

*Privy Council Appeal No. 67 of 1947*

*Bengal Appeal No. 15 of 1945*

**Promode Kumar Roy and others** - - - - - *Appellants*

v.

**Nikhil Bhusan Mukhopadhyaya and others** - - - - - *Respondents*

FROM

**THE HIGH COURT OF JUDICATURE AT FORT  
WILLIAM IN BENGAL**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 20TH JANUARY, 1949**

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*Present at the Hearing:*

LORD SIMONDS

LORD MORTON OF HENRYTON

LORD REID

[*Delivered by* LORD MORTON OF HENRYTON]

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This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal dated the 15th June and the 28th August, 1945, which affirmed, subject to two modifications, the judgment and decree of the Subordinate Judge, Rangpur, of the 21st July, 1943. The appeal raises certain questions as to the true construction of the Bengal Money-Lenders Act, 1940 (Bengal Act X of 1940) (hereinafter referred to as the "Act").

It is necessary to state the history of the case in some detail, in order to show how these questions arise, and it will be convenient to refer to respondents Nos. 1 to 7 and their predecessors in interest as "the Mortgagors" and to respondent No. 8 as "the Bank".

On the 10th February, 1927, the Mortgagors borrowed Rs.1,20,000 from the Bank and executed a mortgage of the Tushbandar Estate to secure that sum, with compound interest thereon at the rate of  $8\frac{1}{2}$  per cent. per annum, with half-yearly rests. The loan was repayable on the 31st December, 1927, but was never in fact repaid.

On the 15th September, 1930, the Bank borrowed Rs.50,000 from Rai Bahadur Tarit Bhusan Roy (hereafter called "Roy"). Roy is the predecessor in title of the present appellants. On the same day, in order to secure repayment of the the said sum with compound interest at the rate of 8 per cent. per annum (with yearly rests) the Bank executed a document which, in their Lordships' view, may be accurately described as a sub-mortgage, though counsel for the appellants took exception to this description. This document contained an assignment in the following terms, the Bank being referred to as "the company" and Roy as "the Financier":—

"THIS INDENTURE FURTHER WITNESSETH that in further pursuance of the said Agreement and for the consideration aforesaid the company doth hereby assign unto the Financier ALL THAT the said sum of Rupees One lac and twenty thousand owing to the

Company upon the security of the said hereinbefore in part recited Indenture of Mortgage and all interest now due and henceforth to become due thereon and the benefit of all securities for the same and all powers rights or remedies thereby expressly or impliedly conferred on the Company to hold the same unto the Financier absolutely subject to the proviso for redemption hereinafter contained AND THIS INDENTURE FURTHER WITNESSETH that in further pursuance of the said Agreement and for the consideration aforesaid the Company doth hereby grant transfer convey and assign under the Financier all that the right title and interest and claim and demand of the company as the mortgagee under the said Indenture of mortgage of and in the Zemindaries Talooks Mausas Jotes messuages lands hereditaments and premises particularly described in the schedule hereunder written together with all bankar, falkar, mines, quarries, markets, bazars, fairs, hats, ghats and all other the rights profits liberties easements appendages and appurtenances thereto belonging or appurtenant or reputed to belong or be appurtenant thereto and also all those the rights powers and remedies available to the Company under and by virtue of the said Indenture of Mortgage against the Mortgagors in the said Indenture of Mortgage named and their and each of their respective heirs executors administrators representatives and assigns to hold the same unto the Financier subject to such right or equity of redemption as is now subsisting therein by virtue of the said Indenture of Mortgage and subject also to the proviso for redemption hereinafter contained PROVIDED ALWAYS and it is hereby declared that if the said sum of Rupees Fifty thousand with interest and compound interest computed at the rate and in the manner and all other the moneys hereby secured shall be paid on the 31st day of March one thousand nine hundred and thirty-one in pursuance of the covenants in that behalf hereinbefore contained the Financier will at the request and cost of the Company reassign and retransfer unto the company or as it shall direct the security hereby created."

