

(1954) 07 OHC CK 0001
In the Orissa High Court
Case No : S.A. No. 401 of 1950

Banamali Mahapatra and Others

APPELLANT

Vs

Chiravuri Narayan Raju and Another

RESPONDENT

Date of Decision : 28-07-1954

Acts Referred:

Orissa Money Lenders Act, 1939 — Section 11(1), 17
Transfer of Property Act, 1882 — Section 76
Civil Procedure Code, 1908 (CPC) — Order 34 Rule 7

Citation : (1954) 20 CLT 481

Hon'ble Judges : Narasimham, J; Mohapatra, J

Bench : Division Bench

Advocate : P. Misra, for the Appellant; G.K. Misra, for the Respondent

Judgement

Narasimham, J.—This appeal is by Defendants 2 to 7 against the concurrent decisions of the two lower Courts decreeing the Plaintiff's suit for accounts u/s 76(h) of the Transfer of Property Act and for recovery of possession of some lands I which were originally mortgaged by the predecessor-in-interest of the Plaintiff in favour of the predecessor-in-interest of Defendants 2 to 7. The mortgage bond in question (Ext. 1) was executed on 10-5-1906 for a consideration of Rs. 600/-. It was stipulated that interest was payable at Rs. 1/7/- per cent per month compound interest. The gross annual usufruct from the mortgaged property was estimated at about Rs. 96/- and it was stipulated that out of this sum the mortgagee should pay rent and Cist due to the Government and appropriate the balance towards satisfaction of a substantial portion of the interest. The balance of the interest was to be added every year to the principal and compound interest calculated on the same. On 11-6-1909 and 11-2-1910 two other mortgages (Exts. A and B) were also executed between the parties in respect of the same property: The Plaintiff contended that these two were simple mortgages and that they had become time-barred. So far as the main mortgage of 1906 was concerned, the Plaintiff's case was that it was an anomalous mortgage and that the total income appropriated by the mortgagee during the

years from 1906 till the date of the institution of the suit (1946) was very much in excess of the total interest and principal due and that consequently he was entitled to the surplus u/s 76(b) of the T.P. Act.

2. The contesting Defendants, however, urged that the other two mortgages (Exts. A and B) were both usufructuary mortgagee in respect of the same property and that the Plaintiff was bound to redeem the same. Both the Courts rejected this argument and upheld the Plaintiff's contention that these were simple mortgages and that they had become time-barred. This finding was rightly not challenged before us by Mr. P. Misra appearing on behalf of the Appellants.

3. The main question in controversy is the right of the Plaintiff to call for accounts u/s 76(h) of the T.P. Act. The contesting Defendants urged that the first mortgage was a usufructuary mortgage and not an anomalous mortgage and that consequently by virtue of Section 17 of the Orissa Money-Lenders Act the mortgage should be deemed to have been completely discharged long ago and that no other right remained with the mortgagor or his successor-in-interest except to obtain possession of the property as provided in that section. In support of this argument reliance was placed on a Division Bench decision of this Court in S.A. No. 470 of 1949 XX C.L.T. 467 : ILR 1954 Cut 435 where the lights of a mortgagor and a mortgagee u/s 17 of the Orissa Money-Lenders Act in respect of a usufructuary mortgage, have been fully discussed. Elaborate arguments were advanced before us by the learned Counsel for both sides on the question as to whether the mortgage of 1906 was in anomalous or a usufructuary mortgage. It is, however, unnecessary for us to decide this question because we consider that even if the mortgage be held to be an anomalous mortgage the mortgagee is not bound to render accounts in view of the proviso to Section 11(1) of the O.M.L. Act.

4. In the lower Courts also the question about the applicability of the said proviso was raised. But both the Courts held that the said proviso would not apply and that the rights of the mortgagor described in Section 76(b) of the T.P. Act were not in any way affected by the provisions of Section 11(1) of the O.M.L. Act. In taking this view they have mainly relied on the absence of the non-obstante clause "notwithstanding anything to the contrary contained in any other law" at the commencement of Section 11(1) of the O.M.L. Act. From this omission both the Courts thought that a fair inference could be made that the provisions of Section 76(h) of the T.P. Act were not in any way allotted by Section 11(1) of the O.M.L. Act. This view of both the Courts is clearly wrong. In S.A. No. 470 of 1949 X. C.L.T. 467 : 1954 ILR Cut 435 we have discussed this point also and held that notwithstanding the absence of the non-obstante clause at the commencement of Section 11(1) of the O.M.L. Act that enactment being a later species enactment dealing with the rights of the creditors and debtors should be held to override the provisions of Section 76(h) of the T.P. Act to the extent provided therein. It is unnecessary to repeat the reasons which have been fully given in

the decision mentioned above.

5. The next question is whether the proviso to Section 11(1) of the O.M.L. Act would help the Appellant-Defendants in the present case. That proviso says that if after re-opening the transaction and baking an account between the creditor and the debtor it is found that the creditor has realised a sum in excess of the amount due he will not be required to refund any sum which has been paid to him. Two views are possible regarding the construction of this proviso. The first view is that which we indicated in our previous decision namely, that any payment made to the creditor towards interest in excess the amount permitted by the O.M.L. Act will not be refundable; whereas any payment towards principal in excess of the amount due may *prima facie*, be not saved by the proviso. The other view is that whether payment to the creditor has been made either towards interest or towards principal, all payments made to him prior to the re-opening of the transaction are not refundable. In our previous decision we were inclined *prima facie* to accept the former view; but we let the question open. Mr. P. Misra on behalf of the Appellants contended that if the latter view be taken no payment made to the mortgagee was refundable and even if the former view be taken no sum would be refundable in view of the admitted facts of the present case. He urged that there could possibly be no excess payment towards principal in view of the stipulated rate of interest and the approximate value of the net usufruct from the land. Hence, he urged that whatever may be the true construction of the said proviso the Appellants would be completely saved by the proviso and no sum would be refundable. Hence, the taking of accounts would be wholly unnecessary.

