**AIR 1985 Cal 115**

**Calcutta High Court**

**Case No:** A.F.O.D. No. 37 of 1976

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| Rukmanand Khaitan | | APPELLANT |
| | Vs | |
| Jawala Dutt Lohia and Another | | RESPONDENT |

**Date of Decision:** June 12, 1984

**Acts Referred:**

- Arbitration Act, 1940 - Section 17
- Bengal Money Lenders Act, 1940 - Section 36, 36(1), 36(2)
- Civil Procedure Code, 1908 (CPC) - Section 11

**Citation:** AIR 1985 Cal 115

**Hon'ble Judges:** Mukul Gopal Mukherjee, J; Chittatosh Mookerjee, J

**Bench:** Division Bench

**Advocate:** A.C. Bhabra, Tarun Chatterjee and Dipak Dey, for the Appellant;Swadesh Bhusan Bhunia, (for No. 2), Tapan Mitra, (for No. 1(a)) and B.C. Ghosh Roy and S. Parmar, (for No. 1(d)), for the Respondent

**Final Decision:** Allowed

**Judgement**

C. Mookerjee, J.
The plaintiffs respondents had instituted in the First Subordinate Judge''s Court at Alipore, 24 parganas against the defendant appellant Title Suit No. 56 of 1973 u/s 36(6)(a)(i) of the Bengal Money Lenders Act, 1940. The learned Subordinate Judge has decreed the said suit in the preliminary form. He has ordered that the decree passed by this Court on 14th Mar. 1973 on consent of parties and the transactions of loan between them be reopened and accounts between them be taken. Final decree would be made upon taking of the said accounts between the parties. Being, aggrieved thereby the defendant, Rukmanand Khaitan, has preferred this appeal.

2. Before considering the merits of the submissions made on behalf of the appellant and the respondents, we may briefly set out the salient facts of the case. It is no longer

disputed that on diverse dates between 19th Sept. 1962 and 31st Mar. 1969 the defendant, Rukmanand Khaitan, who was an Insurance Agent, had advanced and paid an aggregated sum of Rs. 24,151.58 P. towards premia of the insurance policies held by the plaintiffs and other members of their family. The defendant. Rukmanand Khaitan, had further claimed that he had lent and advanced for commercial purposes to the plaintiffs another sum of Rs. 30,300/- which carried interest at the rate of 1 1/4% per month compoundable at the close of the year up to March 1966, and thereafter at the rate of l 1/2% per month compoundable at the close of the year. By an agreement dt. 18th Mar. 1970 made between the plaintiffs and the defendant, the differences and disputes between them in respect of the said monetary transactions were referred for decision to the sole arbitration of one Sri Ram Gopal Agarwalla,

3. The said Ram Gopal Agarwalla, the Arbitrator, by his award dated December, 1970 directed that Jawala Dutt Lohia and Jewan Kumar Lohia, the plaintiffs, would jointly and severally pay Rukmanand Khaitan the defendant, a sum of Rs. 95,000/- with interest at the rate of 9% per annum from the date of the award till payment. Pursuant to the requisition made by Rukmanand Khaitan, on 9th January, 1971 the said Arbitrator had filed his Award in this High Court (Award Case No. 18/1971). The plaintiff respondents filed in this court an application under Sections 30 and 33 of the Arbitration Act, 1940, for setting aside the said award, inter alia, on the ground that the learned Arbitrator had misconducted himself and the proceedings. Section K. Roy Chowdhury J. by his judgment delivered on 29th June, 1972, had dismissed the said application u/s 30 and 33 of the Arbitration Act, 1940. The learned Judge, inter alia, held that there was no error apparent on the face of the record and no ground had been made for setting aside the same. It would appear from the judgment of the learned Judge that at the time of the hearing of the application for setting aside the said award, the present plaintiffs had mainly urged that the learned Arbitrator had committed an error apparent on the face of the record by allowing the defendants'' claim which according to the plaintiffs was already barred by limitation.