On the 8th December, 1931, Roy brought a suit (mortgage suit No. 310 of 1931) in the Court of the Subordinate Judge, Rangpur, to which the Bank and the Mortgagors were made defendants. Certain decrees were made in that suit. Unfortunately, neither the plaint nor the decrees have been included in the Record now before the Board, but they are summarised in the following passage from the judgment of Mitter, J. in the High Court, the Mortgagors being referred to as "the Mukherjees":—

"On the 8th December, 1931, Roy filed a suit to recover his dues. The Bank was made defendant No. 1 and the Mukherjees defendants Nos. 2 to 6. He prayed for a decree according to Form No. 11, Appendix D of the Code of Civil Procedure. A preliminary decree in that form was passed on the 29th April, 1932. A sum of Rs.1,43,211-14-6 was found due from the Mukherjees to the Bank on the original mortgage and a sum of Rs.54,586-5-3 was found due from the Bank to Roy on the latter's derivative mortgage, calculated up to the 29th August, 1932 (the date of grace). The decree, *inter alia*, directed that 'in default of payment by defendants 2 to 6 and defendant No. 1 within the period of grace, the plaintiff may apply to the Court for a final decree for sale and on such application the mortgaged property or a sufficient portion thereof shall be directed to be sold. . . . If the defendant No. 1 pays into Court the amount due to the plaintiff, but the defendants Nos. 2 to 6 make default in payment of the amount due to defendant No. 1, defendant No. 1 shall be at liberty to apply for a final decree for sale. . . .

No payment having been made in terms of the preliminary decree either by defendants 2 to 6 or by defendant No. 1, a final decree for sale of the mortgaged properties was passed on the 23rd June, 1933, on the application of Roy. They were sold in execution of the said final decree and were purchased by Roy, on the 12th August, 1935, for the sum of Rs.48,400. The sale was confirmed on the

6th August, 1936, and possession was delivered to him on the 19th August, 1936. Thereafter, on the 18th March, 1939, Roy obtained a personal decree jointly against the Bank and the Mukherjees for the sum of Rs.28,503-13-0."

On the 1st September, 1940, the Act came into force. Section 36 of the Act gives the Court wide powers to re-open mortgage transactions and to give certain forms of relief to borrowers. Subsection (5) however provides:—

"(5) Nothing in this section shall affect the rights of any assignee or holder for value if the Court is satisfied that the assignment to him was *bona fide*, and that he had not received the notice referred to in clause (a) of subsection (1) of section 28."

Section 28 (1) provides:—

"28.—(1) Where any debt in respect of—

- (i) a loan advanced by a lender, whether before or after the commencement of this Act, or
- (ii) interest on any such debt, or
- (iii) the benefit of any agreement made, or security taken, in respect of any such debt or interest,

is assigned to any person, the assignor (whether he is the lender by whom the loan was advanced or any person to whom the debt has been previously assigned) shall, before the assignment is made—

(a) give to the assignee notice in writing that the debt, interest thereon, agreement or security is affected by the operation of this Act, and

(b) where the debt is in respect of a loan advanced by a money-lender, supply to the assignee in such form as may be prescribed all information as to the state of the loan together with copies of documents relating thereto."

On the 9th December, 1940, the present proceedings were instituted in the Court of the Subordinate Judge, District Rungpur, by the Mortgagees against the Bank and Roy, claiming relief under the Act.

In their application they alleged (*inter alia*) that, inasmuch as the rates of interest payable by them as well as by the Bank were in excess of those permitted by the Act, the transactions ought to be re-opened.

They therefore prayed:—

- (a) that the transactions concerning the mortgage bonds and the decrees in the mortgage suit should be re-opened;
- (b) that accounts be taken between them and the opposite parties;
- (c) that they might be exonerated from payment of interest in excess of that permitted by section 30 of the Act;
- (d) that they be restored to possession of the lands purchased in the execution sale by Roy;
- (e) that if, on the taking of accounts, any amount be found due from them to the opposite parties, such amount to be made payable by instalments extending over fifty years;
- (f) that if, on the taking of accounts, any sum be found to have been taken in excess by either of the opposite parties, the same should be refunded.

On the 24th January, 1941, Roy filed a petition of objection to the application and on the 12th March, 1941, the Bank filed its objections to the application.

