

**Upendra Narayan Chatterjee and ors. Vs. Sudhir Chandra Jana and ors.**

**Upendra Narayan Chatterjee and ors. Vs. Sudhir Chandra Jana and ors.**

**SooperKanoon Citation :** [sooperkanoon.com/864463](http://sooperkanoon.com/864463)

**Court :** Kolkata

**Decided On :** Apr-05-1946

**Reported in :** AIR1947Cal172

**Appellant :** Upendra Narayan Chatterjee and ors.

**Respondent :** Sudhir Chandra Jana and ors.

**Judgement :**

1. On 30-6-1915 Madan Mohan Jana and his wife Barada Kumari borrowed Rs. 20,000 from Adhar Chandra Chatterjee on a mortgage at compound interest of 9 per cent per annum with yearly rests. The property secured by the mortgage was Touzi No. 2901 of the 24-Perganas Collectorate. A suit instituted in 1930 by the two sons and legal representatives of Adhar Chandra on the said mortgage resulted on 9-7-1930 in a consent decree for Rs. 70,000 made payable in twenty-five annual instalments (Ex. A). On 15-7-1915 Madan Mohan alone borrowed from the same person Rs. 40,000 on a mortgage at 9 per cent, compound interest with yearly rests. The security was Touzi No. 2902 of the 24-Parganas Collectorate. A consent decree (Ex. A. 2) was passed on this mortgage on 11-7-1930, for the sum of Rs. 1,40,000 and the said amount was made payable in twenty-five yearly instalments. On 30-8-1915 Madan Mohan and his wife Barada Kumari again borrowed from the same person a further sum of Rs. 20,000 on the same interest as before. This sum was secured by a mortgage of Touzis No. 2901, 2954 and 3026. A consent decree for Rs. 65,000 (Ex. A-3) payable in twenty-five yearly instalments was passed on this mortgage on 8-7-1980. On 30-8-1915 Madan

Mohan and his wife Barada Kumari again borrowed Rs. 8000 from the same person on the same terms of interest as before on the mortgage of Touzis No. 2901, 2902, 2954 and 3026. On 10-7-1930 a consent decree (Ex. A-1) for Rs. 25,000 was passed on this mortgage. The amount was also made payable in twenty-five annual instalments.

2. Each of the consent decrees provided that in default of payment of two instalments in succession the balance of the decretal amount then due would become payable and the decree-holders being entitled to all reliefs prayed for in their plaints will be competent to realise the same by execution. One of the prayers made in the suit to enforce the fourth mortgage set out above was as follows:

On a sale of the mortgaged properties in pursuance of the prior mortgages aforesaid, and after satisfaction of the same if there remains any surplus, a charge on account of this mortgage might be declared on such surplus sale proceeds, and proper orders passed for payment of such amount to the plaintiffs.

3. We have not given the detailed description of the mortgaged properties and have mentioned those Touzi numbers in that manner for brevity's sake. The Touzis mortgaged were temporarily settled Sunderban Lots and the status of the owners thereof, namely, Madan Mohan and his wife, Barada Kumari, was that of tenure-holders, as defined in the Bengal Tenancy Act. The leases of Touzis Nos. 2901, 2902 and 2954 which were held by Madan Mohan or his wife Barada Kumari, as the case may be, expired in 1940. For instance Touzi No. 2901 had been leased to Barada Kumari for thirty three years from 1-4-1907 to 31-3-1940 (Ex. H). In each of the leases held by them was the following clause:

That upon or at any time after the expiration of the term (of the lease) hereby granted...this Lot shall be open to re-settlement for a period of thirty years on such terms as the Government think fit, provided that the assessment shall not be fixed higher than the rates which would be paid by the cultivating raiyats in the neighbourhood for lands growing ordinary crops of the country, less 30 per cent, to be allowed to the lessee to cover the risks and costs of collection and to represent his profits, and the above assessment shall be calculated on the entire area less one fourth which is exempted from assessment under the first condition of this

lease.

This is Clause 8 of Ex. H.

