
(1960) 05 MAD CK 0016
In the Madras High Court

E. Rajagopalan Chettiar and Another APPELLANT
Vs
Sina Ana Ishack Rowther and Others RESPONDENT

Date of Decision : 06-05-1960

Acts Referred:

Tamil Nadu Agriculturists Relief Act, 1938 — Section 9A

Citation : (1961) ILR (Mad) 161 : (1960) 73 LW 594 : (1960) 2 MLJ 495

Hon'ble Judges : Ramachandra Iyer, J; Ramachandra Aiyar, J

Bench : Division Bench

Judgement

Ramachandra Iyer, J.—This appeal raises the question, whether the provisions of Section 9-A of the Madras Agriculturists' Relief Act, 1938 (Madras Act IV of 1938) could be applied to the claim by a mortgagee-creditor to be paid out of the compensation amount deposited in respect of an estate taken over by the Government under the provisions of Act XXVI of 1948 (Abolition Act).

2. The inam estate of Kusavarungulam was notified and taken over by the Government on 3rd January, 1951, and an advance compensation of Rs. 11,031 was deposited with the Tribunal. The appellants, claiming under an Qthi executed on 2nd November, 1941, in favour of one Nambi Narayana Chettiar by the 1st Respondent in respect of i/3rd share in the inam estate, applied for payment out of the sum reserved under the mortgage, namely, Rs. 3,500. The 1st Respondent also applied for payment of his 1 /3rd share in the compensation amount less what was payable to the mortgagee. He claimed that he was an agriculturist, entitled to the benefit of Act IV of 1938, that, by the operation of Section 9-A of the Act, the debt covered by the othi stood partially discharged, and that he was entitled to be paid out the amount.

3. Immediately after the othi was executed, the mortgagor, namely, the 1st respondent, obtained a lease of the mortgage properties from the appellant, and was in possession as a tenant till 1st July. 1946, when he surrendered possession of the properties. The 1st respondent claimed that during the period he was in possession as tenant he had paid a certain amount by way of rent which was in

excess of 5 1/2 per cent, per annum, on the amount lent and that the excess payment should be taken in reduction of the principal amount due. The Tribunal accepted the contentions of the respondent, and held that, by applying the provisions of Section 9-A (9) and crediting the rent in excess of 5 1/2 per cent, per annum towards the principal, the debt due on 1st July, 1946 was only Rs. 3,045-8-0, and that, as the mortgagees were in possession of the properties thereafter till the estate was taken over by the Government, there should be a proportionate reduction of the debt. That was ascertained to be Rs. 2,113-13-8. The balance of 1/3rd share of the compensation amount was directed to be paid over to the 1st respondent. The appellants have appealed against the order of the Tribunal, claiming that the mortgage debt is not liable to be scaled down, and that the entire mortgage amount, namely, Rs. 3,500 should have been directed to be paid over to them.

4. It is not disputed that the 1st respondent is an agriculturist. But it is contended that Section 9-A of Act IV of 1938 would apply only to usufructuary mortgages, and its provisions cannot be invoked to scale down the debt due under an anomalous mortgage. Reliance was placed for the contention on N.K. Rajaraja Varman Thirumalpad and Others Vs. K.K. Krishnan Nair and Others, . The correctness of that decision was challenged on behalf of the 1st respondent. It is unnecessary, in the view we are taking, to express any opinion about the correctness or otherwise of the decision in T.V. Srinivasaraghava Aiyangar Vs. M. Narasimha Mudaliar, . We shall assume that the mortgage in question, though an anomalous one, would come within the scope of Section 9-A of the Act.

5. Section 9-A (5) states that, if a mortgagee has been in possession of mortgaged property for a period of 30 years or more, the mortgage debt shall be deemed to have been wholly discharged with effect from the expiry of the period of thirty years. The mortgage in the instant case came into existence in 1941, and that rule cannot apply. Section 9-A (3) deals with cases, where a mortgage is less than 30 years old, and it runs:

Where the mortgagee has been in possession of the whole of the property mortgaged to him for an aggregate period of less than thirty years, the mortgagor shall not be entitled to redeem the mortgage, unless he pays to the mortgagee:

(1) the difference between the principal amount secured by the mortgage and an amount bearing to principal amount the same proportion as the period during which the mortgagee has been in possession bears to thirty years." (Rest of the section omitted as unnecessary).

The terms of the section set out above only enable the debtor to redeem the mortgaged property by paying an amount reduced in proportion to the period during which the mortgagee had been in possession and enjoyment of the property. The language employed is not similar to the one in Section 7, which statutorily declared all outstanding interest discharged. If, therefore, the

mortgagor does not redeem, the mortgage does not stand discharged. That is possibly for the reason that in an usufructuary mortgage, where the mortgagee is entitled to remain in possession till the entire debt is paid off, a provision for a partial discharge before redemption is unnecessary. This view of the section has been accepted in a series of decisions. In *T.V. Srinivasaraghava Aiyangar Vs. M. Narasimha Mudaliar*, , Subba Rao, J., (as he then was) observed that Section 9-A was intended to apply only to a case where the mortgagor seeks to redeem the mortgage. This view was accepted in *Visalakshi Achi v. Mayalagu* (1955) 68 L.W. 630. The decisions in those cases are sought to be distinguished on the ground that they related to a claim for scaling down the rent payable to an usufructuary mortgagee who had granted lease back of the properties to the mortgagor. It is true that the question raised in those cases was with reference to Section 9-A (9) of the Act, but we are unable to see any distinction either in principle or in the language employed by the learned Judges, between a case where the benefit is claimed by way of reduction of rent payable or for redemption. In both cases the claim or benefit could be sustained only u/s 9-A, and it was necessary to consider to which type of mortgage the section would apply. It is, however, unnecessary to dilate on this aspect of the matter, as that view has been accepted even in cases where no question of payment of rent arose. In Appeal No. 462 of 1950, the suit was laid for recovery of the amount due on an anomalous mortgage, while the mortgagee was in possession. The mortgagor was let into possession under a lease from the mortgagee, but that fact is of no significance, as the claim was for the mortgage money. The mortgagor pleaded that the debt should be scaled down by the application of Section 9-A of the Act. The learned Judges held that it was not open to the mortgagor to plead, by way of defence in a suit for sale u/s 9-A, that the debt had been discharged partially. In the course of the judgment, Govinda Menon, J., observed:

