

## Haridas Mondal vs Anath Nath Mitra on 21 February, 1961

**Equivalent citations: 1961 AIR 1419, 1961 SCR (3) 880, AIR 1961 SUPREME COURT 1419**

**Author: J.C. Shah**

**Bench: J.C. Shah, J.L. Kapur, M. Hidayatullah**

PETITIONER:

HARIDAS MONDAL

Vs.

RESPONDENT:

ANATH NATH MITTRA.

DATE OF JUDGMENT:

21/02/1961

BENCH:

SHAH, J.C.

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SHAH, J.C.

KAPUR, J.L.

HIDAYATULLAH, M.

CITATION:

1961 AIR 1419

1961 SCR (3) 880

ACT:

Money lending-Reopening of transactions-Successive suits by -borrower for relief-Maintainability-Res judicata-Bengal Money-lender; Act, 1940 (Ben. X of 1940), s. 36-Code of Civil Procedure, 1908 (Act V of 1908), s. 11, O. 2, r. 2.

HEADNOTE:

The appellant obtained a preliminary and then a final mortgage decree against the respondent and thereafter a personal decree for the debt remaining due to him 'after sale of the property mortgaged. The appellant applied for execution of the personal decree and thereupon the respondent sued for relief under s. 36 of the Bengal Money-lenders Act, 1940, by reopening the personal decree. In the suit relief for reopening the preliminary decree and final decree was not claimed. The personal decree was reopened in that suit and an instalment decree for a smaller amount passed instead,

which was ultimately upheld by the High Court. The respondent failed to pay the instalments and the appellant applied for executing the decree. The respondent then filed another suit under S. 36 of the Act for reopening the preliminary and final decrees. The Subordinate judge dismissed the suit holding that it was barred as res judicata and the District judge on appeal affirmed that decision. But the

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High Court in second appeal reversed those decisions and directed the preliminary and the final decrees be reopened and remanded the case to the trial court for passing a fresh preliminary decree. Hence this appeal with special leave.

Held (per Kapur and Shah, JJ.), that S. 36 of the Bengal Money-lenders Act, 1940, contemplated the filing of one and not successive suits for the reopening of transactions including decrees and obtaining relief under the Act. If in such a suit, the borrower failed to seek the entire relief he was entitled to and abandoned his right to a part of the relief, he would be precluded from seeking that relief in another suit.

The principle underlying r. 2 of O. 2 of the Code of Civil Procedure as also the principle of res judicata applied to a suit under s. 36 of the Act.

Per Hidayatullah, J.-When the respondent moved the executing court under s. 36 of the Act he had not filed a suit but only an application. It was the duty of the court thereunder to give him full relief although he might not have asked for it. If the court failed in its duty and he filed a suit no question of waiver or constructive res judicata could at all arise. This was made clear by the non obstante words of sub-ss. (1) and (6) of s. 36 and the question that arose under the section was not so much of the right of a party as of the duty of the court to give entire relief under the Act. The remedies enjoined by the Act were not exclusive of one another, either expressly or by necessary intendment, and were intended to give the widest possible relief to the borrowers.

Jadhunath Roy v. Kshitish Chandra Acharya Choudhury (1949) L.R. 76 I.A. 179 and Joy Chand Lal Babu v. Kamalaksha Choudhury, (1949) L.R. 76 I.A. 131, referred to.

Since the Act required that the decrees passed against the respondent had to be reopened, no provision of the Code of Civil Procedure or of equity could bar the suit, the former being expressly excluded and the latter made inapplicable by the substantive provisions of the Act.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 508 of 1957.

Appeal by special leave from the judgment and decree dated June 3, 1955, of the Calcutta High Court in Appeal from Appellate Decree No. 1090 of 1949.

N. C. Chatterjee and D. N. Mukherjee, for the appellant. B. C. Panda and P. K. Chatterjee, for the respondent, 1961. February 21. The Judgment of Kapur and Shah, JJ. was delivered by Shah, J. Hidayatullah, J. delivered a separate judgment.

