

CASE NO.:
Appeal (civil) 1441 of 1981

PETITIONER:
MONOTOSH KUMAR MITRA (DEAD) BY LRS. ...

Vs.

RESPONDENT:
AMARENDRANATH SHAW (DEAD) & ORS.

DATE OF JUDGMENT: 17/02/2000

BENCH:
S.S.Ahamad, Y.K.Sabharwal

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T...J

SABHARWAL J.

In a mortgage suit, a preliminary decree was passed in favour of the appellant on 18th November, 1968. The said decree directed the payment of the sum of Rs.24,000/- in four equal instalments. The first instalment was payable on or before 31st March, 1969 and subsequent instalments by 31st day of March of each succeeding years. Thus the last instalment was payable on 31st March, 1972. The decree further stipulated that in case of default of payment of any one of the instalments, the plaintiff may, subject to the provisions of Bengal Money Lenders' Act, 1960 (for short, Bengal Act), apply to the Court for a final decree for sale of the mortgaged property and on such application being granted, the mortgaged property or a sufficient part thereof shall be directed to be sold.

It has not been questioned that neither the first instalment payable under the decree on or before 31st March, 1969, was paid by the defendants nor was any subsequent instalment paid.

Order 34 Rule 2 of Code of Civil Procedure inter alia stipulates grant of six months' time to the defendant to pay the mortgage amount stipulated under the preliminary decree and on default of payment, the plaintiff is entitled to apply for final decree directing sale of the mortgaged property as stipulated by Rule 4 of Order 34. Section 34 of Bengal Act, however, empowers the Court to direct payments by instalments notwithstanding the limit of six months fixed in Order 34 of Code of Civil Procedure. Section 34 of the Bengal Act reads as under :-

"34. Power of Court to direct payment by instalments
-- (1) 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 XXXIV of the First Schedule to the Code of Civil Procedure, 1908, apply, on the application of the defendant and after hearing the plaintiff, notwithstanding the limit of six months provided herein, direct at the time of the passing of the preliminary decree under rule 2 or rule 4 of the said Order to the effect mentioned in sub-clause (i) of clause (c) of sub-rule (1) of the said rule 2, -

(i) that the payment of the amount found or declared due under sub-rule (1) of rule 2 or sub-rule (1) of rule 4 of the said Order, as the case may be, is to be made, subject to such conditions as the Court may impose in such number of annual instalments and on such dates as the Court thinks fit having regard to the circumstances of the plaintiff and the defendant and the amount of the decree; and

(ii) 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 under sub-clause (ii) of clause (c) of sub-rule (1) of the said rule 2 or under sub-rule (1) of the said rule 4, as the case may be, and the date of such default shall be deemed to be the date fixed under sub-clause (I) of clause (c) of sub-rule (1) of the said rule 2 for payment of the whole amount found or declared due under or by the preliminary decree :

Provided that nothing in this clause shall affect the power of the Court to allow extension of time under sub-rule (2) of rule 2 or sub-rule (2) of rule 4 of the said Order :

Provided further that if the defendant, after receiving the notice referred to in sub-clause (ii) and before a final decree is passed, makes payment into Court of the amount due from him in respect of any such instalment, the payment of such instalment shall not be deemed to be in default and the Court shall not pass a final decree;

(b) in suits in respect of loans advanced before the commencement of this Act other than those referred to in clause (a) --

(i) on the application of a defendant and after hearing the plaintiff, order at the time of the passing of the decree, or

(ii) on the application of a judgment-debtor against whom a decree in such suit has been passed whether before or after the commencement of this Act and after notice to the decree-holder, order at any time after the decree has been passed, that the amount of the decree shall, subject to such conditions as the Court may impose, be payable without interest in such number of annual instalments, on such dates and within such period not exceeding twenty years as the Court thinks fit having regard to the circumstances of the plaintiff and the defendant or the decree-holder and the judgment-debtor and the amount of the decree, and that, if default is made in making payment of any instalment, that instalment and not the whole of the decretal amount shall be recoverable;

(c) during the pendency of any enquiry under

sub-clause (ii) of clause (b) order, subject to such conditions as the Court may impose, the stay of execution of the decree.

