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Court : Kolkata

Decided On : Jul-11-1952

Reported in : AIR1953Cal562

Judge : P.B. Mukharji, J.

Acts : Debt Laws; ;Bengal Money Lenders Act, 1940 - 34(1); ;Limitation Act, 1908
- Schedule - Article 181

Appeal No. : O.S. Suit (Liquidation Claim) No. 835 of 1950

Appellant : Ganendra Kumar

Respondent : Narayan Chandra and ors.

Advocate for Def. : A.K. Sarkar, Adv.

Advocate for Pet/Ap. : Gouri Mitter, Adv.

Judgement :

ORDER

P.B. Mukherji, J.

1. This is an application for final decree in a Mortgage Suit under Section 34(1)(a)(ii), Bengal Money Lenders Act.
2. The facts are simple.

3. On 22-2-1951, the usual preliminary mortgage decree was passed in this suit declaring the applicant as the first mortgagee under the two Indentures of Mortgage dated 22-12-1941 and 22-12-1945 and the amounts due to the applicant for principal and interest up to the date of that decree were Rs. 58,450/-and Rs. 71,438-14-3 respectively on the two mortgages. The decree provided that the amounts due to the applicant for principal and interest and also costs awarded thereunder should be paid, in four equal annual instalments. It provided that in default of payment the applicant would be at liberty to apply for a final decree for sale. Default having taken place, the mortgagee now applies for the final decree, after having given notice to the mortgagors.

4. The only point on behalf of the respondents mortgagors is a short point about the notice mentioned under Section 34(1)(a)(ii), Bengal Money-lenders Act.

5. Mr. Sarkar appearing on behalf of the respondents argues that the application is not maintainable because the time specified in the notice given under that Section expired before this application was moved in Court. The notice under the Bengal Money-lenders Act appearing as Annexure to the notice of motion and as exhibit referred to in the affidavit of Parswanath Saha affirmed on 21-5-1952, is dated 17-5-1952. That notice specified that an application would be made by the plaintiff 'within 15 days' to the Court for final decree under Sub-rule 1 of Rule 4 of Order 34, Civil P. C. The notice of motion was taken out on 22-5-1952 notifying that an application would be made on 2-6-1952. Although the date for which the notice of motion was returnable was within the time specified in the notice under the Statute the application was not noted as made on that date. On 2-6-1952 when the application appeared on the motion list it was by consent of the parties adjourned for affidavits till 13-6-1952. Mr. Sarkar's contention is that such an application must be made within the time specified in the notice given under the Bengal Moneylenders Act and as it was not actually made within that time this Court cannot make an order for final decree. In aid of his argument he has relied on the well known decision of this Court in -- 'Sreechand Daga v. Sohanlal Daga' : AIR1943 Cal257 and -- 'Debendra Nath v. Satya Bala Dasi, : AIR1950 Cal217 (B).

Further reliance has been placed on the decision of S.R. Das J. in -- 'Rangalal Man-dal v. Narendra Nath Ghosh' : AIR1944 Cal414 . In that decision S.R. Das J. holds that under Section 34(1)(a)(ii), Bengal Money-lenders Act, the giving of a notice in the form prescribed by the Rules made under the said Act is a condition precedent for the plaintiff's right to apply for a final decree and the provision relating thereto should be strictly complied with. In that case this statutory notice was given not by all the plaintiffs but by only one amongst them and the notice also suffered from the defect that the amount specified there for which default was alleged was not correct. It was held that such a notice was bad and the plaintiff was not entitled upon such notice to apply for a final decree. This case, however, is not an authority for the point which I am now asked to decide here on the question that if the notice specifies that application will be made within 15 days then unless the application is made to the Court within such 15 days the decree-holders will lose their right to apply for the final decree on the strength of such notice,

6. The case, however, which helps Mr. Sarkar on the point, is an unreported decision of Gentle J. in Suit No. 2077 of 1939 -- 'Sm. Sovana Sundari Pal v. Satyendra Nath Chatterjee (D)' and delivered on 14-3-1945. There Gentle J. upon the same point observed :

'The prescribed notice is found in Form 15 of the Rules under the Act. In the notice to be given by the mortgagee decree-holder notification is given that an application will be made by him to the Court within a number of days which can be filled in by the person giving the notice for a final decree in the suit.'

The learned Judge then proceeds to refer to the two decisions that I have just mentioned and then holds :

'The Bengal Money-lenders Act in Section 34 Makes it imperative for a notice to be given of an intention to apply for final decree for sale and the notice must be in accordance with the prescribed form and the prescribed form requires the mortgagee to state when the application will be made that is to say the period during which the mortgagor is to expect that the mortgagee will apply to the Court. I have come to the conclusion that the application must be made within that period

specified in the notice, and if it is not made within that period the notice has spent itself and when the notice is spent then until and unless a fresh notice is given the application cannot be made. I uphold the preliminary objection and dismiss the application.'

