Allahabad High Court
Ziaul Hasan And Ors. vs Mt. Ruquyia Begum And Anr. on 29 July, 1947
Equivalent citations: AIR 1948 All 123
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JUDGMENT Malik, J.

1. This is a Judgment-debtors' appeal. On 8-2-1930, the appellants executed a mortgage for Rs. 840 in favour of the plaintiff. On the basis of this mortgage the plaintiff filed a suit for sale of the mortgaged property, which consisted of a sitting room and a shop, in the Court of the First Munsif of Bulandshahr (orinigal Suit No. 4 of 1939). A preliminary decree was passed on 15-1-1940. The final decree for sale was passed on 5-9-1940, for Rs. 2008-2-0. This decree was put into execution and the property included in the mortgage was sold for Rs. 1200.

2. The mortgage decree was not satisfied in full and the mortgagee filed an application on 8-1-1942, for a decree under Order 34, Rule 6, Civil P.C., The judgment-debtors filed an objection that they were agriculturists and were entitled to the benefit of Section 21, U.P., Debt Redemption Act (13 [xiii] of 1940) which provided that no decree under Order 34, Rule 6, Civil P.C., could be passed against them.

3. On 8-10-1940, an application for execution of the decree made under Order 84, Rule 5, Civil P.C., had been filed by the decree-holder. In the course of execution proceedings the decree-holder had made a declaration under Section 4, Debt Redemption Act on 27-2-1941. The declaration was in these terms:

I, the decree-holder, Mt. Buqaya Begam, hereby declare under Sub-section (3) of Section 4 of Act 13 [XIII] or 1940 that the decree under execution shall not be executed against land, agricultural produce or person of the judgment debtor." The decree-holder relied on this declaration and urged that by reason of the declaration made by her on 27-2-1941, Section 21, Debt Redemption Act was no longer applicable and that she was entitled to a decree under Order 34, Rule 6, Civil P.C.

4. The learned Munsif held against the decree-holder and dismissed the application.

5. In appeal the lower appellate Court has set aside that order and has sent the case back to the trial Court for preparation of a decree under Order 34, Rule 6, Civil P.C.,

6. The judgment-debtors have filed this appeal and their contention is that the decision of the lower appellate Court is wrong and should be set aside and that the order passed by the trial Court should be restored.

7. Sub-sections (1) and (2) of Section 4, Debt Redemption Act provide for a declaration to be given by the plaintiff in a suit pending at the commencement of the Act or filed after the commencement of that Act. In case such a declaration is made, in accordance with the provisions of those sub-sections, the provisions of the Act do not apply to a suit for recovery of a loan from an agriculturist.

8. If, on the other hand, a declaration can not be made under Sub-sections (1) and (2) of Section 4 but, a declaration has to be made under Sub-section (3) the sub-section provides that the decree, with reference to which the declaration has been made, shall not be amended. The relevant portion of Sub-section (3) is in these words:

No decree recoverable from an agriculturist shall be amended under the provisions of this Act if the creditor declares that such decree shall not be executed against the land, agricultural produce or person of such agriculturist.

9. It will be noticed that the declaration given by the decree-holder on 27-2-1941, purported to be under Sub-section (3) of Section 4, and the only result, therefore, of such a declaration is that the final decree for sale dated 5-9-1940, cannot be amended. It is difficult to see how the declaration made by the decree-holder on 27-2-1941 which we have quoted above can make the provisions of Section 21 of the Act inapplicable. On this ground alone this appeal ought to be allowed, the order passed, by the lower appellate Court should be set aside and the order of the trial Court restored.

10. Learned Counsel has, however, urged that Sub-section (3) refers to a case where a declaration is given after a case has been finally decided and it does not apply to a pending suit. His contention is that proceedings under Order 84, Rule 6, Civil P.C., are not proceedings for execution of the decree but are proceedings in the suit itself, and for this proposition he has cited a number of cases. It is not necessary to deal with those cases as this Court has consistently taken the view, that proceedings under Order 34, Rule 6 are not proceedings in execution.