SHAH, J--To secure repayment of Rs. 2,500/- Anath Nath Mitra-hereinafter referred to as Mitra-mortgaged four parcels of land to Haridas Mondal-hereinafter referred to as Mondal-by deed dated April 25, 1930. Mondal filed suit, No. 18 of 1937 on June 11, 1937, for enforcement of the mortgage in the Court of the 2nd Subordinate Judge, Midnapore, and obtained a preliminary mortgage-decree for Rs. 5,000/- and interest and costs. This decree was made absolute and in execution of the decree, the mortgaged property was sold for Rs. 4,160/- and an amount of Rs. 2,176.66 out of the decretal amount remained due and payable under the mortgage decree. Out of the four parcels of land sold, three were purchased by Mondal and the remaining was purchased by Mitra's wife. Mondal then applied for a personal decree under O. 34, r. 6 of the Civil Procedure Code and obtained on September 7, 1940, a decree for payment of Rs. 2,338.15/- against Mitra. Mondal then applied for executing the personal decree by Misc. Execution Case No. 11 of 1941. In the meanwhile, the Bengal Legislature enacted the Bengal Money-lenders Act, 1940, which enabled the courts in certain circumstances to reopen decrees already passed. Availing himself of this Act, Mitra filed a suit under s. 36 of the Bengal Money-lenders Act for an order reopening the personal decree. By order dated August 16, 1941, the Subordinate Judge, Midnapore, decreed the suit and directed that a new decree for Rs. 1,431.15/- be drawn up and that the amount due under the personal decree be paid in three annual instalments. Against this decree, an appeal was preferred to the District Court, Midnapore. The District Judge dismissed the appeal and allowed the cross-objections filed by Mondal. In Second Appeal No. 1442 of 1942, the High Court of Judicature at Calcutta set aside the decree of the District Judge and restored the decree of the Subordinate Judge, 2nd Court, Midnapore. Mitra did not pay the amount as directed under the new decree and Mondal applied for executing the decree. Mitra then filed another suit under s. 36 of the Bengal Money-lenders Act in the 2nd Court of the Subordinate Judge, Midnapore, for reopening the decrees preliminary and final passed in the mortgage suit. The Subordinate Judge dismissed this suit as it was, in his view, barred as *res judicata*. In appeal to the District Court, the decree was confirmed. But the High Court in Second Appeal ordered that the preliminary and final decrees be reopened and the case be remanded to the trial court for passing a fresh preliminary decree. Against the said decree of the High Court, this appeal is filed with special leave. Section 30 of the Bengal Money-lenders Act, 1940, provides in so far as it is material that notwithstanding anything contained in any law for the time being in force, or in any agreement, no borrower shall be liable to pay after the commencement of the Act a sum in respect of principal and interest which, together with any amount already paid or included in any decree in respect of a loan exceeds twice the principal of the original loan and that the borrower shall not be liable to pay interest at rate per annum in cases of secured loans exceeding 8 per cent. simple. By s. 36, the liability on loans secured or otherwise which contravenes the provisions of s. 30 is liable to be reopened. It is provided by sub.s. (1) of s.36 in so far as it is material that notwithstanding anything contained in any law for the time being in force, if in any suit brought by a borrower for relief under this section whether heard

ex parte or otherwise, the court has reason to believe that the exercise of one or more of the powers under the section will give relief to the borrower it shall exercise all or any of the powers specified therein as may be considered appropriate. The court is invested with the power of reopening transactions including taking of accounts between the parties, of releasing the borrower of all liability in excess of the limits specified in cls. (1) and (2) of s. 30 and offsetting aside either wholly or in part or of revising or altering any security given or agreement made in respect of any loan. Exercise of these powers is subject to the provisos which are not material for the purposes of this appeal. By sub-s. (2), the court reopening a decree is prohibited from doing anything which affects the rights acquired bona fide by any person other than the decree-holder in consequence of the execution of the reopened decree; but is enjoined to order the restoration to the judgment-debtor of such property, if any, of the judgment-debtor acquired by the decree-holder in consequence of the execution of the reopened decree as may be in the possession of the decree-holder on the date on which the decree was reopened and also to order the judgment-debtor to pay to the decree-holder in such number of instalments as it may think fit, the whole amount of the new decree passed under cl. (a). The court is further enjoined to direct that in default of payment of any instalments, the decree-holder shall be put into possession of the property which has been restored to the judgment-debtor and that the amount for which the decree-holder purchased such property in execution of the reopened decree shall be set off against so much of the amount of the new decree as remained unsatisfied. Sub- section (6) provides that notwithstanding any. thing contained in any law for the time being in force, the court which, in a suit to which the Act applies, passed a decree which was not fully satisfied by the first day of January, 1939, may exercise the powers conferred by sub-ss. (1) and (2) in any proceeding in execution of such decree. Section 36, sub-s. (1), contemplates the institution of a suit by a borrower for relief under that section and the court is thereby invested with the power of reopening decrees already passed.