6. We think that this contention of Mr. P. Misra must prevail and that it will be unnecessary to decide the question which was left open in the previous decision. The interest payable on the original mortgage was Rs. 1/7/- per cent per month. Till the commencement of the Orissa Money-Lenders Act in 1939 the stipulated rate of interest as given in the mortgage bond was legally realisable and the mortgagee was entitled to appropriate the usufruct towards payment of a substantial portion of the interest so calculated. Doubtless, the exact amount of the net usufruct from the mortgaged property is not on Record. But at the time of the execution of the bond the gross usufruct was approximately estimated at Rs. 96/- per annum and out of that sum the mortgagee was required to pay rent and Cist due to the Government. The total interest due at the stipulated rate is Rs. 103/8/- and thus the net usufruct would admittedly be much below the interest calculated at the contracted rate. Moreover, we find that during the cross-examination of the Defendants in the trial Court it was elicited that the actual amount realised from the mortgage property was much below the amount of interest which the mortgagor was required to pay under the bond. Thus till 1939 the total usufruct that was appropriated by the mortgage was below the amount that he was entitled to appropriate towards interest and there could possibly be no question of any appropriation of a portion of the usufruct towards the principal. Doubtless after the commencement of the Orissa Money-Lenders Act

the position may slightly differ. The mortgagee was not entitled to appropriate more than nine per cent simple towards interest and the balance out of the usufruct could be appropriated only towards the principal. But even if we calculate interest at this rate the annual appropriation towards interest would come to Rs. 54/- only and the surplus out of the usufruct which remained every year for the discharge of the principal would hardly be Rs. 86/-. The suit was brought within seven years of the commencement of the Orissa Money-Lenders Act and even if we assume in favour of the Plaintiff that the entire balance was appropriated towards principal the balance of the principal which would remain due on the date of the institution of the suit would be so great that there could be no question of any surplus being available for refund. Thus on the facts of this case there will be no surplus for which the Plaintiff could claim refund and it is therefore unnecessary to order accounting even if the prima facie view which we indicated in our previous judgment about the construction of the proviso to Section 11(1) of the O.M.L. Act be adopted.

7. Mr. G.K. Misra, however, contended that the litigation proceeded in the lower Courts on a different set of facts and that the mortgagee never asserted that any amount was paid to him either towards interest or towards principal and that consequently it will not be proper at this belated stage to assume such payment and to hold that the prevail to Section 11(1) of the O.M.L. Act would come to his relief. It is true that in the lower Court the question as to whether there was in fact payment of any money out of the usufruct either towards interest or towards principal of the original loan was not specifically raised and the controversy between the parties was limited to the purely legal question as to whether Section 76(h) of the T.P. Act would override Section 11(1) of the O.M.L. Act. The facts were not one into with a view to determine whether even if the said proviso be held to apply, the mortgagee had established the facts which would entitle him to avail himself of that proviso. But there seems no doubt on the facts of this case that the usufruct out of the mortgaged property was appropriated- towards interest. In fact, the Plaintiff himself seems to have admitted this position in para 4 of the plaint where he unambiguously stated that out of the usufruct both the interest and the principal of the mortgage money had been discharged though he took care to add that if any amount was still due he was willing to pay the same. There could be no question of "discharge of any interest" unless there has been either payment in fact or appropriation of the usufruct as stipulated in the mortgage bond. We are therefore inclined to take the view that on the pleadings of the parties it was the admitted position that the entire usufruct was appropriated towards interest prior to 1939 and that after the coming into force of the Money Lenders Act, it was appropriated partly towards interest and partly towards principal. It is true that the mortgagee put forward another case to the effect that a portion of the usufruct was used for the purpose of paying up a portion of the interest in respect of the other two mortgage-bonds (Exts. A and B). This story of his was disbelieved by both the Courts. But so far as appropriation of the usufruct towards interest and principal of the earlier bond

was concerned it was taken for granted by both parties. Otherwise, the controversy as to whether the proviso to Section 11(1) of the O.M.L. Act would apply could not possibly have arisen in the two lower Courts. We cannot assume that the two lower Courts entered into an academic discussion of this legal question.

8. We would, therefore, hold that the proviso to Section 11(1) of the O.M.L. Act overrides Section 76(h) of the T.P. Act but that whatever construction be put on that proviso the mortgagee would not be bound to render any account inasmuch as there is no possibility of any surplus remaining after appropriation towards the interest and a portion of the principal till the date of the institution of the suit. The claim for accounts must fail. The judgment and decree of the trial Court are modified 1109 follows:

The direction about the return of the mortgage document (ext. 1) to the Plaintiff after endorsement of full satisfaction thereon and his being placed in possession of the suit lands is maintained. But the direction for appointment of a Pleader Commissioner under Order 34, Rule 7 CPC to examine the accounts u/s 76(h) of the T.P. Act is set aside.

Both parties will bear their own costs throughout.

Mohapatra, J.

9. I agree.