4. The judgment-debtors paid only a sum of Rs. 2756 towards one of the decrees and they having made default in the payment of two successive instalments in respect of each of them, the four consent decrees were put into execution in 1937. In that year the executing Court put up the mortgaged properties to sale. At the sales the decree-holders themselves purchased. In execution of the decree on the first mortgage the mortgage property, namely, Touzi No. 2902 was purchased for Rs. 40,000. In execution of the decree on the second mortgage the mortgaged properties, namely, Touzi Nos. 2901 and 2954 were purchased for Rs. 60,000. In execution of the decree on the third mortgage the remaining property, namely, Touzi No. 8026 was purchased for Rs. 80,000. The total price did not cover the total amount of the decretal amounts then due on the aforesaid three decrees, so that there being no surplus nothing could be released by the decree-holders for payment of the decree passed on the fourth mortgage, and the execution started in respect of that decree was dismissed for default in 1938. It was at the date of the suit filed by the judgment-debtors for relief under Section 36, Bengal Money Lenders Act, 1940, a dead decree.

5. Although the fact is not relevant we may mention that the decree-holders got no benefit from their purchase of Touzi No. 3026, for a person who had purchased the same at a sale held in execution of a decree obtained by a prior mortgagee, namely, the Benares Bank Ltd., got a better title. After 1-1-1939, the decree-holder-purchasers obtained delivery of possession from the Court, and so the suits to enforce the first three mortgages were suits to which the Bengal Money-Lenders Act, 1940, applied. After obtaining possession and getting their names registered in the Collector's Registers under the Bengal Land Registration Act the decree-holder-purchasers got re-settlement of the three Touzis 2901, 2902 and 2954 for periods of 30 years from April 1940, the period of the leases held by Madan Mohan and Barada Kumari, which had been mortgaged by them, having expired on 31st March 1940. On 14th July 1941 Barada Kumari and the sons and legal representatives of the mortgagor Madan Mohan instituted under Section 86,

Bengal Money-Lenders Act, Suit No. 59 of 1942 in the Court of the Subordinate Judge, Khulna for relief in respect of the first mortgage, and on 1st September 1942 the said legal representatives of Madan Mohan instituted a similar suit in the same Court, being No. 60 of 1942, for relief in respect of the second mortgage. In the suits they prayed for re-opening the mortgage decrees, for taking accounts on those mortgages, for release from liabilities in excess of the limits specified in Section 30 of the said Act, for passing new instalment decrees and for restoration of the mortgaged properties, namely, Touzies Nos. 2901, 2902 and 2954, which had been purchased by the decree-holders themselves in execution of their mortgage decrees.

6. The two suits were tried together by the learned Subordinate Judge who decreed them. He has re-opened those two mortgage decrees and has passed two new decrees in their place for amounts which are allowable under the provisions of Bengal Money-Lenders Act and have made the decretal amounts payable in twenty annual instalments. He has also ordered restoration of possession of the properties, namely Touzies 2901, 2902 and 2954 to the plaintiffs (judgment-debtors) in terms of Clauses (c) and (e) of Section 36, Sub-section (2) of the Act. The decree-holders who are two in number have filed two separate sets of appeals. Four questions have been raised before us, namely, (1) Whether the two original mortgage decrees can be re-opened in view of Proviso 2 to Section 36, Sub-section (1), Bengal Money Lenders Act, 1940, hereafter called the Act; (2) Can the borrowers get restoration of possession, (3) If the first two questions be answered in favour of judgment-debtors, what should be amount of annual instalments, and (4) Should the payment by the judgment-debtors of the amount of the decree on the fourth mortgage be made a condition in the new decrees.

7. The decrees passed in the two suits brought to enforce the first two mortgages were not satisfied before 1st January 1939, as the decree-holders themselves had purchased the mortgaged properties at the execution sales and had obtained delivery of possession through Court after that date. Those decrees are, therefore, prima facie liable to be re-opened in these suits brought by the judgment-debtors under Section 36 of the Act. It is, however, urged by the decree-holders that that cannot be done as the re-opening of those two decrees would affect the decree

passed on the fourth mortgage. The last mentioned decree cannot be regarded as a decree passed in a suit to which the Act applies, for the reason that neither an appeal against that decree nor a proceeding in execution for recovery of the decretal amount had either been filed after or was pending on 1st January 1939.

