

Jnanendra Narayan Vs. Naba Kumar Singha

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Court : Kolkata

Decided On : Apr-16-1946

Reported in : AIR1947Cal141

Appellant : Jnanendra Narayan

Respondent : Naba Kumar Singha

Judgement :

1. The appellants who are the plaintiffs in, a suit instituted under Section 36, Bengal Money Lenders Act, 1940, (hereafter called the Act) borrowed from the respondents' predecessors a total sum of Rs. 25,700 on different dates from 5-4-1923, to 16-10-1930. All these loans were taken on hatchittas and carried compound interest at 12 per cent, per annum with yearly rests. They paid in all Rs. 8278 before April 1933. On 3-4-1933, accounts were adjusted on the basis of the hatchittas and after giving credit for those payments a sum of Rs. 45,901 was found due from them. For securing the said sum, the appellants executed on the next day a mortgage (Ex. A) in favour of the respondents. The said sum of Rs. 45,901 was taken as principal and it was to carry compound interest at the rate of 10 1/2 per cent, per annum with yearly rests. There, after the appellants paid Rs. 3200 towards the mortgage dues on different dates, the last payment being in March 1937. On 13-4-1937, there was another adjustment of accounts on the basis of the said mortgage and after giving credit for those payments a sum of Rs. 67,678 odd was found due. On 28-6-1937, the appellants sold to the respondents by a registered instrument (EX. B) two of the mortgaged properties in part

satisfaction of their dues, namely 8 annas share of a revenue paying estate named Lot Krishnapur and 8 annas share of Bar Patni called Ahina. To be more precise the price was fixed at Rs. 55,200. The said sum was not paid in cash by the respondents-the purchasers-to the appellants-the vendors-but was set off against the money that was due by the latter to the former on the said mortgage. The result of this transaction was that a sum of about Rs. 12,500 still remained due from the appellants to the respondents on the basis of the said adjustment.

2. We may state two further facts. They are that on the same date on which the said sale was effected, the respondents granted to the appellants a patni of Lot Krishnapore and a sepatni of Ahina at rents which left them a good amount as munafa. Later on, the respondents got a decree for rent against the appellants in respect of that patni and sepatni which was later on satisfied by the appellants by payment. On 12-2-1942, the suit in which appeal arises was filed by the appellants under Section 36, Bengal Money Lenders Act, hereafter called the Act. They prayed [I] for reopening (a) the mortgage: (b) the sale, and (c) the patni and sepatni leases ; [II] for setting aside the rent decree, [III] for taking accounts in terms of the Act; [IV] for being relieved of all liabilities in excess of Section 30 of the Act; and [v] for further and consequential reliefs.

3. The respondents did not resist the prayer for reopening the mortgage transaction, and prayers III and IV as stated above. The learned Subordinate Judge has given the appellants appropriate relief in respect of those prayers and no further question in respect thereto has been raised before us. The respondents, however, resisted the appellants' claim to have the transactions represented by the conveyance and the leases reopened, as also their claim to have the rent decree set aside. They also resisted their claim for restoration of the properties sold to them by the said conveyance and also their claim for refund of what may be found to be excess payment on accounts being taken in terms of Section 30 of the Act. Those two claims were not specifically made in the plaint but were pressed at the hearing apparently on the basis that they fell within the general prayer for 'further relief.' The learned Subordinate Judge gave effect to the respondents' contention and has refused those prayers. He gave a number of reasons, one of them being that a sale is not a transaction within the meaning of

Section 36(1)(a), but in coming to that conclusion he did not examine the Act he had to construe but relied upon commentaries made by the text book writers on the Usurious Loans Act of 1918 and the English Money Lenders Act, 1900. It would have been better if he had also made a more detailed examination of the Bengal Money Lenders Act itself. To adopt the interpretation given to the word 'transaction' which is mentioned in Section 3, Usurious Loans Act, 1918, or to that word occurring in the English Money Lenders Act, 1900, is in our judgment not a safe guide. Those Acts give sure indication that the words 'the transaction' mentioned in them meant 'the transaction of loan' or as the English Act puts it in Section 1(4), what in substance can be regarded as 'the transaction of money-lending.'