7. Left to myself I would have been content to follow this decision of Gentle J. But there are certain considerations which require more careful scrutiny and Mr. Gouri Mitter appearing for the applicant has very ably advanced some arguments which I do not find considered by Gentle J. in his judgment. I accept the principle that the provision regarding notice under the Bengal Money lenders Act must be strictly followed. But even then does it follow that if the application is not actually moved in Court but a notice of motion is taken out returnable within the time specified in that notice., then that should be read as a bar of limitation as though it was provided in the Limitation Act? Be it observed that in the case before Gentle J. the notice of motion was made returnable after the time specified in the statutory notice. Here in the case before me the returnable date of the notice of motion was within the time specified in the statutory notice.

8. The language used in Section 34(1)(a)(ii) of the Act is important in this connection. That language is

'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.'

The prescribed notice is in Form 15 under the Rules made under the Act which uses the language 'An application will be made by me to the Court within days.' The point is that under Section 34(1)(a)(ii) the plaintiff's right to apply for a final decree does not arise until after a notice is given. All that the statute does is to make it a condition precedent that such a notice should be given and the plaintiff can apply 'after giving to the defendant such notice as may be prescribed.' If therefore the notice itself specifies the time within which the application has to be made then it puts additional fetter on the right to apply for a final decree by stipulating that such right must be exercised within the period of the notice.

The form of the notice therefore intimating the time within which the application is to be made goes beyond the prohibition contained in the statute itself in Section 34(1)(a)(ii). Then the question does arise whether such specification of the time in the Statutory Notice requiring that the application must be made within that time goes beyond the statute and therefore ultra vires. In fact Form 16 made under Section 34(2) of the Act which section also does not put a time limit, sets out the notice for execution of the decree but provides no time limit as in notice under Section 34(1)(a)(ii). In other words if the statute has not put in a limitation of time within which to apply for the final decree but says only that such right shall arise 'after' giving to the defendant such notice as may be prescribed then can the notice itself curtail the right to apply by saying that it must be exercised within a particular time and not beyond that? Neither the judgment of Gentle J. nor the two decisions which I have referred to considered this point. In my opinion this is a point of substance and requires to be carefully examined.

9. Section 34(1)(a)(ii), Bengal Moneylenders Act, makes it a condition precedent that the plaintiff decree-holder before exercising his right to apply for a final decree shall give the prescribed notice. Two conditions therefore must be satisfied under this clause before his right to apply for the final decree accrues. First there must be a default in the payment of the instalment. Secondly the decree-holder must give the prescribed notice. So far as the statute is concerned there are all the limitations imposed thereunder. The statute says that 'after' giving the notice the mortgagee decree-holder shall be entitled to apply for the final decree and does not prescribe the time within which to apply once the notice is given, which therefore remains governed by Article 181, Limitation Act, providing a period of 3 years from the time when the right to apply accrues. The Bengal Moneylenders Act and specially Section 34(1)(a)(ii) thereof do not say that when the notice is once given the plaintiff's right to apply will further be limited by the time specified in the notice in derogation of Article 181, Limitation Act.

This statute could have done so having regard to the opening words 'Notwithstanding any law for the time being in force' at the beginning of Section 34(1) of the Act, but in fact had not done it. If the notice has put a limit to the time within which the plaintiffs apply, then in so far as it does so, it extends beyond the

statute. Form 15 prescribes the notice is certainly a statutory notice. But the point remains that this form framed under the Rules made under the Act has chosen to give a period of time within which the application is to be made to the Court. In this case the notice reads 'an application will be made by me to the Court within 15 days.' The statutory form prescribed does not itself stipulate the particular number of days within which the application is to be made. The form itself leaves blank the period of time and which blank space is only filled by the person giving the notice.

10. On an anxious consideration I have come to this conclusion that this specification of time in the form cannot fetter the right to apply when Section 34(1)(a)(ii) does not itself put the time fetter. It should be observed that the rule making power under the Bengal Moneylenders Act is contained in Section 44. That section makes it clear that the rules must be 'for carrying out the purposes of the Act.' I do not consider that under Section 44(2)(n) of the Act under which the form is prescribed the time limit within which the application is intended to be made can be read and construed as a special limitation of the right to apply for final decree. That will not be carrying out the purposes of the Act but will be creating a new law beyond the Act.