8. In this view of the matter, we need not consider the soundness of the view expressed in some decisions that a decree unsatisfied in fact may be deemed to be satisfied on a particular date, if on that date its execution was barred by limitation. The question, therefore, is whether the reopening of the two decrees passed on the first two mortgages would affect the decree passed on the fourth mortgage. If it would, then those two decrees cannot in view of Proviso 2 to Section 36(1) of the Act be re-opened. The answer to the question would depend upon the terms of three decrees namely the decrees on the first, second and fourth mortgages. Normally the reopening of one decree would affect another decree when the one is dependent on the other, but possibly other cases may be conceived. The test in our judgment is whether the modification of the decree which is sought to be re-opened would need a modification of the terms of the other decree to which the Act does not apply or would affect the rights of parties thereunder. The re-opening of the two decrees passed on the first two mortgages would result in new mortgage decrees for lesser amounts. That in our judgment would not require a modification of the terms of the decree passed on the fourth mortgage, nor would affect the rights of the parties thereunder. The rights of the decree-holders under the fourth decree are, (1) to proceed against such of the mortgaged properties as may not be required for the satisfaction of the decrees on the earlier mortgages, and (2) to take surplus sale proceeds, if any, and whatever its amount may be, if all the properties mortgaged in the fourth mortgage had been sold in execution of the decrees passed on the earlier mortgages; and the right of the mortgagor was to have the surplus sale proceeds that may be left, whatever its amount may be, after satisfaction of all the four mortgage-decrees, and those rights of the decree-holders and the judgment-debtors remain the same if the decrees on the first two mortgages be re-opened and as a result of the re-opening new decrees for lesser amounts be passed. Whether there would be any surplus or what would be the amount of the surplus depend upon various factors, and one of them at least would be an uncertain one, namely, the price at which the

properties would sell at the court sales. The right to get the surplus sale proceeds is in our judgment quite different from the expectancy of a puisne mortgagee or of the mortgagor to get a greater amount as surplus sale proceeds after the satisfaction of the prior mortgagee's claim or the claims of all the mortgagees, as the case may be. We accordingly overrule the first point urged by the appellants.

9. We also cannot give effect to the fourth contention urged by them. Where the mortgaged properties have not been sold in execution of the re-opened decree it has been held that suitable conditions may be imposed upon the borrower in the new decree to preserve the mortgagee's security as long as the instalment given by the new decree have to be paid or till default in payment is made by the borrower; and when all the mortgaged properties have been sold in execution of the re-opened decree and purchased by the decree-holder himself suitable conditions have to be imposed on the borrower for the preservation of the properties as long as they may be in the possession of the borrower by reason of restoration of possession to him, as the title to them would remain in the decree-holder-purchaser notwithstanding the restoration of possession to the borrower till all the instalments payable under the new decree are paid. The condition which the appellants ask us to impose on the borrowers is not for preserving their security or title. Nor is the case of the same type as the case in *Mrs. J.D. Hill v. Ram Taran Banerjee* ('45) 50 C.W.N. 47. There the borrowers got the benefit of the purchase money paid by the lenders at the sale in execution of the re-opened decree at which they had purchased and justice of the case required that the borrower should make restoration of the lenders' money before she could ask for re-opening the original decree and ask for a new decree in terms of Section 36, Sub-section (2), Clause (d) of the Act. The effect of, the imposition of the condition asked for on the, judgment-debtors in the case before us would be to make them pay up a dead decree. The appellants cannot, in our judgment, be allowed to achieve indirectly what in law they could not have achieved directly.

10. We have already stated that the mortgaged premises were leasehold interest in Sunderban Lots, and the mortgagees purchased them in execution of their mortgage decrees. After their purchase they got re-settlements from the Government for a period of 30 years commencing from April 1940 and it is under

this re-settlement they are possessing the lands of those touzies. The contention of the learned Advocate appearing for them is that the said lots cannot in law be restored to the judgment-debtors (respondents) because what his clients are possessing are not the properties of the judgment-debtors, which they had purchased at the court sales.