Mitra in the year 1941 filed the suit under s. 36 of the Act for reopening the personal decree passed under O. 34, r. 6 of the Civil Procedure Code. In Schedule " A " to the plaint, he set out the principal amount due under the mortgage. the interest at the rate of 8% due thereon from the date of the mortgage till the date of the suit, costs of the suit, and after giving credit for the price realised by sale of the properties, he submitted that Mondal was entitled to recover only Rs. 66-13-2 and that Mondal should be declared entitled to that amount in twenty annual instalments. By a suit under s. 36, Mitra undoubtedly was entitled to reopen the preliminary decree, decree absolute for sale and also the personal decree; but in the first suit, he gave up his right to reopen the preliminary decree and the decree absolute for sale, and was content to obtain an order that the personal decree alone be reopened. In the execution under the mortgage decree one parcel of land was purchased by Mitra's wife and it is presumably on account of this circumstance that Mitra was unwilling to have the preliminary decree reopened. The District Judge, Midnapore, who heard the appeal against the order passed by the 2nd Court of the Subordinate Judge in the first suit under s. 36 of the Act observed:

" It is admitted before me by the learned pleader for the appellant that the reopening of the entire transaction will not be to the benefit of the appellant and the latter, therefore, does not want this to be done. The only relief he claims is that the new decree passed by the learned Subordinate Judge for Rs. 1,431-15-0 shall be reduced to

Rs. 66-13-2 as mentioned in his application under s. 36 of the Act."

In the first suit under s. 36 filed by Mitra, the claim to reopen the preliminary decree and the decree absolute was deliberately abandoned and he obtained relief expressly on the footing that he did not, desire that those decrees should be reopened. Is it thereafter open to Mitra to file another suit for obtaining relief under s. 36 by reopening the preliminary decree and the decree absolute ? In our judgment, s. 36 contemplates filing of one suit and not successive suits for reopening transactions including decrees and obtaining relief under the Act. If in a suit filed for that purpose, a borrower does not obtain relief which he has asked for or abandons his right to relief, in our judgment it will not thereafter be open to him to institute a second suit for relief which could have been but was not claimed in the earlier suit.

The plea that in the previous suit it was not open to Mitra to make a claim for reopening the preliminary decree and the decree absolute is without substance. By sub-s. (6) of s. 36, the right to grant relief in proceedings in execution of a decree already passed but which is not satisfied is vested in the court passing the decree and the first suit under s. 36 was filed in the court which had originally passed the mortgage decree. The claim to reopen the decrees preliminary and final was abandoned not because the court was incompetent to grant relief but because Mitra did not at that stage desire to reopen those decrees. We are unable to agree with the High Court that to a suit under s. 36 of the Act, the rule contained in o. 2, r. 2 of the Code of Civil Procedure does not apply. We are also of the view that the right to claim relief which could have been but has not been asked for in the previous suit must be regarded as res judicata. In that view of the case, this appeal will be allowed and Mitra's suit No. 105 of 1947 dismissed with costs throughout.

HIDAYATULLAH, J.-I have had the advantage of reading the judgment just delivered by my brother, Shah, J.; but I regret my inability to agree that the judgment under appeal be reversed.

The appellant, a money-lender, had advanced a sum of Rs. 2,500/- to the respondent on a simple mortgage of four properties. He filed a suit which was decreed on November 13, 1937, when a preliminary decree for Rs. 5,000/- plus costs was passed against the respondent. This decree was made final on February 25, 1938. On May 17, 1939, the four properties were sold for Rs. 4,160/-, and the balance then remaining due was Rs. 2,176/-. Three of the properties were purchased by the appellant (decree-holder), and the fourth, by the wife of the mortgagor.

On September 7, 1940, a personal decree for Rs. 2,338-15-3 was passed against the respondent. In 1941, execution of that decree was taken out. In the meantime, the Bengal Money-lenders Act had come into force on August 1, 1940. The respondent thereupon made an application under s. 36 of the Bengal Money-lenders Act for reopening the decree. The respondent did not say which decree he wanted reopened; but with his application he gave a statement of account of the entire amount as reduced under the Bengal Money-lenders Act and by the amount realised by sale of the four properties, and asked that a decree for the balance, Rs. 66-13-2, should be passed against him. The application was partly allowed, and afresh decree for Rs. 1,431-15-0 was passed. If the earlier decrees had been reopened, the amount due would have been Rs. 5,591-15-0, but the Subordinate Judge said :

" As Rs. 4,160/- was paid, I find no necessity of cancelling the sale and ordering restitution, but for the balance of Rs. 1,431- 15-0, a new decree be drawn up."