4. The patni and the sepatni leases must stand or fail with the conveyance. If the transaction represented by the conveyance be reopened or what comes to the same thing, if the sale is set aside, there would be no difficulty in making declarations in favour of the plaintiffs appellants to the effect that those leases would not be binding on them and that the said rent decree though in fact satisfied by payment, would have no effect on the question of the relationship of landlord and tenant. The sole question, therefore, is whether the Court has under the Act the power to set aside the sale-deed, or, to use the phraseology used before us, to reopen the transaction represented by conveyance, thereby destroying the relationship of vendor and purchaser, and so relegating the parties to the position of mortgagors and mortgagees in respect of the properties included in the said conveyance. The contention of the appellants' advocate is that the Court has that power, because under Section 36, Sub-section (1), Clause (a) of the Act the Court can reopen 'any transaction between the parties.' He admits, and that is also obvious that the words "between the parties" mean 'between the borrower and the lender,' and so the transaction, which the Court has the power to reopen, must be connected with the loan. The conveyance, Ex. B, therefore, says he, comes within that clause as it is connected with the loan for by it a part of the loan then outstanding was satisfied.

5. A sale by the borrower to the lender in full or part satisfaction of a loan would ordinarily be covered by the word 'transaction' occurring in that clause, but it would

be otherwise, if there are other indications of Legislature's intentions. The para. 1 of Section 36(1) makes it clear that the powers enumerated in that section have been conferred on the Court in order to enable it to give relief to the borrower and the Court can exercise them only for accomplishing that purpose. It would follow that the Court will not have the power to reopen a transaction between the borrower and the lender, if that particular transaction does not impede or obstruct the relief or reliefs to which the borrower is entitled under the Act. Putting the matter in terms of interpretation it comes to this: that a transaction between the borrower and the lender would not be regarded as a 'transaction' within the meaning of Section 36, Sub-section (1), Clause (a), if it has not the effect of impeding or obstructing the relief or reliefs to which the borrower is entitled under the provisions of the Act. The relief or reliefs which the Act has intended for borrowers must therefore be kept in view, and the Act must be carefully examined to find out what reliefs the Legislature has intended for borrowers.

6. The objects of the Act, as expressed in the preamble are two in numbers : namely, (1) to control money-lenders and (2) to control and regulate money-lending. It is not necessary to notice in detail the provisions of the Act by which the Legislature has carried out the first mentioned object. They are the provisions which require a money-lender to take out a license, provisions which require him to keep his accounts in a certain manner and to furnish statements of accounts about the loan to the borrower, etc. Control and regulation of money-lending are attained by not letting the money-lender have whatever his contract with the borrower would allow him to have, and as interest is the essential and most oppressive part of a money-lending contract that is controlled by stringent provisions. The principal relief which the Act has forged for the borrower is relief from the burden of interest. Notwithstanding the contract interest is not to exceed a certain percentage and the lender cannot recover interest which is in excess of the principal of the loan or the amount of the outstanding principal, amounts already paid either towards principal or interest being taken into computation, and the 'principal of the loan' is to be taken to be the amount actually advanced to the borrower. For the purpose of deciding the question involved in this appeal, it is not necessary to notice the other benefits which have been conferred by the Act on the borrower, such as payment of decretal amounts in instalments, stopping

interest after decree on a pre-Act loan etc. The) 'relevant fact is that payments by the borrower, except excess payments made by the borrower after 1-1-1939 which stand on a different footing in view of the provisions of Section 36,, Sub-section (1), Clause (d), come into the picture only for the purpose of Section 30, Sub-section (1), Clause (a) of the Act. Only the fact and the amount of payment are relevant in a proceeding started, with the object of giving relief to the borrower. A transaction, which in essence: is a 'transaction concerning payment' would not impede or obstruct the relief conferred on the borrower by the provisions of Section 30, but on the other hand would act in aid of that relief. A sale of property by the borrower to the lender in full or part satisfaction of his debt is in essence a payment in kind. It can also be regarded as a double act, namely, a payment of the price by the lender-purchaser to the borrower-vendor simultaneously followed by repayment by the latter to the former of the loan either wholly or in part, as the case may be. We accordingly hold that the powers conferred on the Court by the provisions of Section 36 of the Act do not comprise the power to reopen the sale. As the conveyance before us, which represents a transaction concerning payment, a means through which part-payment of the loan was made, had been executed before 1-1-1939 no further question-arises. If it had been made after that date and if by it the lender got in substance payment in excess of what he would have been entitled to on an account being taken in terms of Section 30 of the Act, a further question would have risen, and the point as to whether, the sale was to be set aside or the lender would have been required only to refund a sum of money would have required consideration. We hold that the conveyance Ex. B and the patni and sepatni leases cannot be reopened, that is, set aside and. the effect of the rent decree cannot be changed.