11. It is clear that the appellants have obtained those re-settlements in consequence of their purchase in execution of the re-opened decrees, for only by reason of their purchase at the execution sales that they obtained the right to obtain re-settlement from the Government. If they had not been the purchasers of the interest that the mortgagors had in those lots under the settlement then current Government would not have re-settled the lots with them, nor would have been bound to do so. The case before us therefore is not of the same type as the case in *Kamalakhya Choudhury v. Joychand Lal Babu* ('43) 48 C.W.N. 105. The only question therefore is whether what has been ordered by the learned Subordinate Judge to be restored to the respondents is their property or not. This question, would depend upon the consideration of the terms of the leases that had been granted to them by the Government. Those leases are of the same type. We have already set out one of the material terms of one of these leases (Ex. H). The other material terms of Ex. H are contained in the ninth and the last clause of that lease. Clause 9 runs thus:

That the land shall from time to time be subject to resurvey and re-assessment in accordance with the first clause of the preceding condition after the expiry of 30 years from any resettlement

and the material portion of that last clause is as follows:

It (the Government) also retains its proprietary right in the land and only confers on the lessee an occupancy, right which shall be hereditary and transferable.

12. On the construction of these leases we hold that a permanent right, namely the right to occupy for all times to come was conferred and that on the expiry of the period of each periodic settlement the rent was to be reassessed in the manner indicated in Clause 8. The word 'resettlement' used in these leases in our

judgment mean revision of the rent. The rights which the respondents had in those lots did not therefore come to an end on the expiry of the period of time mentioned therein. We accordingly hold that the learned Subordinate Judge was right in ordering restoration. Although it is not necessary for us in this case on the view we have taken in respect of the rights that had been conferred on the judgment-debtors by the lease Ex. H and other similar leases we would have been inclined to accept the view that a lease obtained by the decree-holder-purchasers of the leasehold interest on the strength of a renewal clause in the lease, which the judgment-debtors held would be regarded as the property of the judgment-debtors within the meaning of Clause (c) of Section 36(2) of the Act, and such an acquisition would not be regarded as an acquisition by the decree-holder-purchasers under a different or independent title. We will now consider the question of instalments.

13. The evidence on the record as given by the witnesses of the respondents is that they, the respondents, have 800 bighas of khas land in the district of Midnapore and from thm they got annually 3200 to 4000 maunds of paddy in their share after meeting the costs of cultivation. They have besides about 12 bighas of khas land in touzi No. 2902 and 80 bighas of khas land in Rakhitkhanda. Those lands would give them each year in their share 350 to 400 maunds more of paddy after meeting the costs of cultivation. They have also 500 bighas of khas land in Rallsonas Khali. Those lands are now lying fallow but may be expected to yield a decent income in future. The net profit from the rents collected from their tenants of Touzi No. 2902 alone is Rs. 3000 a year. Besides that there would be some income from the other two Touzies 2901 and 2954. They require about 130 maunds of paddy for their home consumption and some money for their other expenses. On the most modest estimate a sum exceeding Rs. 11,000 would be available to them every year for payment of-the decretal amount. The total amount of the two new decrees come up to Rs. 1,23,252-4-6. In these circumstances we hold that they cannot have more than ten yearly instalments.

14. We accordingly order that the decretal amounts be paid in ten yearly instalments in the following manner. That in respect of the decree passed in Suit No. 60 of 1942 they do pay Rs. 4203-8-0 within 15th May 1946, and the balance in

nine equal annual instalments to be paid within 15th May of each succeeding year beginning with the year 1947. With regard to the decree passed in Suit No. 59 of 1942 they do pay Rs. 1959-12-6 within 15th July 1946, and the balance in nine equal annual instalments to be paid within 15th July of each succeeding year beginning with the year 1947. If any amount has already been paid towards the decrees that is to be credited towards the first instalment, and if there is any excess that would be credited towards the next following instalment or instalments. The decrees of the learned Subordinate Judge are modified to this extent and this extent only. The result is that the appeals are allowed in part. Each party to bear their respective costs of the appeals.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**