(2) In default of payment of any instalment referred to in clause (b) of sub-section (1), the decree-holder shall, after giving to the judgment-debtor such notice as may be prescribed, be entitled to apply for execution of the decree in respect of such instalment together with interest thereon at the rate of not more than six per centum per annum from the date of such default:

Provided that nothing in this sub-section shall affect the power of the Court to allow, prior to an order for execution of the decree, an extension of time of not less than one year for the payment of any instalment, and if such extension of time is allowed, the payment of such instalment shall not be deemed to be in default:

Provided further that if the judgment-debtor, after receiving the notice referred to in this sub-section and prior to an order for execution of the decree, makes payment into Court of the amount due from him in respect of any such instalment, the payment of such instalment shall not be deemed to be in default and the Court shall not order execution of the decree.

(3) Any order made under sub-clause (ii) of clause (b) of sub-section (1) shall be deemed to have been passed under section 47 of the Code of Civil Procedure, 1908."

On failure of the defendants to pay any instalments, the appellant served on them notice under the aforesaid provision stating that the defendants had defaulted in payment of all the instalments in terms of the decree, an application will be made in the High Court of Calcutta within 30 days for final decree for sale of the property. The defendants having still failed to make any payment, an application for passing final decree was filed by the appellant in the High Court on or about 15th February, 1973. The said application was dismissed by the learned Single Judge as time barred and the appeal having been dismissed by the Division Bench, the present appeal has been preferred by the plaintiff.

An application for passing of the final decree is governed by Residuary Article 137 of the Limitation Act, 1963, under which application for passing of final decree has to be filed within three years from the date when the right to apply accrues. If the right to apply for final decree had accrued to the plaintiff on default being committed by the defendants in payment of the first instalment itself on 31st March, 1969, the application for passing of final decree would be required to be filed within three years from the date of default. Not disputing that the default was committed by defendants in payment of the first instalment, learned counsel for the appellant contends that default committed in each subsequent year in payment of instalment gives rise to a fresh cause of action to apply for passing of final decree and, therefore, such an application having been filed on 15th February, 1973, would not be time barred at least in respect of the instalments which were payable under the decree on 31st March 1970, 1971 and 1972. It is further contended that the application may

be time barred, at best, in relation to default committed by defendants for payment of the first instalment payable on or before 31st March, 1969.

It is evident from Section 34 of the Bengal Act that in default of payment of any instalment, the date of such default shall be deemed to be date fixed under sub-clause (i) of clause (c) of Sub- Rule (1) of Rule 2 for payment of the whole amount. The whole amount found or declared due under or by a preliminary decree becomes payable and the plaintiff becomes entitled to apply for a final decree [Section 34(1)(a)(ii) of the Bengal Act]. It is thus clear that notwithstanding the dates of the instalments having been fixed under the preliminary decree which was subject to the provisions of the Bengal Act, a right accrued to the appellant to apply for final decree on default having been committed by the defendants in payment of the amount of the first instalment. It is not a case of a simple money decree. It is a case of a mortgage where under the preliminary decree, an opportunity is granted to the defendants to pay the mortgage amount in default whereof the plaintiff becomes entitled to apply for a final decree for sale of the mortgaged property. That right accrued to the plaintiff in this case on 31st March, 1969. The plaintiff cannot extend the period of limitation by delaying service of notice on defendant under Section 34 of the Bengal Act, which is a pre-condition for making of an application by plaintiff for passing of final decree. The period of limitation would start running from the time the right to apply for final decree accrues and is not dependent on the date of sending of notice by the plaintiff to the defendant as required under the Bengal Act. In *Nalini Kanto Bhattacharjee v. Mohan Chand Biswas* (AIR 1960 Cal. 477), a Division Bench of Calcutta High Court rightly held that the starting point of limitation for making an application for final decree was the date when the first default was made and as the application was made more than three years after from the date of the first default, it was barred by limitation. It also held that though the giving of notice prescribed by Section 34 of Bengal Act is a condition precedent to the making of application for final decree, the fact of giving of the prescribed notice had not the effect of arresting the running of normal period of limitation or enlarging the period of limitation and further upon default being made in payment of any instalment, the whole of the amount payable under the decree becomes due on the date of such default and right to apply, therefore, accrues once and for all on the date of the default. It may also be noted that the notice under Section 34 sent by the appellant was based on all the four defaults committed by the defendants and it was not stated that any default was waived or condoned. In this view, we need not go into the question whether in law plaintiff could at all waive or condone the default for the purposes of the Limitation Act. Rightly relying upon the aforesaid decision, the application of the appellant for passing of the final decree was dismissed by the High Court. We find no infirmity in the impugned judgment.

For the aforesaid reasons, the appeal is dismissed. Parties are, however, left to bear their own costs.