11. It is, however, difficult to see how learned Counsel can bring his case under Sub-sections (1) and (2) of Section 4. The suit on the basis of the mortgage was filed on 23-12-1938, before the Debt Redemption Act had been passed. The Act can into force on 1-1-1941. Both the preliminary and final decrees had been passed before the Act came into force. On the date when the Act came into I force therefore, the suit had already been decided. After the mortgage property was sold and it was found that the mortgage property was; insufficient, a fresh right accrued to the decree-holder to apply for a decree under Order 34, Rule 6, Civil P.C., Prom the mere fact that proceedings under Order 34, Rule 6 are not proceedings in execution but are proceedings in the suit itself, it does not follow that on the date when the Act came into force, the suit which had been decided by the passing of the final decree on 5-9-1940, could be said to be still pending. The plaintiff may have had a latent right to claim an additional decree in case the mortgaged property was found insufficient, but she was entitled to take the benefit' of that right only after the entire mortgaged property had been sold. It may be that the Legislature had not clearly in mind an application under Order 34, Rule 6 when Section 4, Debt Redemption Act was drafted, but that would be no reason to stretch the language of the Act in favour of the decree-holder, and we are of the opinion that a declaration under Sub-sections (1) and (2) of Section 4 cannot be applicable to proceedings under Order 34, Rule 6, Civil P.C.

12. A mortgagee who has made a declaration in accordance with Sub-sections (1) and (2) of Section 4, Debt Redemption Act in a pending suit may be entitled to a decree under Order 34, Rule 6, Civil P.C., even, against an agriculturist. If however, that stage has passed and he has to make a declaration under Sub-section (3) of Section 4, the only advantage that he gets as a result of his

declaration is that the decree will not be amended. This may be a lacuna in the Act with which we are not concerned. In this case from the form of the declaration and from the fact that the declaration was made under Sub-section (3) and could only be made under that Sub-section at that stage, it is clear that Section 21, Debt Redemption Act clearly prohibited the passing of a decree under Order 84, Rule 6.

13. After the order passed by the learned Munsif on 16-11-1942, dismissing the application for preparation of a decree under Order 34, Rule 6, Civil P.C., the decree-holder realised that the declaration given by her on 27-2-1911, might not suffice. She, therefore, on 2-12-1942, while the appeal was pending in the Court of the District Judge of Bulandshahr, made a fresh declaration purporting to be under Section 4, Debt Redemption Act. Our attention was not drawn to this declaration by learned counsel. Even if we were to hold that the suit was pending in the Court of the learned Munsif, so long as the application for a decree under Order 34, Rule 6 had not been disposed of, we do not see how this declaration made on 2-12-1942, after the proceedings had terminated in the Court of the learned Munsif by the dismissal of the application could come under the provisions of Sub-sections (1) and (2) of Section 4, Debt Redemption Act.

14. Learned Counsel for the decree-holder has raised a fresh point before us and has urged that the suit was not based on a loan secured by a first mortgage. He has no information or instructions on the point, but according to him the burden was on the judgment-debtors to prove positively that it was a suit based on a loan secured by a first mortgage. This point was not raised in either of the Courts below, and it raises certain questions of fact for which evidence may be necessary. The point never having been raised before we see no reason to allow the appellants to raise this new point in a Court of second appeal. We have, however, looked into the record and have satisfied ourselves by looking into the mortgage deed and the plaint that the loan was secured on a first mortgage. There is no mention in the mortgage deed of any previous encumbrance, nor is there any such mention in the plaint. No other encumbrance was notified at the time of the sale of the mortgaged, property. The fact that the judgment-debtors were agriculturists was found by the trial Court and the finding was not challenged either in the lower appellate Court or before us. There is, therefore, in any ease, no force even in this contention.

15. The result is that the appeal is allowed, the order of the lower appellate Court is set aside and the order of the trial Court is restored with costs in all the Courts.