

CALCUTTA HIGH COURT

Sarvamongala dasi

Vs.

Paritosh Kumar Das

A.F.A.D. No. 491 of 1948

(G.N. Das, J.)

03.08.1951

JUDGMENT

G.N. Das, J.

1. This is an appeal by the plaintiff or, as the appellant chooses to say, the applicant in proceedings under Section 36 (1), Bengal Money-lenders Act. The appellant raised money on a mortgage from the predecessor-in-interest of the respondents. The latter instituted a mortgage suit and obtained a preliminary decree for sale on 24-5-1939. The decree was made final on 12-9-1939. Thereafter the decree-holders started proceedings in execution and prayed for realization of the decretal dues by a sale of the mortgaged properties. The mortgaged properties were sold on the 15th of February, 1940, and were purchased by the decree-holders. Thereupon the decree-holders, auction-purchasers, applied for possession and possession was delivered to them on 20-6-1940. It does not appear that thereafter any further proceedings were taken by the decree-holders or by the auction-purchasers. The Bengal Money-lenders Act having come into force on 1-9-1940, the appellant, judgment-debtor in the execution proceedings, made an application for relief under Section 36, Bengal Money-lenders Act, on 10-8-1946. The applicant prayed for the reopening of the mortgaged decree and for payment of the sum in installments and for restoration of possession of the mortgaged properties which were acquired by the decree-holders in consequence of the execution of the mortgage decree.

2. The respondents raised certain defenses, the principal defense being that the application for relief under the Bengal Money-lenders Act was not available to the present appellant and that his right to relief was barred by the one year's rule of limitation contained in Section 36 (6)(a)(ii), Bengal Money-lenders Act.

3. The trial Court repelled the defense and reopened the mortgage decree and passed a new decree for a sum of Rs. 764-6 annas which was made payable in six installments commencing

with Asar, 1354 B.S.

4. The respondents preferred an appeal. The appeal was heard by the learned District Judge, Howrah. The learned Judge was of the opinion that the present proceedings were barred under Article 120, Limitation Act. In the result the proceeding initiated by the appellant was dismissed. It is the propriety of this order which is challenged in this appeal.

5. Mr. Basu appearing on behalf of the appellant has first contended that the present proceeding partake of the nature of an application and in this view Article 181 of the First Schedule of the Indian Limitation Act might have been attracted but for the reason, as he suggests, that the present application is not an application under the Code of Civil Procedure; in his submission this fact excludes the operation of Article 181 of the First Schedule of the Indian Limitation Act and it must, therefore, be held that there is no limitation provided for by the Statute.

6. The basis of this contention rests on the fact that the present proceeding partake of the character of an application. Mr. Basu drew my attention to the fact that the present proceeding was registered as a miscellaneous case. This is because of the rules which have been framed under the Bengal Moneylenders Act, and has nothing to do with the character of the proceedings which were initiated by the appellant borrower.

7. Section 36, Bengal Moneylenders Act is a special provision which entitles the Court under certain circumstances to give relief to the borrower. The procedure for obtaining such relief varies according to the stage of the proceedings for recovery of a loan. The scope of Section 36 was considered by a Bench decision of this Court in the case of *Satya Narayan V. Radha Nath*¹, Mitter, J., delivering the judgment of the Court classified the various proceedings under the Bengal Money-lenders Act under different heads. It was pointed out that if the suit for recovery of the loan was pending, the borrower might apply for relief in that suit. No independent proceeding was necessary to obtain relief which the Bengal Moneylenders Act gave to the borrower. If the suit for recovery of a loan was disposed of by the trial Court and the matter was pending in appeal, the borrower might claim relief under the Act by an application in the appeal under the provisions of Section 36 (6) (b) of the Act. If the suit or appeal had been disposed of and an execution proceeding was pending, the borrower might apply for relief in the execution proceeding under the provisions of Section 36 (a) (i) of the Act. If no such proceedings were pending and a decree had been obtained for recovery of the loan, the borrower might apply for review for the purposes of getting relief under Section 36 (6) (a) (ii) of the Act within one year of the date of the commencement of the Act. The borrower has an additional remedy by way of a suit under Section 36 (1) of the Act. It was held in that case that such a relief could be obtained either before the loan had been sued upon or after the loan had been sued upon and a decree obtained but no proceedings either by way of an appeal or by way of an execution was pending in any Court. The position, therefore, is that the remedy of a party varies according to the stage of the proceedings for recovery of the loan. In the present case, the mortgage had been sued

upon, a final decree had been obtained, the decree had been executed and the property had been sold and possession taken of the mortgaged properties. No proceeding was pending in any Court for recovery of the loan. The only remedy, therefore, which was available to the borrower was the remedy conferred on him by Section 36 (1), Bengal Money-lenders Act.

8. The material portion of Section 36 (1), Bengal Money-lenders Act runs as follows :

¹45 Cal Wn 1085

"notwithstanding anything contained in any law for the time being in force, if in any suit to which this Act applies, or in any suit brought by a borrower for relief under the section, whether heard ex parte or otherwise, 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 exercise all or any of the following powers as it may consider appropriate, namely, . . .