7. As the case is of first impression and maybe the forerunner of many like cases we have placed our judgment on broader grounds than those of the learned Subordinate Judge, but it must not be taken that we disapprove the other reasons given by the learned Subordinate Judge. We would however point out that he is not right in observing that as soon as a decree is reopened, the sale held in execution of the reopened decree automatically falls through, where the decree-holder himself is the purchaser. The result is that the decree of the learned Subordinate Judge is affirmed and this appeal is dismissed, but in the

circumstances without costs. No order is necessary on the application under Section 115, Civil P.C.

8. F.A. 22 of 1943 and F.M.A. 8 of 1943.--The facts of this case are somewhat different from the facts of the case of the other appeal which we have just now decided. But point which arises is the same. We will first state the facts and then indicate how that point arises. On 10-9-1923, Kalicharan Singha, whose widow and legal representative is the defendant respondent Sreemattya Puddo Kumari, borrowed a sum of Rs. 40,000 from the executors to the estate of Rai Budh Singh Dhudhuria. The loan carried compound interest at the rate of 10 1/2 per cent, per annum with annual rests and was secured by a mortgage of immoveable property. Naba Kumar Singh Dhudhuria and Joy Kumar Singh Dhudhuria are the grandsons of Rai Budh Singh Dhudhuria and are the universal legatees under their grandfather's will. The executors made over the estate to them before 1931. On 12-2-1931 they instituted a suit to enforce the mortgage. The claim was laid at Rs. 69,606-14-3, that being the amount then due for principal and interest calculated in terms of the mortgage-bond. No payment had been made by the mortgagor before the institution of the suit. On 12-6-1931 a consent decree for Rs. 74,548-11-9 was passed on account of principal, interest and costs. Thereafter in 1933 the mortgagor paid Rs. 12,000 in two instalments towards the decretal amount. On 15-1-1939 the mortgagor executed a conveyance (Ex. 5) in favour of the decree-holders whereby he conveyed to them four of the mortgaged properties for a consideration of Rs. 30,000, and in terms of the conveyance the mortgage-decree was taken as satisfied to that extent. On the same day, the decree-holders granted a patni lease of those properties to the mortgagor by the instrument Ex. 4. Those transactions took place when the proceedings for execution of the mortgage-decree were pending and just a day before the date fixed by the Court for sale. On the date fixed for the sale, that is to say on 16-1-1939, a joint petition was filed in the mortgage suit and in the execution case for recording an adjustment. The terms were that the decretal amount was to be paid (a) by the judgment-debtor selling to the decree-holder the properties mentioned therein for Rs. 30,000 (b) by the payment of Rs. 9000 in cash on that date; (c) by payment of Rs. 1000 in cash with interest at 8 per cent within Chaitra 1345 B.S. and (d) by payment of Rs. 4000 in cash with like interest in instalments spread over the three following years. The

total payments already made and thus agreed to be made came up to Rs. 56,000 plus a comparatively small amount on account of interest, and so was far less than the amount which was then due under the decree. It was further provided that on payment being made in the aforesaid manner the balance of the decree was to be remitted, but if the judgment-debtor made default, then the decree-holders would be entitled to realise fully what would be due to them in terms of the decree. There were other terms, one of which was that the decree-holders would grant a patni to the judgment-debtor of the properties which were to be conveyed by the latter to the former in part satisfaction of the decree. This adjustment was recorded. The conveyance and the patni lease had in fact been executed on the preceding date, though according to the language used in the joint petition they were to be executed at a later date. The judgment-debtor paid the sum of Rs. 9000 on that date and later on in April 1939 and April 1940 the sum of Rs. 1000 and the first of the three instalments in which Rs. 4000 was made payable together with the stipulated interest.