4. On Aug. 18. 1972 the present plaintiffs respondents had preferred Appeal from Original Order No. 213 of 1972 against the aforesaid order of S. K. Roy Chowdhury, J. dt. June 29, 1972. dismissing their aforesaid application under Sections 30 and 33 of the Arbitration Act for setting aside and declaring that the Award dated Dec. 5,1970 was invalid. They, however, did not present any appeal against the judgment and decree of S. K. Roy Chowdhury, J. dt. 10th July, 1972 in Award Case No. 18 of 1971.

5. On Mar. 13,1973, S. K. Mukherjea and S. C. Deb, JJ., by consent of parties, disposed of the said Appeal No. 213 of 1972. The order appealed against was confirmed and it was recorded that if the appellants, Jawala Dutt Lohia and Jiwan Kumar Lohia, (meaning the present plaintiffs), paid to Rukmanand Khaitan, the decree holder in the said appeal (the present defendant) a total sum of Rs. 105000/- together with interest as stipulated thereunder in the manner set out in the said order, the decree-holder would accept the same in full satisfaction of the decretal amount. The sum of Rs. 105000/- with interest

was payable by six instalments. The Compromise Decree further recorded that if the said instalments or any of them or part thereof or any interest thereupon be not paid, then the decree-holder would be entitled to execute the decree dt. 10th July, 1972 for the balance amount then remaining.

6. On 31st May. 1973 as already stated, the plaintiffs filed the aforesaid Title Suit No. 56 of 1973 u/s 36(6)(a)(i) of the BML Act, 1940 in the First Court of the Subordinate Judge Alipore. 24 parganas, inter alia, for reopening the loan transactions and the decree made between them, for taking accounts between the parties, to make a declaration that all liabilities of the plaintiffs in respect of the loan stood fully discharged by virtue of the payments already made by them and also to direct the defendant to re-pay the plaintiffs a sum of Rs. 10848.42 P. allegedly paid in excess. Some of the averments made in the plaint of their suit were not appropriate to a proceeding u/s 36 of the BML Act because the plaintiffs had purported to deny that apart from Rs. 24151.51 P. which was advanced towards premia of the plaintiffs'' insurance policies they had for them any other sum.

7. The plaintiffs in their plaint of Title Suit No. 56 of 1973 filed in the First Subordinate Judge''s Court, Alipore, did not mention that after their application u/s 30 of the Arb. Act was dismissed on 10th July, 1972, S. K. Roy Chowdhury, J. had passed his judgment upon the aforesaid Arbitration award and decree had followed. Their plaint in Title Suit No. 56 of 1973 did not also contain any specific prayer for setting aside either the award or the said judgment and decree passed upon it on 10th July, 1972. The learned Subordinate Judge by preliminary decree has purported to direct that the decree dt. 13th Mar. 1973 passed in Appeal No. 213 of, 1972 be reopened and accounts be taken. We have already pointed out that the Division Bench by their judgment and decree dt. 13th Mar. 1973 had affirmed the order of S. K. Roychowdhury, J. dismissing the plaintiffs'' application u/s 30 of the Arbitration Act, but by consent of parties, the Division Bench had granted the plaintiffs six instalments to pay the sum of Rs. 105000/-with interest which was due under the award passed by Ram Gopal Agarwalla. In case of default in payment, the decree-holder (the defendant herein) was given liberty to execute the decree upon award passed against the present plaintiffs. The preliminary decree passed by the court below for reopening only the said decree dt. 13th Mar. 1973 was inappropriate because the learned Subordinate Judge has not granted the plaintiffs any relief in respect of the judgment and decree dt. 10th July, 1972 passed upon the said award. Even if the judgment and decree passed by the court below is maintained, the award which was made Rule of the Court would remain operative and binding upon the parties.