11. The general procedure for enforcing a mortgage is still contained in Order 34, Civil P. C. and I read the Bengal Money-lenders Act only to provide such specific inroads upon the general law as are expressly or by the most necessary implication contained in the Bengal Money-lenders Act. When therefore I find that under Order 34, Civil P. C. the mortgagee decree-holder's right to apply for the final decree is governed by Article 181, Limitation Act, I am unwilling to take away such statutory right unless the Special Statute of the Bengal Moneylenders Act expressly or by necessary implication takes it away. As I read and interpret Section 34(1)(a)(ii), Bengal Money-lenders Act, I find that while express reference is made prescribing the mortgagee decree-holder's right to apply for a final decree it does not proceed to provide a special limitation of time in derogation of the Limitation Act within which the right must be exercised. It is true that; prescribed notice has to be given. It is also true that the prescribed notice in this case provides a time limit. But neither of these two facts can override the Statute itself which does not put that limitation. Nor does the fact of a specified time in the

notice in my opinion can be said to override the Limitation Act.

To exalt the time limit put privately by the notifying party in the blank space provided in the prescribed statutory notice, into a period of limitation is to my mind engage in legislation. To do so to the extent of importing all the technicality of a notice of motion read with Limitation Act as in : AIR1943 Cal257 that a notice of motion made returnable on a particular date does not amount to making of the application in Court within the meaning of the Limitation Act is to create a technicality where it does not exist. I find no justification that this strictness with which the Limitation Act has always to be applied, should be imported in construing the effect of the period of time which the notifying party puts in by his own hand in the blank space of the prescribed notice under Form 15 read with Section 34(1)(a)(ii) of the Act and Rule 23(1) made thereunder. There is no authority for such a proposition and in the absence of one it appears to me it is an unjustified extension of the principle laid down in -- 'Srichand Daga's case', (A) applied to a statute like the Limitation Act. This however is only an independent reason. If that principle is intended to be applied in all its strictness in construing the notice under Form 15 of the Bengal Moneylenders Act then I would hold that in so far as that form makes a special limitation of time within which to apply for final decree, such special limitation is ultra vires the Bengal Money-lenders Act and, therefore, void and ineffective.

12. I therefore, do not interpret the time mentioned in the Statutory notice under Section 34(1)(a)(ii), Bengal Money-lenders Act, as a limitation within which the application has to be made. This construction does not create any hardship for the borrower for whose relief the Statute was enacted; Court's power to grant extension of time even then under Order 34 Rule 4(2), Civil P. C., is preserved expressly by the first proviso to Section 34(1)(a), Bengal Money-lenders Act. This construction, therefore, that I am putting is in harmony with the spirit and language alike of the Moneylenders Act.

13. There is yet another reason why the time mentioned in the statutory notice should not be read as prescribing a period of limitation. The prescribed statutory notice does not itself lay down the period of time within which the application is to

be made. As I have said the party notifying in each case by his own hand puts whatever time he chooses to fix. If this were intended to be a limitation as hard as one under the Limitation Act then the result will be that there will be varying periods of limitation for applying for a final decree according to the whims of the mortgagee decree-holders and according to such times as their 'fancies dictate.' Some may put in the statutory notice 7 days, others a fortnight, or one year or twelve years. Is it going to be said that if 12 years' time is given in the notice that will keep alive the right to apply for final decree which normally would have been barred by 3 years under Article 181, Limitation Act. This will lead to most absurd and ridiculous results. This will lead to most unequal laws for the same classes of people. I therefore hold that filling up the blank space providing the time within which the application is to be made remains a private act of the party giving the notice and by no such private act agreement or consent can the period of limitation as imposed by the Limitation Act be reduced or enlarged or altered. If any authority is needed for such a well known proposition reference may be made to the Full Bench decision of -- 'Krishna Kamal v. Haru Sirdar', 13 WR 44 (FB) (E) and Section 28, Contract Act.

14. For these reasons I respectfully dissent from that decision of Gentle J. and I hold that the plaintiff applicant is entitled to the final decree that he has asked.

15. Mr. Sarkar also raised the point that in the statutory notice in this case, the notice after specifying the amount of the first instalment up to date asks for 'subsequent interest' in terms of the preliminary decree without stating the exact amount of interest due. In my opinion the notice on this point is sufficiently in compliance with the Act and the preliminary decree and cannot be impugned on the ground that the exact figure is not stated. The rate of interest is fixed and it is a matter of calculation and the decree makes it abundantly clear by saying 'subsequent interest payable under Rule 11 of Order 34 of Schedule 1, Civil P. C.' It is properly said 'subsequent interest' as it grows from day to day and does not remain stationary.

16. There will, therefore, be an order in terms of the notice of motion.

