

CRIMINAL REVISION.

Before Edgley J.

FAZLUR RAHMAN SARKAR

v.

ATAL BEHARY GHOSH.*

1940

April 23.

Usufructuary mortgage—Debt arising out of such mortgage—Award by Debt Settlement Board—Direction as to manner of payment—Jurisdiction—Bengal Agricultural Debtors Act, 1935 (Ben. VII of 1936), ss. 25(1)(e), 27(1).

On February 17, 1932, A. executed a usufructuary mortgage of certain immovable property in favour of F. The instrument of mortgage provided that the mortgage debt would be liquidated by the mortgagee remaining in possession of the mortgaged property and receiving rents and profits accruing therefrom for a period of fifteen years as from the date of the mortgage. In accordance with this provision the mortgagee went into possession. Subsequently, the mortgagor applied to the Debt Settlement Board of Mesra under s. 8 of the Bengal Agricultural Debtors Act, 1935, for a settlement of his debts, including the said mortgage debt.

By an award dated October 8, 1938, made under s. 25 of the Act, the Board directed the mortgagor to pay to the mortgagee a certain sum every year for a period of twenty years in satisfaction of the mortgage debt as settled by the Board, and directed the mortgagee to make over possession of the mortgaged property to the mortgagor with effect from January 15, 1939.

The mortgagee contended that the direction as to making over possession of the mortgaged property to the mortgagor would, in effect, convert the usufructuary mortgage into a simple mortgage and was, by virtue of s. 27(1) of the Act, without jurisdiction.

Held that the direction of the Board that the debt as settled by it should be paid in instalments by the mortgagor after possession of the mortgaged property had been restored to him, instead of, as provided in the instrument of mortgage, the mortgagee paying himself the debt out of the rents and profits of the mortgaged property in his possession, was a direction under s. 25(1) (e) of the Act as to the manner in which the debt was to be paid, and was not without jurisdiction.

Held, further, that s. 27(1) of the Act did not prevent the Board from making an award which would in effect convert a usufructuary mortgage into a simple mortgage.

CRIMINAL RULE obtained by the accused.

The material facts of the case and arguments in the Rule appear sufficiently from the judgment.

*Criminal Revision, No. 271 of 1940, against the order of Maulvi Abul Hossain, Honorary Magistrate of Serajganj, dated December 22, 1939.

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Ghosh.*Dinesh Chandra Roy* for the petitioners.*Jnanendra Kumar Roy* for the opposite party.

EDGLEY J. This Rule is directed against the order of Maulvi Abul Hossain, Honorary Magistrate of Serajganj, dated December 22, 1939, by which he convicted the petitioners under s. 379 of the Indian Penal Code and sentenced them to pay fines of Rs. 50 each or in default to undergo rigorous imprisonment for two months each.

The case for the prosecution appears to have been that the complainant was the mortgagor in respect of certain property which had been mortgaged to Fazlur Rahman Sarkar, petitioner No. 1, and also to the father of Abdul Gani, petitioner No. 2, under a usufructuary mortgage which was executed on February 17, 1932. In due course, the complainant applied to the Mesra Debt Settlement Board for the settlement of his debts including the debt covered by the above-mentioned mortgage. The amount of these debts was duly determined under s. 18 of the Bengal Agricultural Debtors Act, 1935, and, on October 8, 1938, the Debt Settlement Board settled the complainant's debts by an award, one of the terms of which was that, as far as the debts due to the petitioners were concerned, these should be liquidated by means of annual payments of Rs. 7-5 for twenty years and that, in the meantime, the mortgaged property would be made over to the possession of the mortgagor with effect from the beginning of Mâgh 1345 B. S (January 15, 1939). It was the complainant's case that in accordance with the terms of this award the mortgaged property came into his possession and he cultivated it through his *bargâdârs*, but that, on July 17, 1939, the petitioners together with a number of other people entered the land and cut away and took jute therefrom valued at about Rs. 80.

The main defence of the petitioners before the trial Court was to the effect that they were not guilty and did not take part in the alleged occurrence.

