Esrali Molla and ors. Vs. Adhir Kumar Saha and ors.

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Court : Kolkata

Decided On : Dec-14-1949

Reported in : AIR1950Cal502,54CWN489

Judge : G.N. Das and ;K.C. Das Gupta, JJ.

Acts : Bengal Money-lenders Act, 1940 - Section 34(1); ;Code of Civil Procedure (CPC) , 1908 - Order 34; ;Debt Law

Appeal No. : Civil Rule No. 1638 of 1949

Appellant : Esrali Molla and ors.

Respondent : Adhir Kumar Saha and ors.

Advocate for Def. : Satya Priya Ghose, Adv.

Advocate for Pet/Ap. : Hari Prosanna Mukherjee, Adv.

Judgement :

G.N. Das, J.

1. This application in revision is at the instance of certain mortgagees. The mortgage loan was taken on 13th August 1932, The mortgagees instituted a suit for recovery of the sum due on the mortgage treating the claim as one foe recovery of money and not as a claim for enforcement of the security, The suit

was, therefore, not framed in terms of Order 34, Civil P. C. The decree was put into execution when the judgment-debtors made an application under Section 34(1),(b) and Section 86, Bengal Money-lenders Act. The decree-holders raised certain preliminary objections to the maintainability of the application. One of the objections with which we are now concerned related to the prayer of the judgment-debtors for instalments under Section 34(1)(b), Bengal Money-lenders Act.

2. The learned Subordinate Judge has refused to re-open the decree under Section 36, Bengal Money-lenders Act, on the ground that the decree does not contravene the provisions of Section 30 of the Act. The learned Subordinate Judge has however made a preliminary order in favour of the judgment-debtors under Section 34(1)(b)(ii), Bengal Money-leaders Act.

3 In this rule Mr. Mukherjee, appearing for the petitioners contends that Section 34(1)(b), Bengal Money-lenders Act, has no application as the loan was one on mortgage and as such was one to which the provisions of Order 34, Civil P. C., would apply and the remedy of the judgment-debtors was to make an application under Section 34(1)(a) for instalments at the time of the passing of the preliminary decree. The question, therefore, is whether Section 34(1)(a) is attracted to the facts of this case. The material portion of Section 34(1)(a) states :

'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, Schedule 1, Civil P. C. 1908, apply, on the application of the defendant, and after hearing the plaintiff. .... at the time of the passing of the preliminary decree under Rule 2 or Rule 4 of the said Order give certain directions for passing a decree directing this amount of the decree to be payable in instalments as specified therein.'

The question is whether the words 'to which the provisions of Order 34, Schedule 1, Civil P. C. 1908, apply' quality the word 'loan' or 'suit'. Literally this expression may be said to qualify the word 'loan' but having regard to the fact that the application has to be made at the time of the passing of the preliminary decree under Rule 2 or Rule 4 such an interpretation would make Section 34(1)(a) inapplicable to the suits for recovery of loan due on mortgages, where the mortgagee does not proceed to enforce his security under Order 34. Section 34(1)(b) would on the petitioner's interpretation entitle the borrower in case of only unsecured loans contracted before the passing of the Act to get instalments where the lender sues merely for recovery of the loan. The interpretation suggested above would thus result in an anomaly, and leave the mortgagors at the mercy of the mortgagees.

4. In my opinion a fair construction of Section 34(1)(a) is to hold that the expression 'to which the provisions of Order 34, Schedule 1, Civil P. C., 1908, apply' qualifies 'suits.' This is in consonance with the facts that order 34 refers to procedure in mortgage suit. When the Legislature used the expression 'to which the provisions of Order 34, Schedule 1, Civil P. C. 1908, apply' they were contemplating 'suits' and not 'loan.' This interpretation would enable the debtor to have relief by way of instalments in all cases of mortgage loan irrespective of the question whether the mortgagee is seeking to enforce his security or not. The Bengal Money-lenders Act was intended to give relief to debtors. A liberal construction of Section 34 should, therefore, be put upon the expression referred to above.

5. The conclusion, therefore, follows that although the loan is on a mortgage and the mortgagee does not enforce his security but sues for recovery of loan in the ordinary way and not by resort to the provisions of Order 34 the borrower may claim relief under Section 34(1)(b)(i) where the claim has not been decreed or (ii) where the claim has been decreed provided the loan was a pre Act loan. The present case, therefore, is covered by Section 34(1)(b)(ii) of the Act.

6. The contention raised on behalf of the petitioner must, therefore, be overruled.

7. The Rule is accordingly discharged but there will be no order as to costs.

K.C. Das Gupta J.

I agree.