8. There is a more fundamental infirmity in the decree passed by the learned Subordinate Judge. The learned Subordinate Judge had no jurisdiction to entertain the suit u/s 36 of the B.M.L, Act for reopening the decree passed by the High Court in its Original Side and for passing a fresh decree in accordance with the provisions of the B.M.L. Act. There are enough indications in Section 36 of the B.M.L. Act that the powers u/s 36( 1) of the said Act for reopening a decree shall be exercised by the court which passed the original decree or by the appellate court hearing an appeal from the said decree. The expression

"reopening" in ordinary parlance means "to open again", "to take up again" or "to resume consideration". In order to give relief to a borrower, the court may exercise all or any of the powers specified in Cls. (a) to (e) of the said sub-section. The expression "transaction" in clause (a) of Section 36(1) of the B.M.L Act is wide enough to include a decree. The court"s power of reopening transaction extends to reopening of decrees ( AIR 1945 108 (Privy Council) ). The Judicial Committee in the said reported case inter alia, held that the fact, the decree was made by consent was immaterial as also the fact that the amount was agreed (see also Mahendra Nath v. Bireshwar (1948) 52 CWN 314; Srimati Oramba Sundari Dasi Vs. Sri Sri Iswar Gopal Jieu, ). But when in a suit for recovery of loan the defendant borrower"s prayer for granting him relief under the B.M.L. Act has been already refused by the court, the borrower cannot bring a fresh suit for obtaining the same benefits under the said Act. Because the said decision in the earlier suit would operate as res judicata. Thus, where a court had considered the question whether the B.M.L Act was applicable or not and had decided the question, that decision would be res judicata in a subsequent proceeding (vide Nikunja Behari Das Vs. Jatindra Nath Kar and Others, ).

9. The plaintiff respondents instituted the suit u/s 36(6)(a)(i) of the B.M.L. Act. According to the said Section 36(6)(a)(i) of the Act, the court which passed the decree (which was not fully satisfied by 1st Jan. 1939) may exercise the powers conferred by Sub-sections (1) and (2) of Section 36 of the B.M.L. Act. The Clause (a) of Sub-section (2) of Section 36 of the Act prescribes that when a decree is reopened, after hearing the parties, the court will pass a new decree in accordance with the provisions of the Act. The court may also make other ameliorative orders, e.g., may direct restoration of possession, set aside the sale held under the reopened decree etc., subject to qualifications and limitations laid down in different clauses u/s 36(2) of the B.M.L Act.

10. Mr. Bhunia, learned advocate for some of the respondents, himself submitted that when u/s 36(1) of the Act a decree is reopened, the suit is not set down for de novo determination of all the issues which had been previously decided by the reopened decree. The court u/s 36(2)(a) of the B.M.L. Act passes a new decree only in order to limit according to the provisions of the B.M.L. Act the amount of loan and the rate of interest recoverable and may also grant instalments to the borrower to repay the decretal amount. This view finds support from the decision of the Supreme Court in the case of Srimati Oramba Sundari Dasi Vs. Sri Sri Iswar Gopal Jieu, , which had approved the decision in the case of Bank of Commerce v. Amulya Krishna Basu AIR 1944 FC 18. It was held by the Federal Court in the said case that a new decree is passed u/s 36(2)(a) of the B.M.L Act only for the purpose of substituting the method of according sanctioned by the B.M.L. Act for calculation upon which the original decree was passed and to give an opportunity to the judgment-debtor to pay the decretal dues, except for those the adjudications made are not wiped out and the parties are not relegated to their rights and liabilities on the original cause of action.

11. We have already referred to Sub-section (6) of Section 36 of the B.M.L Act. Under clause (a) of Section 36(6) of the said Act the court which in a suit to which this Act applies passed a decree which was not fully satisfied by the first day of Jan. 1939, may exercise the powers conferred by Sub-sections (1) and (2), (i) in execution of the decree or (ii) on review. The court before which an appeal is pending against the decree may itself exercise the powers u/s 36( 1) or (2) or refer the case to the court which passed the decree.