The learned Magistrate after a careful discussion of the evidence came to the conclusion that the complainant's debt to the petitioners had been settled under the award of the Debt Settlement Board on October 8, 1938, as alleged by him, and that, as a result of the award, he had obtained possession of the mortgaged property and had grown jute thereon through his *bargādārs*, which had been cut and taken away by the petitioners. The learned Magistrate further found that the prosecution case had been satisfactorily proved and the petitioners were guilty under s. 379 of the Indian Penal Code.

The main point urged on behalf of the petitioners in connection with this Rule is that they should not have been convicted under s. 379 of the Indian Penal Code, because, in view of the provisions of s. 27 of the Bengal Agricultural Debtors Act, 1935, the Debt Settlement Board had no jurisdiction to direct that the mortgaged property should be made over to the complainant, and in this view of the case, this term in the award dated October 8, 1938, must be regarded as being without jurisdiction. It is, therefore, contended that the usufructuary mortgage, dated February 17, 1932, should have been regarded as still subsisting on July 17, 1939, the date of the occurrence, and, this being the case, the petitioners could not be convicted of theft.

From a reference to the proceedings of the Debt Settlement Board there is no doubt that the debt due to the petitioners was duly determined under s. 18 of the Bengal Agricultural Debtors Act, and that this debt was settled by means of an award under s. 19 of the Act. Under s. 25 (1) (e) of the Act it is laid down that, amongst other particulars, which should be included in the award, are directions as to the manner and the order in which and the times at which the amounts referred to in cl. (d) shall be paid. Clause (d) of this section refers to the amount to be paid to each creditor for each debt owing to him under the terms of an amicable settlement or of an order of the Board under s. 19 or s. 22. It is, therefore, clear

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that the Board had jurisdiction to give directions as to the manner in which the sums, for which the debt had been settled, should be paid; their directions on this point were to the effect that the debt should be settled for Rs. 151-4, which sum should be payable by annual instalments of Rs. 7-5 as already stated.

Under the terms of the usufructuary mortgage, which was executed on February 17, 1932, it was stipulated that the amount of the debt together with the interest thereon would be liquidated by the mortgagor making over possession of the mortgaged property to the mortgagee for a period of fifteen years. It would, therefore, appear to have been the intention of the parties, according to the terms of the mortgage, that the debt should be liquidated in the above-mentioned manner.

Obviously, having regard to the provisions of s. 25 (1) (e) of the Bengal Agricultural Debtors Act, the Debt Settlement Board had authority to prescribe some other manner for liquidating the debt, and in my view, it cannot be said that the directions which they gave in respect of this matter were beyond their powers.

In this connection, it is argued by the learned advocate for the petitioners that, in view of the provisions of s. 27 of the Act, the Debt Settlement Board had no authority to alter the usufructuary character of the mortgage. Section 27 (1) of the Act is in the following terms:—

When an award is made as regards any debt which is secured by a mortgage, lien or charge on any immovable property of a debtor, such mortgage, lien or charge shall subsist to the extent of the amount payable in respect of such debt under the award until such amount has been paid or the property has been sold for the satisfaction of such debt or the debtor has been granted a certificate of discharge under sub-s. (5) of s. 22.

In my view, the intention of the legislature in enacting this section was merely to specify the extent to which a mortgage will continue to subsist after an award has been made. The sum specified in the

award must obviously be regarded as a charge on the mortgaged property until the conditions of the settlement have been fulfilled, but, subject to the provisions of this section, it would appear that the Board have full authority to modify the terms of the original mortgage upon which the loan had been advanced.

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In the case with which we are now dealing the effect of the award, dated October 8, 1938, was merely to convert the usufructuary mortgage, dated February 17, 1932, into a simple mortgage, and I am not prepared to accept the argument to the effect that in doing so the Debt Settlement Board acted without jurisdiction.

There can be no doubt from the findings of the learned Magistrate that, at the time of the occurrence, the mortgaged land was actually in the possession of the complainant, and that all the elements of an offence under s. 379 of the Indian Penal Code are present. This being the case, I am of opinion, that the convictions of the petitioners are correct. This Rule must, therefore, be discharged, and the order of the learned Magistrate dated December 22, 1939, is affirmed.

Rule discharged.

P. K. D.