On the 20th June, 1941, the Subordinate Judge gave judgment allowing the application, with costs. He appointed a Commissioner to take accounts and ascertain the amounts due from the applicants to the opposite parties respectively, allowing a reduced rate of interest in accordance with section 30 of the Act and giving credit for payments made. He adjourned consideration of the reliefs to be granted until after the taking of accounts.

The Commissioner duly made his report, and on the 10th July, 1943, the matter came on for final hearing before the Subordinate Judge. On the 21st July, 1943, he delivered judgment, arriving at the conclusion that the net amount due to Roy, for which a new decree was to be passed, was the sum of Rs.71,624-14-3. Similarly, he found that the net amount due to the Bank was the sum of Rs.1,72,994-1-6. Accordingly, he made an order declaring those amounts due under the re-opened decree, and directing that these amounts be paid by the Mortgagors in sixteen equal yearly instalments, such instalments being payable in the first instance to Roy. He further directed that Roy was to deliver to the Mortgagors possession of the mortgaged properties; but that, in default of payment of any instalment, Roy was to be put back into possession of the property. He gave certain consequential directions and granted various ancillary reliefs which are not material to be stated, and directed that all the parties should bear their own costs incurred since the earlier judgment. In compliance with this judgment, possession of the mortgaged property was given to the Mortgagors.

On the 13th September, 1943, Roy appealed to the High Court against both the judgments and orders above mentioned. He died intestate on the 16th March, 1944, and the present appellants were substituted in his place as his personal representatives under an order of the High Court dated the 20th April, 1944. The Mortgagors and the Bank filed cross-objections.

The appeal was heard by a Divisional Bench (Mitter and Waight, J.J.) and the order of the Subordinate Judge was affirmed, with certain variations which need not be stated.

From that decision the appellants appeal to their Lordships' Board and their counsel put in the forefront of his argument the submission that the appellants' predecessor Roy was an "assignee or holder for value" within section 36 (5) of the Act; that there had never been any suggestion that the assignment to him was not *bona fide*; that he had not received the notice referred to in clause (a) of section 28 (1) and could not have received any such notice, since he took his assignment long before the Act came into force; and that, consequently, the Court had no power to make any order under section 36 which would affect his rights. It was obvious that if this submission should be held to be correct, the order appealed from could not stand. Accordingly their Lordships invited counsel for the respondents to address them on this point, before considering the other arguments put forward on behalf of the appellants. At the conclusion of the argument on this point their Lordships were satisfied that the first submission of counsel for the appellants, already stated, was correct. It was therefore unnecessary to arrive at a conclusion upon the other arguments put forward on behalf of the appellants.

In answer to the first submission of counsel for the appellants it was contended for the respondents:—

(a) That Roy, being a sub-mortgagee, was not an "assignee or holder for value" within section 36 (5); alternatively—

(b) That the subsection refers only to an assignee of a mortgage decree, and not to an assignee of the mortgage debt; alternatively—

(c) That the subsection refers only to a case in which the loan was made after the Act came into operation.

Counsel for the respondents did not contend that the assignment was not *bona fide*.

Contention (a) found favour with the High Court, but in their Lordships' view it cannot be sustained. The sub-mortgage of 15th September, 1930, contained an assignment, in the clearest possible terms, of the sum of Rs.1,20,000 and interest owing under the mortgage of 10th February, 1927, and of "the benefit of all securities for the same and of all powers rights or remedies thereby expressly or impliedly conferred" upon the Bank. It is true that the Bank had the right to redeem, but this fact does not make the assignment any the less an assignment of all the Bank's rights under the mortgage. Mitter, J., observed that an assignee within section 36 (5) "would be that transferee only who has got by the act of the transferor *all* the rights of the latter," but in their Lordships' view Roy exactly answers that description. The Bank vested all its rights in Roy, although in a certain event, namely redemption, these rights would be restored to the Bank.