12. R. C. Mitter and Khundkar, JJ. in the case of Satya Narayan Banerjee and Another Vs. Radha Nath Das and Others, , inter alia, held that Section 36(2) of the B.M.L. Act indicates that the suit u/s 36(1) of the said Act must be instituted in the court which had passed the decree for recovery of loan and not in any other court. The court which can entertain the suit u/s 36(1) of the B.M.L. Act must be the court which is competent to pass the new decree. The Division Bench in Satya Narayan Banerjee v. Radhanath Das (supra), held that the Subordinate Judge, Alipore, 24 parganas was not competent to entertain a suit for reopening of a mortgage decree passed by the High Court in its Ordinary Original Jurisdiction. We respectfully agree with the above views expressed in the case of Satya Narayan Banerjee v. Radhanath Das (supra), and hold that the instant suit filed in the Subordinate Judge''s court for reopening u/s 36( 1) of the Act, the judgment and decree passed by this Court in its Ordinary Original Jurisdiction was not maintainable. To attract the jurisdiction of the learned Subordinate Judge''s court the plaintiff had purported to aver that on 13th Mar. 1973 at 35A Nalini Ranjan Sarkar Avenue, New Alipore "the agreement to advance loan and the transaction took place." But in view of Section 36(2) of the B.M.L. Act, Section 20(c) of the Civil P.C. would not be inapplicable and the suit ought to have been instituted in this court which had passed the decree upon award for recovery of the loan from the plaintiffs.

13. The expression "suits to which this Act applies" u/s 2(22) of the B.M.L. Act means or "any suit or proceeding instituted or filed after 1st Jan. 1939 or pending on that date and includes a proceeding in execution". The plaintiffs did not plead or prove that the execution proceeding for recovery of the decretal due was pending in the 1st Court of the Subordinate Judge, Alipore. Therefore, we need not decide whether a transferee executing court also can exercise power u/s 36 of the B.M.L. Act (vide Dr. S. Roy Vs. Karuna Kisore kar, ).

14. In case, we uphold the power of a court u/s 36(1) of the B.M.L. Act to reopen a decree passed by another court, then there would be serious jurisdictional anomalies. The court entertaining a suit for reopening a decree passed by another court may not have been competent to try the original suit. Thus, the court which could not have entertained the original suit would pass, u/s 36(2) of the said Act, a new decree. The subordinate court would be able to reopen the decree of a court superior to it. We have already observed that a decree u/s 36(1) of the Act is reopened only for the limited purpose of giving to a borrower the benefits of the said section. Therefore, the court which passes the original decree ought to itself reopen its decree and pass a new decree u/s 36(2), of the Act. If we

uphold the jurisdiction of a court to reopen u/s 36(1) of the B.M.L. Act the decree passed by another court, then the original decree would be by one court and a new decree u/s 36(2) of the Act would be by another court. The B. M. L. Act has been enacted for giving certain benefits to borrower and, therefore, the legislature could not have intended to introduce the aforesaid anomalies which might result in denial of the said benefits. The nature of the power conferred by Section 36(1) and (2) of the said Act also clearly indicates that the court which passed the original decree against a borrower is to give the borrower benefits under the Act.

15. The present plaintiffs and the defendant by Memorandum of Agreement dt. 1st Aug 1970 had referred to the Arbitrator "all disputes and differences whatsoever between them". The learned Arbitrator did not give any reason for directing the plaintiffs to repay the defendant, Rukmanand Khaitan, a composite sum of Rs. 95000/- with interest at the rate of 9% per annum. The learned Arbitrator not having separately indicated the principal amounts and interests awarded in the defendant''s favour, it cannot be now predicated whether the Arbitrator had awarded interest or the sums due in excess of the maximum rate prescribed by the B.M.L. Act. Thus, it would be a matter of speculation as to what had impelled the Arbitrator to arrive at his conclusion that Rukmanand Khaitan was entitled to recover Rs. 95000/-with interest from the plaintiffs.