Then follow Clauses (a) to (e) which define the powers which the Court will exercise under Section 36 (1). Then there is a proviso which contains a limitation on the exercise of such powers. Section 36 (2) then says that if the Court in exercise of the powers conferred by Section 36 (1) reopens the decree the Court will exercise certain other powers. One of the powers conferred on the Court is contained in Section 86 (2) (e) which directs restoration of possession of the properties of the judgment-debtor which may have been acquired by the decree-holder in consequence of the execution of the decree sought to be reopened and which are in the possession of the decree-holder at the date of the reopened decree. Clause (e) then says that under certain conditions the property which has been restored to the possession of the judgment-debtor may revert to the decree-holder auction purchaser in case of non-payment of the installments provided for in the reopened decree. If we apply the above principles, it is abundantly clear that in the present case the borrower could claim the reliefs prayed for, only by way of a suit under Section 36 (1). Section 36 (1) does not prescribe any period of limitation. We have, therefore, to turn to the material provision of the Indian Limitation Act which is Article 120 of the First Schedule of the Limitation Act. Article 120 reads as follows :

"Description of suit.	Period of limitation.	of Time from which period begins to run.
Suit for which no period of limitation is prescribed elsewhere in this schedule.	Six years	When the right to sue accrues.

9. The period prescribed by Article 120 is, therefore, six years from the date when the right to sue accrues. The right to sue for relief under Section 36 (1), Bengal Money-lenders Act could not, accrue to the borrower before the Act came into force. This is a right which is conferred by the Act and a party cannot claim that right prior to the date, i.e., at a time when the right was non-existent. The Bengal Money-lenders Act came into force on 1-9-1940. The present proceedings were started within six years thereof and as such would be in time. The learned District Judge was of the opinion that time ran from the date when possession was taken by the decree-holder auction purchaser, that is, 10-7-1940. This is obviously incorrect because the right was not in

existence at the time. In my opinion, therefore, the view taken by the learned District Judge is erroneous and it must be held that the present proceeding started by the borrower, even if it is regarded as a suit, was well within time.

10. In this view it is not necessary to consider the submission which was made on behalf of the appellant by Mr. Basu that there was no period of limitation in the present case. But as the matter has been argued at length I may record my opinion on this question also. The basis of the contention is that the present proceeding has to be regarded as an application made to the Court under the Bengal Money-lenders Act. The residuary Article applicable to an application is contained in Article 181, First Schedule of the Limitation Act. That Article reads as follows :

"Description of application.	Period of Time from which limitation.	of Time from which period begins to run.
Application for which no period of limitation is provided elsewhere in this schedule or by Section 48, Civil Procedure Code	Three years	When the right to apply accrues.

11. On the face of it the Article would apply to any application and would not be restricted to an application under the Code of Civil Procedure. It was however contended that there is a large body of decisions which have taken the view that Article 181 is confined to applications under the Code of Civil Procedure. An early decision of this Court is In the matter of a petition of Ishan Chunder Roy, 6 Cal 707. This case has been followed ever since. But it must be remembered that at the time when these decisions were pronounced, the different Articles in Schedule 1 of the Limitation Act all related to applications under the Code of Civil Procedure. It was therefore held that the word "application" in Article 181 must be read as ejusdem generis with the applications dealt with in the other Articles of the First Schedule. The position however has changed since the enactment of the Indian Arbitration Act, 1940. The Indian Arbitration Act has incorporated Article 158 and Article 178 in the First Schedule. These Articles deal with applications under the Indian Arbitration Act. The basis of the decision in the case of Ishan Chunder Roy, 6 Cal 707 and other cases following it, has therefore been taken away. This point was considered by a Special Bench of this Court in the case of *Asmat Ali Sharip V. Mujahar Ali Sardar*², where Mukherjea, J., delivering the judgment of the Special Bench discussed this point but did not give a final opinion on the question. The applicability of Article 181 has been discussed recently in a Bench decision of this Court in the case of *Abinash Chandra Dutta V. Gour Chandra*³, where Chunder, J., delivering the judgment of the Court has held that Article 181 applies to an application for possession under Section 26G(5), Bengal Tenancy Act. If it was necessary for me to decide this question, I would hold that an application under the Bengal Moneylenders Act would be governed as regards limitation, in cases not expressly provided for in the Bengal Moneylenders Act, by Article 181, Schedule 1, Indian Limitation Act. It would be incorrect to say that there is no period of limitation for applications under the Bengal Money-lenders Act for which no specific period of limitation has been prescribed by that Act.

12. Mr. Basu also contended that conceding that the proceedings in the present case can be

regarded as a suit the proper Article to apply would be Article 144 of Schedule 1, Indian Limitation Act. That Article reads as follows :

"Description of suit.	Period of Time from which period begins to limitation. run.
For possession of immovable property or any interest therein not hereby otherwise provided for	Twelve years defendant becomes adverse to the plaintiff.

²⁵² Cal Wn 64

³⁵⁵ Cal Wn 489

This Article is a residuary Article dealing with suits for possession. The question is whether a suit for relief under Section 36 (1), Bengal Moneylenders Act can be regarded as a suit for possession. I have already referred to the material provisions of Section 36 (1) and Section 36 (2) of the Act. It is obvious that the whole object of a suit or proceeding under Section 36 is to scale down the interest decreed and to give relief to the borrower as provided for in the Act. Section 36 (2) (e) no doubt provides for restoration of possession but this is consequential on the Court reopening the decree. Such restoration of possession is again conditioned by the terms of Section 36 (2) (c) and (e) of the Act. Restoration of possession is one of the reliefs which the borrower gets when the decree is re-opened and that right to relief is circumscribed by the provisions of Section 30 (2) (c) and Section 36 (2) (e). It cannot be said that the suit itself is one for possession of immovable property. I do not see my way to accept the contention raised by Mr. Basu that Article 144 would apply to such cases.

13. As I have already said, the proper Article to apply is Article 120 of Schedule 1 of the Indian Limitation Act. If that Article is applied, I have already held that the present suit is within time.

14. No other point was raised by either party. The result therefore is that this appeal is allowed. The judgment and decree of the learned District Judge are set aside and those of the trial Court restored with costs in this Court and in the lower appellate Court.

Appeal allowed.