It was suggested, in the judgment of Mitter, J. (with which Waight, J. agreed), and in the argument for the respondents, that if a sub-mortgagee were an "assignee" within section 36 (5) of the Act, certain difficulties and anomalies would result. Their Lordships cannot agree with this suggestion. They express no view as to the position which arises if the sub-mortgage contains only a charge upon the original mortgage debt, but when it contains an assignment of that debt, and of all the rights of the mortgagee, the position appears to be free from difficulty. Relief can be given to the original mortgagor as against the original mortgagee under section 36, but such relief must not affect the rights of the assignee by way of sub-mortgage. To take an imaginary case by way of illustration, let it be assumed that the amount due on the original mortgage, for principal and interest at the original rate, is Rs.1,000, and the sum due on the sub-mortgage by assignment, for principal and interest at the original rate, is Rs.500. Let it further be assumed that if relief could be given, and were given under section 36, as against both mortgagee and sub-mortgagee, the sums due to them respectively would be Rs.800 and Rs.400. By reason of subsection (5) the sub-mortgagee's rights cannot be affected. He can therefore, as assignee of the mortgage debt, claim his full Rs.500, as against both mortgagor and original mortgagee. But if the Court gives the mortgagor relief as against the original mortgagee, the mortgagor will only be liable to pay to the original mortgagee Rs.300, the balance of the reduced debt after paying the sub-mortgagee in full.

As to contention (b), it is impossible to read subsection (5) of section 36 as referring only to an assignee of a mortgage decree. The words "and that he had not received the notice referred to in clause (a) of subsection (1) of section 28" make it plain that an assignee of a mortgage debt is within the subsection, since section 28 (1) is concerned only with assignment of debts.

Contention (c) cannot succeed in view of the decision of the Board in *Renula Bose, Srimati v. Rai Manmatha Nath Bose and others* L.R.72 I.A. 156.

If the word "assignee" in section 36 (5) is to be given its ordinary meaning, it must apply to the appellants' predecessor Roy, in view of the clear and comprehensive assignment contained in his sub-mortgage. Their Lordships see no good reason for giving any special or limited meaning to this word. This being so, Roy's successors, the appellants, are protected by subsection (5) and the judgment appealed from cannot stand, as it gravely affects their rights, both as to possession of the mortgaged estate and as to their right to recover in full the principal and interest owing under their sub-mortgage.

For these reasons, their Lordships are of opinion that the respondents 1-7, having regard to the provisions of Section 36, subsection 5 of the Bengal Money Lenders Act, 1940, were not entitled to apply for the re-opening of the decrees in the Mortgage Suit No. 310 of 1931 as against the present

appellants or their predecessors. They will humbly advise His Majesty that this appeal should be allowed and that an order should be made to the following effect:—

(1) Possession of the mortgaged properties sold to Roy on the 12th August, 1935, to be restored to the appellants forthwith.

(2) Discharge the order and decree of the Subordinate Judge of 20th June, 1941, and 21st July, 1943, as far as they purport to re-open the decrees in the Mortgage Suit No. 310 of 1931 as against the present appellants or their predecessors and to alter the amount then due to them.

(3) Order respondents 1-7 to repay to the appellants such sums as the appellants may have paid to them or for them under the orders of 21st July, 1943, and 28th August, 1945.

(4) Order respondents 1-7 to pay to the appellants mesne profits received by or on behalf of such respondents from the date of their taking possession of the mortgaged properties under the orders and decrees of the Subordinate Judge until re-delivery of possession of such properties pursuant to this order.

(5) The appellants are to be at liberty to apply to the Subordinate Judge under Section 144 of the Code of Civil Procedure, 1908.

(6) Any sums paid by respondents 1-7 as annual instalments under the order of the Subordinate Judge dated the 21st July, 1943, or on land revenue under the Order of the High Court of the 15th June, 1945, may be set off *pro tanto* against amounts payable by the respondents to the appellants under clauses (3) and (4) of this order or in respect of costs.

The respondents must pay the appellants' costs of this appeal and respondents 1-7 must pay the appellants' costs of the proceedings in the Court of the Subordinate Judge.



In the Privy Council

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PROMODE KUMAR ROY AND OTHERS

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NIKHIL BHUSAN MUKHOPADHYA  
AND OTHERS

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DELIVERED BY  
LORD MORTON OF HENRYTON