16. The plaintiffs in their application under Sections 30 and 33 of the Arbitration Act filed in Award Case No. 18 of 1971 did not contend that the Arbitrator had committed error apparent on the face of the record by allowing interest upon the principal sums due in contravention of Section 31 of the B.M.L Act. S. K: Roy Chowdhury, J. in his order dismissing the said application under Sections 30 and 33 of the Arbitration Act recorded that the plaintiffs had only urged before him that the recovery of the first three instalments of the loan were barred by limitation and therefore the Arbitrator had committed an error apparent on the face of the record. The learned Judge had rejected the said contention. The Division Bench in Appeal No. 213 of 1972 had affirmed the said order of dismissal passed by the learned single Judge but the Division Bench had granted the plaintiffs instalments to pay the dues of the defendant.

17. We have also noted that thereafter the learned single Judge had passed his judgment upon the award and the decree had followed. The said decree, u/s 17 of the Arb. Act, was bound to be in accordance with the award. In case we uphold the Subordinate Judge''s jurisdiction to reopen the said judgment and decree upon the award, then the new decree which may be passed u/s 36(2)(a) of the B.M.L. Act would be at variance with the Award against the plaintiffs. Even after dismissal of the plaintiffs application u/s 30 of the Arb. Act, the award would be, in effect, modified as a result of passing of a new decree u/s 36(2)(a) of the B.M.L. Act.

18. Mr. Bhunia, learned Advocate for the respondents, is not right in contending that if the court, u/s 36(1) of the B.M.L. Act, reopens the original loan transaction between the parties, no question would arise of setting aside either the arbitration award or the

judgment and decree passed thereon. Mr. Bhunia had alternatively argued that the court below u/s 36(1) of RM.L Act may reopen the decree passed upon award without setting aside or modifying the said award. In the first place, the original loan transaction has been adjusted when the award had been passed and the decree followed. The loan transaction had merged in the award and the decree passed thereon. The plaintiffs'' liability to repay the defendant now arises under the said award and the decree. Unless the said award and the decree which followed are reopened the court u/s 36(1) and (2) of the Act would not be able to give the plaintiffs any benefit under the B.M.L. Act in respect of the sum awarded against them.

19. The decision of A. K. Sen and B. C. Chakraborty, JJ. in the case of Sukumar Ghosh Vs. Tulsi Charan Ghosh, , is distinguishable. In the said reported case even after the application u/s 34 of the Arbitration Act had been rejected, the Arbitrator had proceeded to pass his Award. The Division Bench in Sukumar Ghosh Tulsi Charan Ghosh (supra), held that the decree passed upon such an award was a nullity and was not executable in view of Section 35 of the Arbitration Act. But a decree upon award passed against the borrowers cannot be adjudged as void and without jurisdiction merely because the Arbitrator or the court which passed the decree did not grant benefits of the B.M.L. Act to the borrowers who themselves did not pray for giving them said benefits. At this stage such benefits to the plaintiffs can be given only by setting aside the award and the judgment and decree passed thereon and by passing a new decree.

20. The provisions under Sections 31, 36 etc. of the B.M.L Act are for the benefit of the borrowers. When the borrowers themselves did not seek the said relief in a suit against them in which the B.M.L Act applies, the decree passed in such a suit would not be void. The decree is valid and executable, but may be liable to be reopened in the manner laid down in Sub-sections (I) and (2) of Section 36 of the B.M.L. Act.

21. We have already referred to the Division bench decision in Nikunja Behari Das Vs. Jatindra Nath Kar and Others, , which held inter alia that when the court has once decided that the B.M.L. Act was inapplicable, the decision would operate as res judicata in subsequent proceedings, such decision may be by implication or be an express one.