The appeal can be disposed of on a preliminary question, namely, that Section 9-A cannot be availed of by the defendant when a mortgagee brings a suit for sale because the section expressly states that it is applicable only to a suit for redemption by a mortgagor. In a recent case decided by us (A.S. No. 422 of 1950) the question has been considered at some length and we held that the necessary pre-requisite for the application of Section 9-A is a suit by the mortgagor to redeem and not by the mortgagee for realisation of the monies by sale.

The learned Judges proceeded to refer to a number of earlier judgments of this Court, taking the same view. Govinda Menon, J., had to consider the matter again in *Palanichami Chettiar and Others Vs. The Reliance Bank of India, Ltd.*, , where he held that in a composite mortgage (simple and usufructuary), where the mortgagee sued for realisation of the amount due by sale on the covenant by the mortgagor to pay the sum, Section 9-A of the Madras Agriculturists Relief Act could not be applied, and that that section could come into play only where in the case of a usufructuary mortgage the mortgagor sought to redeem. In that case, the lower Court had applied the provision of Section 9-A in respect of the

mortgage and passed a decree for the reduced amount. In the course of the Judgment, the learned Judge observed:

In these circumstances what we have to consider is whether it is open to the mortgagor by a written statement, without filing a fresh suit, to invoke the provisions of Section 9-A for the amount being scaled down. In my view, unless the mortgagor tenders the money or deposits the sum in Court, he is not exercising the right to redeem. A mere allegation in a written statement that u/s 9-A of the Act the mortgagor is entitled to scale down the amount would not amount to the exercising, of the right of redemption. Section 60 of the Transfer of Property Act states that the right conferred under the section is called " a right to redeem " and a suit to enforce it is called " a suit for redemption." The right of redemption can be exercised by the mortgagor only by tendering the money or by depositing it under the provisions of the Transfer of Property Act.

6. In the present case, there has been no tender or deposit of the mortgage money before the estate was taken over, that is, the mortgage was subsisting on the property.

7. But even so, it is contended for the respondent, that, when the mortgagor applied to the Tribunal for payment out after providing for payment of the mortgage amount as scaled down, it should be held that he applied for redemption, and that Section 9-A would be attracted. The observations of Govinda Menon, J., to which we referred just now, were relied on to show that redemption could be effected by tender or payment, and that when the mortgagor was agreeable to the mortgagee taking the scaled down amount from the compensation money, it should be deemed to be a deposit.

8. Redemption means buying back the mortgage estate by payment of the money due. Section 60 of the Transfer of Property Act declares the right of the mortgagor to redeem. The right of redemption is an incident to a subsisting mortgage and could exist only so long as the mortgage on the property remains. In a case where the mortgage property had been taken over by the Government, no question of redemption of the mortgage property can arise. Section 3 of the Abolition Act (XXVI of 1948) vests the property on notification in the Government free of all encumbrances. The right of the owner as well as that of the encumbrancer would thereafter be transferred to the compensation money paid under the provisions of the Act. The learned Counsel for the respondent argued that the compensation amount should be deemed to be substituted security, and that an application for payment out of the amount would amount to redemption. In *Barhamdeo Prasad v. Tara Chand* (1913) 26 M.L.J. 243 : L.R. 41 IndAp 45 : 1 L.R. 41 Cal. 654, the Privy Council held that, where the mortgage property was sold by a Court in proceedings to which the subsequent mortgagee was a party, the right of such mortgagee would only be against surplus sale proceeds lying in Court after paying the earlier mortgagee. It was held that the surplus sale proceeds represented security which the mortgagee had under the mortgage.

9. Section 41(1)(b)(2) of the Abolition Act enables the Government to deduct from the amount deposited any amount due in respect of a mortgage created before the notified date. Section 42 enables the creditors of the owner of an estate to apply for payment out of the compensation monies, the amount due to them. The right created in favour of the mortgagee is for a certain sum of money, and no question of redemption in the sense of buying back of the mortgage property can at all arise. The provision of Section 9-A (3) of Act IV of 1938, which applies only to suits for redemption, cannot obviously apply when the mortgagor has not chosen to exercise his right of redemption before the estate was taken over. On the taking over of the estate, the mortgage stood wiped out by operation of Section 3 of the Abolition Act and fresh rights were created in favour of the mortgagee.

10. The learned Counsel sought to argue, on the analogy of Order 34, Rule 5, which permits a Court-sale under a mortgage decree being set aside before confirmation thereof thus enabling a redemption, that the mortgage should be deemed to subsist; even when the compensation money had been deposited by the Government. Order 34, Rule 5, is a specific statutory provision enabling a setting aside a Court-sale on certain terms being complied with. The effect of payment under that rule is a discharge of the mortgage decree. That rule or any principle on which it is based cannot apply to a case where the mortgage property has been taken over by the State. Therefore, when an erstwhile mortgagor applies for payment out of the compensation amount after making provision for payment to the mortgagee of the estate, no case of redemption can arise. Section 9-A (3) could not be applied where there is no occasion for redemption. The appellant would, therefore, be entitled to be paid out the full amount of Rs 3,500. The appeal is allowed with costs.