The respondent appealed, and the appellant cross-objected. The District Judge dismissed the appeal, allowed the cross-objection, and dismissed the application. On appeal to the High Court by the present respondent, R. C. Mitter, J. allowed the appeal. He held that the personal decree was liable to be reopened, and restored the decree for Rs. 1,431-15-0 passed by the Subordinate Judge. The respondent who was directed to pay the amount by instalments under the orders of Mitter, J. made default in payment, and a money execution case was started against him. He, thereupon, brought a suit under s. 36 of the Bengal Money-lenders Act for reopening the preliminary, final and personal decrees. This suit was dismissed as barred by constructive res judicata and the principle of o. 2, r. 2 of the Code of Civil Procedure, by the Subordinate Judge, and the appeal to the District Judge also failed. On further appeal to the High Court, K. C. Das Gupta, J. (as he then was) and Guha, J. allowed the appeal. The learned Judges held that o. 2, r. 2 of the Code of Civil Procedure did not apply to the suit, because it refers to a previous suit and not to an application filed in execution for relief. They also pointed out that under the Bengal Money-lenders Act the duty was laid upon the Court to reopen any decree, if it was likely to give relief to the borrower, and that the relief did not depend upon the desire or claim of the borrower. They further pointed out that even Mitter, J. was of the opinion that the relief to be given was incumbent upon the Court and independent of the wishes of the borrower. In the appeal before us filed with special leave, Mr. N. C. Chatterjee contended that the suit was barred by res judicata, waiver and estoppel, and that the Divisional Bench of the High Court was in error in ordering the reopening of the three decrees, when the respondent himself had not asked on the earlier occasion that they be reopened. The scheme of the Bengal Money-lenders Act is as follows:

The Act, though passed to control moneylenders and to regulate and control money-lending, gave relief to borrowers in many ways. One such way was to put the limit of what is popularly known as Damdupat on interest, and another was to limit the rate of interest to 8 per cent. simple in the case of secured loans. By s. 36, transactions which contravened these provisions were required to be reopened. This reopening was not limited to transactions, but decrees also were required to be reopened, unless fully satisfied by the first day of January, 1939. The section gave vast powers to Courts reopening decrees. Sub-section (2) of s. 36 provided:

" (2) If in exercise of the powers conferred by sub-section (1) the Court reopens a decree, the Court-

(a) shall, after affording the parties an opportunity of being heard, pass a new decree in accordance with the provisions of this Act, and may award to the decree-holder such costs in respect of the re-opened decree as it thinks fit,

(b) shall not do anything which affects any right acquired bona fide by any person, other than the decree-holder, in consequence of the execution of the reopened decree,

(c) shall order the restoration to the judgment-debtor of such property, if any, of the judgmentdebtor acquired by the decree

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holder in consequence of the execution of the reopened decree as may be in the possession of the decree-holder on the date on which the decree was reopened,

(d) shall order the judgment-debtor to pay to the decree-holder, in such number of instalments as it A may think fit, the whole amount of the new decree passed under clause

(a), and

(e) shall direct that, in default of the payment of any instalment ordered under clause

(d), the decree-holder shall be put into possession of the property referred to in clause (c) and that the amount for which the decree-holder purchased such property in execution of the reopened decree shall be set off against so much of the amount of the new decree as remains unsatisfied. "

The stages at which decrees could be reopened were laid down by sub-ss. (1) and (6) of s. 36. Sub-section (1) provided :

" 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 this 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....."

Sub-section (6) provided:

" Notwithstanding anything contained in any law for the time being in force,-

(a) the Court which, in a suit to which this Act applies passed a decree which was not fully satisfied by the first day of January, 1939, may exercise the powers conferred by sub-sections (1) and (2)-

(i) in any proceedings in execution of such decree, or

(ii) on an application for review of such decree made within one year of the date of commencement of this Act, and the provisions of rules 2 and 5 of Order XLVII of the First Schedule to the Code of Civil Procedure, 1908, shall not apply to any such application;

(b) any Court before which an appeal is pending in respect of a decree referred to in clause (a) may either itself exercise the like powers as may be exercised under sub-sections (1) and (2), or refer the case to the Court which passed the decree directing such Court to exercise such powers, and such Court shall after exercise thereof return the record with the additional evidence, if any, taken by it and its findings and the reasons therefore to the Appellate Court and thereupon the provisions of rule 26 of Order XLI of the First Schedule to the Code of Civil Procedure, 1908, shall apply. "

The words "suit to which this Act applies" were defined to mean:

" 2 (22)..... any suit or proceeding instituted or filed on or after the 1st day of January, 1939, or pending on that date and includes a proceeding in execution-

(a). for the recovery of a loan advanced before or after the commencement of this Act;

(b) for the enforcement of any agreement entered into before or after the commencement of this Act, whether by way of settlement of account or otherwise, or of any security so taken, in respect of any loan advanced whether before or after the commencement of this Act; or

(c) for the redemption of any security given before or after the commencement of this Act in respect of any loan advanced whether before or after the commencement of this Act. "

By s. 2(21), " suit " included an appeal. The definition was still further widened for purposes of s. 36 vide sub-s. (3) but nothing turns on it.

