bengal Legislature. The argument in support of this contention is this: Section 299, Government of India Act, 1935 lays down that no person shall be deprived of his properties in British India save by authority of law. The Constitution Act has not authorised either expressly or by necessary implication a provincial Legislature to make a law depriving a person of his property. Decrees already passed in favour of a person are his properties within the meaning of Section 299, Government of India Act, 1935. The Bengal Money-lenders Act in so far as it authorises the Courts to reopen such decrees is,

therefore, ultra vires of the Bengal Legislature.

20. Section 36, Bengal Money-lenders Act, 1940, authorises Courts to reopen a decree and to pass a new decree in accordance with the provisions of the said Act. This provision therefore authorises Courts to alter decrees in a manner not justified by the Code of Civil Procedure. It may be justified by reference to Nos. 4 and 15 of List III and to Nos. 2 and 27 of List II in Schedule 7 (case No. 4 of 19403 - Per Gwyer C. J. and Varadachariar J.). A mortgage is in essence a borrowing transaction. The right of the mortgagee in the property mortgaged is accessory to the right to recover the debt. Even if a decree has been passed in respect of a debt there is no reason why the judgment-creditor should not still be considered as a money-lender under No. 27 in List II of Schedule 7, Government of India Act (ibid - Per Varadachariar J.). The legislative practice in India before the Constitution Act shows that in the various provinces there were existing legislations for relief from high rates of interest. The power to deal with mortgage debts may, therefore, be justified by reference to No. 27 (money lending and money lenders) in List No. II and No. 10 (contracts) and No. 8 (transfer of property) in List III. I, therefore, hold that even if a mortgage decree is a property within the meaning of Section 299, Government of India Act, 1935, the Bengal Legislature had power to enact Section 36, Bengal Money-lenders Act, subject to the assent of the Governor-General under Section 107, Government of India Act, 1935.

21. The second contention on behalf of the mortgagee decree-holder is that in any view of the case the Bengal Money-lenders Act in so far as it affects transactions before 1st April 1937 is ultra vires in view of the provisions of Section 292, Government of India Act. I am unable to accept this contention in view of the decision of the Federal Court in Case No. Subrahmanyam Chettiar v. Muttu-swami Goundan Reported in . The objections of the mortgagee decree-holder to the reopening of the preliminary and final mortgage decrees must, therefore, be overruled. The preliminary and the final decrees in question are accordingly set aside. Section 36, Clause 2 (a) authorises the Courts to pass a new decree in accordance with the provisions of the said Act. The contention of the debtor is that the new decree is to be passed in accordance with the provisions of Section 34

while the contention of the plaintiffs is that the new decree should be as directed by Section 36, Clause 2 (d). Reading Clauses (c), (d), (e) of Section 36 (2), I am of opinion that the new decree should be in terms of Section 34 and in the form indicated in the judgment of my Lord the Chief Justice. I also agree with the order which my Lord the Chief Justice has made as regards the costs.

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