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Court : Kolkata

Decided On : Feb-24-1943

Reported in : AIR1944Cal334

Appellant : Upendranath

Respondent : Durlav Chandra

Judgement :
ORDER

Gentle, J.

1. This is an application on behalf of the plaintiffs that some terms of settlement which were made between the parties should be recorded and a decree passed in accordance with them. The defendants, who are the respondents, originally relied upon two grounds against the prayers in the application being granted (i)that the terms were not finally agreed between the parties, and (ii) that even in the event of the terms being agreed, the agreement was made in mistaken belief of the legal rights of the defendants under the Bengal Money-Lenders Act. Reference to some facts is now required. This is a mortgage suit in which a final decree has been passed. On 17th July 1941 the plaintiffs made an application to this Court that the Registrar be directed to sell some of the premises, the subject-matter of the mortgage, and that prices at which he should sell should be fixed. At that time it was alleged, and it is not disputed, that under the terms of the decree sums

approximate to Rs. 29,000 and Rs. 2000 were due in respect of principal and interest and in respect of costs. On behalf of the defendants an affidavit was filed dated 29th July 1941, in which it was stated that the original loan which subsequently became, after renewal, the subject-matter of the mortgage, amounted to Rs. 15,000, and various payments alleged to have been made are set out, including a sum of Rs. 2998 paid before 12th March 1934. In para. 16 of the affidavit the deponent states that having regard to the facts previously set out the defendants pray that relief under the Bengal Money-Lenders Act, 1940, should be given in the manner set out thereunder, and a claim is made that matter should be re-opened and a fresh decree passed under the Act, and the defendants should be released from liability to pay more than 8 per cent, interest and a total sum exceeding Rs. 14,000 which amount should be directed to be paid by 20 equal annual instalments. That being the position learned counsel representing the plaintiffs and the defendants discussed the matter between them it being appreciated at that time, and it seems the position was taken, that there was a claim for relief by the defendants under the Bengal Money-Lenders Act.

2. Paragraph 22 of the petition in the present application refers to the terms of settlement which, in this paragraph, it is alleged were drawn up and approved by mutual counsel and the parties agreed to the terms. The terms as drawn up and approved were signed by the defendants after they had been explained to them, by the Court Interpreter. Reference is made to a position which subsequently arose regarding a guarantor, mentioned in one of the terms, not having signed the document and the matters discussed between the respective attorneys in regard to the guarantor. None of the facts alleged in para. 22 of the petition are denied, and no point is now taken which arose in regard to the guarantor. Paragraph 22 then proceeds to set out the terms of settlement. They provide that the previous decrees made in the suit were thereby re-opened and a new final decree for sale was made upon the following terms: The defendants were to pay to the plaintiffs a sum of Rs. 21,000 in respect of principal and interest, and Rs. 1973 in respect of costs with interest at 6 per cent. The sum of Rs. 21,000 was to be paid by instalments, Rs. 2000 on or before 31st July 1942 and the balance in ten equal annual instalments, the first of. which was to be paid by 31st July 1943; and the amount for costs within three years from date. Provision is further made that in

default of payment of any two instalments in respect of principal and interest, and in default of payment of the costs, as provided earlier, the mortgage premises should be put up for sale by public auction and the sale proceeds, less costs and charges, should be applied towards payment of the balance of the amount due to the plaintiffs. Other provisions require no reference. It is to be noted that the terms involve the plaintiffs making a total reduction of about Rs. 8000 from the amount which, under the decree itself, they could assert. The terms were arranged at a time when the defendants were claiming the benefits of the Act and reductions in the amounts due under the decree. In argument today, no point has been made that the terms of settlement were made by the defendants in mistaken belief of their legal rights under the Bengal Money-Lenders Act, nor has it been contended that the parties did not agree upon the terms to which reference has been made. The argument has been upon the basis that, assuming the terms were agreed, nevertheless they cannot be enforced. Reference is made to Section 36(1), Bengal Money-Lenders Act, the relevant provisions of which are as follows:

Notwithstanding anything contained in any law for the time being in force, if any suit to which the Act applies, the Court has reason to believe that the exercise of one or more of the powers under this section will give relief to the borrower, it shall exorcise all or any of the following powers as it may consider appropriate, namely, shall-(b) notwithstanding any agreement, purporting to close previous dealings and to create new obligations, re-open any account already taken between the parties; and in consequence (c) release the borrower of all liability in excess of the limits specified in Clause (1) and (2) of Section 30.' It has been pointed out that under Section 30 (1) (a), the borrower is not liable to pay more than double the amount of the original advance in respect of principal and interest. Whilst in the affidavit filed on behalf of the defendants in the application made in July 1941, it is stated that the original loan was Rs. 15,000 made in 1921 or 1922, in the affidavit filed by the same deponent, Durlav Chunder Kundu, dated 2nd February 1943, to which reference has been made and upon which reliance is placed in the present application, it is therein alleged that the original loan was made in 1915 of a sum of Rs. 8000 and all subsequent transactions including the mortgage itself were in renewal of the first transaction. The facts or matters upon which, for the purposes of argument, no contest has arisen are that the plaintiffs admit that they have

received a total sum of about Rs. 13,500. The defendants, for the purposes of argument, agree and for this purpose alone, that Rs. 15,000 was the original advance, the plaintiffs allege it was a sum of Rs. 16,000. Assuming it was the larger amount, double that sum is rupees 32,000, Rs. 13,500 having been paid, as the plaintiffs admit, they cannot recover more than about rupees 8,500 together with costs, consequently, it is contended by the defendants that the sum of Rs, 21,100, which is the amount which is payable under the terms of the agreement, is one which is in conflict with the provisions; of the Bengal Money-lenders Act. That being so, it is further argued that this Court should not direct the recording of the terms of settlement which were made between the parties in the course of the application for sale of some of the mortgaged premises. This argument is based upon the words in Section 36 (1) (b), Money-Lenders Act, 'notwithstanding any agreement, purpoiting to close previous dealings and to create new obligation:; re-open any account already taken between the parties.' The application is made under the provisions of Order 23, Rule 3, Civil P.C. which provides: 'Where it is proved to the satisfaction of the Court that a suit has teen adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect, of the whole or any part of the subject-matter of the suit, tile Court shall Order such agreement, compromise or satisfaction to bo recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.' It is pointed out, on behalf of the plaintiffs, that the wording of the above Rule is mandatory, and upon the Court being satisfied of the adjustment and that the adjustment is a lawful agreement, it shall Order such agreement to be recorded. In 1.Sourendra Nath v. Tarubala Dasi , in respect to Order 23, Rule 3 of the Code their Lordships of the Judicial Committee of the Privy Council observed as follows at page 143:

The words of the Rule do not in terms appear to confer a discretion on the Court, but their Lordships desire to say nothing to prejudice a contention that the Courts retain an inherent power not to allow their proceedings to be used to work a substantial injustice-In the present case no injustice of any kind was established, and as it was established that the suit had been adjusted either wholly or in part by a lawful compromise, it was the duty of the Court to record the agreement and pass a decree in accordance therewith.' The contention on behalf of the

defendants that the terms of compromise should not be recorded goes as far as; this: that in a suit by a borrower for relief under the Bengal Money-Lenders Act, which the de-fendants are entitled to present, under the provisions of Section 36 (1) of the Act, if the parties agree upon the relief and the terms of the decree in that suit, and a decree is passed accordingly, upon the borrower becoming aware that he has not received full benefit which the Act gives him, proceedings can be taken to reopen the decree passed by reason of the agreement made between the parties. In the present matter before me the terms were agreed in the course of proceedings in which the defendants claimed benefits which the Act gives to borrowers and the agreement was made upon the basis of the claims which were then asserted. The provision in_Section 36(1) (b) enabling; the Court to reopen any account taken between the parties notwithstanding any agreement purporting to close previous dealings, in, my view, does not prevent, in the present circumstances, the plaintiffs names (getting ?) recorded the agreement which was made, and which terminated the disputes between the parties as they existed in 1941. I cannot find that the agreement was an unlawful agreement,) nor that it has worked or will work a substantial injustice. In my view the prayers which are sought in the application before me should be granted, and consequently the terms of settlement should be recorded and there shcould be a decree in accordance therewith. The plaintiff-applicant's costs may be added to the amount due to them under the decree, and the defendants will bear their own costs.