The effect of these provisions may be summed up: The reopening of transactions and decrees could be achieved:

(a) in any suit to which the Act applied;

(b) in a suit brought by the borrower for relief under s. 36;

(c) in any proceeding in execution of decrees; and

(d) by an application for review of a decree made within one year of the date of commencement of the Act; and

(e) by appellate Courts at all the above stages. Once the Court was moved, the action of the Court was dictated by the Act, and the Court was compelled by the Act to give full relief. The Court in this case, was required by law to reopen all the decrees passed against the respondent. Indeed, R. C. Mitter, J. quite correctly pointed out:



" In this case the judgment-debtor was entitled to have all the decrees, namely, the preliminary, final and the personal decrees reopened. He should not have been refused relief simply because he had asked for the reopening of the personal decree only if there had been a contravention of the provisions of section 30 of the Bengal Money-lenders Act. "

The learned Judge, however, declined to remand the case for the application of the Act or even to apply it himself, because he felt that what was asked for by the respondent should at least have been granted, and he granted only that relief. The law, however, gave no such option. It was mandatory, and laid a duty upon the Court.

The respondent then filed a suit, and asked for all the reliefs which the Court had to award, and there can be no doubt that unless the suit be incompetent, the Act must be applied even now, because the volition of the borrower is entirely out of place in the application of the Act. The respondent no doubt, when he applied on the previous occasion, asked that the Act be applied only so far as benefited him; but his wishes were irrelevant, and the Act had to be applied, as it stood. Every one who has dealt with this case has felt this to be the true position in law. Thus, the question is whether the respondent was precluded from bringing the suit. The suit could be barred under s. 11 or O. 2, r. 2 of the Code of Civil Procedure, or by the application of the principle of constructive res judicata, or because of waiver, estoppel or the equitable principle of approbation and reprobation. The opening words of Sub-s. (1) and again of sub-s. (6) of s. 36 are:

" Notwithstanding anything contained in any law for the time being in force and they are apt to put out of consideration both s. 11 and O. 2, r. 2 of the Code of Civil Procedure. Waiver and the equitable doctrine of approbation and reprobation can apply only if a right were give up. They can have no application where the question is not so much of a right of a party as of the duty of a Court under the Act. The Court was moved, and had to do its duty. If it can be moved a second time by another proceeding, neither those principles nor the principle of constructive res judicata can apply. The remedies which are enjoined by the Act are not exclusive of one another, either expressly or by necessary intendment. As the law stands, the Court could take action to enforce it at almost any stage of the proceedings between the parties commenced by the creditor, and, in addition, in proceedings or a suit commenced by the borrower. The intention of the law is clear and manifest that borrowers must be protected. Indeed, in *Jadunath Roy v. Kshitish Chandra Acharya Choudhury* (1), the Judicial Committee held that the preliminary, the final and the personal decrees in a suit to enforce a simple mortgage were all connected and were, in effect, one decree only, and there could be no question of reopening one decree and not the others. And in *Joy Chand Lal Babu v. Kamalaksha Choudhury* (2), a consent decree in a mortgage suit,,, which combined the preliminary, the final and the personal decrees into one decree, was held to, be properly reopened. The decrees passed against the respondent were required by law to be reopened, and no provision of the Code of Civil Procedure or of equity could bar the suit. The first was excluded expressly, and equity was hardly applicable in view of the law on the subject. Indeed, by the suit even

the decree, of Mitter, J. could be reopened, if it did not comply with the law. In my opinion, the order of the Divisional Bench of the Calcutta High Court, with respect, is correct and to hold otherwise is to decline to give effect to the protection, which the Act has sedulously erected in (1) (1949) L.R. 76 I.A. 179, (2) (1949) L.R. 76 I.A. 131.

favour of borrowers and against rapacious moneylenders. I find myself in such complete agreement with the judgment impugned, that I do not find it necessary to cover the same ground.

I would, therefore, dismiss the appeal with 'Costs. BY COURT.-In view of the majority judgment of the Court, this appeal will be allowed and Mitra's Suit No. 105 of 1947 dismissed with costs throughout.