22. In the instant case the plaintiffs, in their application filed in this court under Sections 30 and 33 of the Arbitration Act, might have attacked the award on the ground that the learned Arbitrator committed an error apparent on the face of the record by not granting them benefits of the B.M.L. Act.

23. Therefore, even if the plaintiffs were right in contending that the provisions of the B.M.L. Act are applicable in respect of the arbitration awards, in their application under Sections 30 and 33 of the Arbitration Act they might have attacked the award on the ground that the learned Arbitrator had committed an error apparent on the face of the record by not granting them benefits of the B.M.L. Act. They did not raise the said question before S. K. Roychowdhury, J. who passed his judgment and decree upon the

Award or even in their Appeal from Original Decree No. 213 of 1972 preferred against the order of the learned single Judge dt. 29th June, 1972 dismissing their application under Sections 30 and 33 of the said Act. Therefore, they ought not to be allowed to challenge the said transactions relating to the arbitration award including the judgment and decree passed thereon by filing an independent suit in a Court which was incompetent to try the original cause.

24. There is considerable force in the submission of Mr. Bhabra, learned advocate for the appellant, that without considering the evidence of Rukmanand Khaitan, D.W. 1. the learned subordinate Judge held that the defendant did not "lead even an iota of evidence to discharge the burden" of proving that the loan of Rs. 30300/- was a commercial loan. The defendant in para 9 of his written statement had pleaded, inter alia, that diverse sums aggregating Rs. 30,300/- were commercial loans. The plaintiff 1 could not complete his evidence which was being recorded on commission. The plaintiff 2, P.W. 1. in course of his examination-in-chief did not state anything about the nature of the said loan amounting to Rs. 30,300/-. The other amount of Rs. 24,151.58 p. was admittedly paid by the defendant towards the premia due in respect of insurance policies of the plaintiffs and the members of their family. P.W. 1 denied during his cross-examination that the defendant had given them loan of Rs. 30,300/- but he could not say if the defendant had filed in this Court a receipt in respect of the said sum signed by his father. D.W. I. Rukmanand Khaitan, in his examination-in-chief had claimed that he had given the plaintiffs the further sum of Rs. 30,300/- as loan. The plaintiffs were tea planters. They got extensive landed property. The plaintiffs took loan of Rs. 30,300/- for their business. In course of his cross-examination D.W. 1 had stated that the plaintiffs had told him that they required the said amount for their business. The defendant did not lead any evidence to show how they had utilised the sum of Rs. 30,300/- borrowed from the defendant. Therefore, the evidence was practically one-sided that the plaintiffs had borrowed the said amount for their business purposes. Until Section 2(12) of the B.M.L Act, 1940 was amended by the West Bengal Act 4 of 1981 the expression "loan" in the said clause aliadid not include a commercial loan. The said West Bengal Act 4 of 1981 which was published in the Calcutta Gazette on Mar. 28, 1981 had deleted Sub-clause (f) of clause (12) of Section 2 of the said Act and as a result commercial loans have been brought within the purview of the B.M.L Act, 1940. The West Bengal Act 4 of 1981 was not made expressly retrospective but Mr. Bhunia, learned advocate for the plaintiffs-respondents, submitted that the aforesaid amendments in the B.M.L. Act would apply even to commercial loan transactions made before the commencement of the said amending Act 4 of 1981. In this connection, Mr. Bhunia has relied upon a number of reported cases. In view of our foregoing finding that the instant suit was not maintainable and the court below also had no jurisdiction to entertain the suit, it is unnecessary for us to consider whether or not commercial loan transactions made prior to Mar. 28, 1981 are also now within the purview of the B.M.L. Act, 1940.

25. We, accordingly, allow this appeal, set aside the judgment and decree passed by the learned subordinate Judge and dismiss the suit. In the circumstances of the case, both parties will bear their respective costs throughout.

26. Let the operation of the judgment be stayed for six weeks hence.

M.G. Mukherjee, J.

27. I agree.