9. The Bengal Money Lenders Act came into operation on 1-9-1940. After it had come into operation the 2nd instalment in respect of the sum of Rs. 4000 was paid by the widow of the mortgagor who had died in the meantime. She was his sole heir and legal representative. On 9-7-1941 she filed her application under Section 36, Bengal Money Lenders Act, wherein she prayed for reopening the mortgage-decree, for taking of account in terms of Section 30 of the Act, for a new preliminary mortgage-decree in terms of Section 34 and for restoration of possession of the proper, ties conveyed to the mortgage-decree-holders by Ex. 5. The last mentioned prayer involved the setting aside of the conveyance EX. 5 and the patni lease, Ex. 4. The decree-holders resisted the said application and in ground 9 specifically stated that as the sale was in part payment of the decretal dues the applicant could not get restoration of the properties which were the subject-matter of the sale.

10. The learned Subordinate Judge, who was the same person, who later on decided the other case granted all the prayers made. He delivered a very short judgment in which he did not at all advert to the question as to whether the conveyance and the patni lease could be touched. The two appeals are by the

decree-holders. One, is directed against the order of restoration and the other against the new decree. Both the appeals raise the question as to whether the conveyance and the patni lease can be 'reopened' that is to say, set aside. The appellants did not challenge that part of the judgment by which the original mortgage decree has been reopened nor do they challenge the calculations made by the learned Subordinate Judge. The amount of the new decree would necessarily depend upon the question as to whether the conveyance can be touched. If it can not be set aside, then the amount of the new decree as passed by the Subordinate Judge will have to be reduced by the Sum of Rs. 30,000, which represented the consideration for the conveyance and was regarded therein as part payment, and by the sum of Rs. 5800 which was paid by the judgment-debtors to the decree-holders as rent on the basis of the patni lease. The amount of new decree would then be for Rs. 22,043 5-6 plus costs of execution.

11. As in the other case the patni lease and the prayer for restoration of possession made by the respondent will stand or fall with the conveyance. From the facts stated above, it is clear that the conveyance was a transaction that represented payment. At the time when it was executed a sum exceeding Rs. 30,000 would be due to the decree holders if accounts be taken in terms of Section 30 of the Act. So there was no excess payment. Accordingly no further question arises, for there cannot be any question of repayment by the decree-holders to the respondent, though the conveyance, which in substance represents payment, was executed after 1-1-1939, Clause (d), Section 86(1) being inapplicable. The sale cannot be touched for the same reasons which we have given in the other appeal. The order for restoration of possession to the judgment-debtor is accordingly discharged. The amount of the new decree will have to be reduced to Rs. 22,043-5-6 plus costs of previous executions, if at all a new decree for money is to be passed. The condition imposed on the respondent by the lower Court regarding the payment of revenue would necessarily have to be taken out of the decree.

12. There is no necessity of passing a new preliminary mortgage decree with the right reserved to the mortgagee to apply for a final decree on the judgment-debtor's default, as the mortgagees have purchased four of the mortgaged

properties by the conveyance Ex. 5, which we have held cannot be touched, and have released the rest for their mortgage lien. This is their admission in ground 9 of their petition of objection. A simple money decree for the sum which we have mentioned above can be passed in the form indicated in Section 34(1), Clause (b), but only if the decree-holders have the right to get a personal decree under Order 31, Rule 6, Civil P.C. This question has to be adjudicated and as there are no materials on the record we have to remand the case to the Court below, with a direction that the decree-holders will have to make their application for a personal decree, if they so desire, within two months after the arrival of the records in the Court below. If they make the application within that time and succeed the learned Subordinate Judge would pass a money decree for the amount of Rs. 22,048-5-6 plus costs of execution and make the sum payable in such instalments as he may think fit and proper, and in that event would set off as against the instalments that may be made payable by that decree the sums of money which the judgment-debtor has paid to the decree-holders or has deposited in Court to their credit in carrying out the order for instalment passed in the decree under appeal, as also sums of money which she may have paid as revenue for the estates conveyed by Ex. 5 in pursuance of the condition imposed on her by the said decree. If the decree-holders do not make the application for a personal decree within the aforesaid time or if their application is dismissed then the aforesaid sums of money will be treated as payment towards the patni rent payable to the decree-holders on the basis of the patni patta Ex. 4.

13. We do not expressly direct the respondent to put back the decree-holders into possession of the properties sold to them by Ex. 5, because all that is necessary on the facts of this case, is to say that her possession shall be regarded as possession of a lessee under the decree-holders on the basis of the patni lease Ex. 4. The result is that both these appeals, the 1st appeal and the miscellaneous appeal, are allowed in part and the case remanded to the Court below. The parties would bear their respective costs of this Court and of the Court below up to this stage. Further costs to be in the discretion of the lower Court.