(1960) 03 P&H CK 0032

In the Punjab And Haryana At Chandigarh

Case No : Second Appeal No. 1483 of 1959

Gurbaksh Singh — APPELLANT

Vs

Dr. Dayal Chand — RESPONDENT

Date of Decision : 11-03-1960

Acts Referred:

Displaced Persons (Claims) Act, 1950 — Section 16, 16(3), 16(5), 16(6)
Displaced Persons (Debts Adjustment) Act, 1951 — Section 10, 11(2), 15, 16, 16(2)

Citation : AIR 1960 P&H 599

Hon'ble Judges : D.K. Mahajan, J

Bench : Single Bench

Advocate : B.R. Tuli, for the Appellant; H.L. Sarin, for the Respondent

Judgement

D.K. Mahajan, J.—The only question involved in this second appeal is whether a creditor whose debt was secured by a mortgage of property now situate in Pakistan and who alter the coming into force of the Displaced Persons (Debts Adjustment) Act (No. 70 of 1951) hereinafter referred to as the Act - has elected to retain that security u/s 16 of the Act as against the property allotted to the displaced person in lieu of the property left in Pakistan is entitled to enforce that charge by a separate suit?

2. In order to appreciate the entire controversy in this appeal, it is necessary to set out the facts in some detail. Gurbax Singh mortgaged his entire land measuring 225 Kanals 17 marlas in favour of Dr. Dyal Chand to secure a debt of Rs. 4,000/-. After the partition of the country, both parties came to what is now India. An application was made by Dr. Dyal Chand u/s 10 of the Act against Gurbax Singh for recovery of the debt secured by the mortgage. As soon as notice of Section 10 application was served, the debtor made an application u/s 5 read with Section 11(2) of the Act. During the trial of this application, the creditor decided to retain the security u/s 16 of the Act and as required by that provision, the Tribunal declared that the creditor was entitled to Rs. 2167/9/- and by force of that provision this amount became the first charge on the immovable

property allotted to the debtor.

3. The present suit has been filed by Dr. Dyal Chand to enforce the charge. The suit was for recovery of Rs. 1711/9/- by sale of the charged property. The trial Court decreed the suit and on appeal that decision has been upheld by the Additional District Judge, Ferozepur. Dissatisfied with this decision, the debtor has come up in, second appeal to this Court.

4. The principal contention of Mr. Tuli, learned Counsel for the Appellant, is that a separate suit to enforce this charge is barred under tire Act. The learned Counsel relies on Section 15 of the Act, which is in these terms:

15. Where a displaced debtor has made an application to the Tribunal u/s 5 or under Sub-section (2) of Section 11, the following consequences shall ensue, namely:

(a) all proceedings pending at the date of the said application in any civil Court in respect of any debt to which die displaced debtor is subject (except proceeding by way of appeal or review or revision against decrees or orders passed against the displaced debtor) shall be stayed, and the records of all such proceedings other than those relating to the appeals, reviews, or revisions as aforesaid shall be transferred to the Tribunal and consolidated;

(b) all attachments, injunctions, orders appointing receivers or other processes issued by any such court and in force at the date of the said application in respect of any such debt shall cease to have effect and no fresh process shall, except as hereinafter expressly provided, be issued:

Provided that where an order appointing a receiver ceases to have effect under this section, the receiver shall, within fourteen days from the date on which his appointment ceases to have effect or within such further time as the Tribunal may in any ease allow, submit to the Tribunal instead of to the Court which appointed him his outstanding accounts, and the Tribunal shall, in relation to such accounts, have the same powers with respect to the receiver as the court which appointed him had or could have had;

(c) no fresh suit or other proceedings other than any such appeal, review or revision as is referred to in Clause (a) shall be instituted against a displaced debtor in respect of any debt mentioned by him in the relevant schedule to his application;

(d) any immovable property belonging to the displaced debtor and liable to attachment shall not be transferred except under the authority of the Tribunal and on such terms as it thinks fit, until the application of the displaced debtor has been finally disposed of or any decree passed against him is satisfied in accordance with the provisions of this Act.

In Order to appreciate the learned Counsel''s contention, it is necessary to set out in detail the relevant provisions of the Act.

3. Save as otherwise expressly provided in this Act, the provisions of this Act and of the rules and orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, or in any decree or order of a Court, or in any contract between the parties.

9. (1) If there is a dispute as to whether the applicant is a displaced person or not or as to the existence or the amount of the debt due to any creditor or the assets of any displaced debtor, the Tribunal shall decide the matter after taking such evidence as may be adduced by all the parties concerned and shall pass such decree in relation thereto as it thinks fit.

(2) If there is no such dispute or if the Respondents do not appear or have no objection to the application being granted, the Tribunal may, after, considering the evidence, placed before it, pass such decree in relation thereto as it thinks fit.

11.(1) Where an application u/s 10 has been made, the Tribunal shall cause, notice thereof to be served on the displaced debtor calling upon him either to show cause, if any, against the application or to make an application on his own behalf u/s 5.

(2) If, in response to a notice under Sub-section (1), the displaced debtor makes an application in accordance with the provisions of Section 5, the Tribunal shall proceed further in the matter as if it had commenced with an application by the displaced debtor u/s 5, and all the other provisions of this Act shall apply accordingly; but, if the displaced debtor does not choose to make any such application, the Tribunal shall, after considering such evidence, if any, as may be produced before it, determine the claim and pass such decree in relation thereto as it thinks fit.

(3) The period of limitation specified in Sub-section (1) of Section 5 in respect of an application by a displaced debtor shall not apply to an application made under Sub-section (2).

16. (1) Where a debt incurred by a displaced person is secured by a mortgage, charge or lien on the, immovable property belonging to him in West Pakistan, the Tribunal may, for the purpose of any proceedings under this Act, require the creditor to elect to retain the security or to be treated as an unsecured creditor.

(2) If the creditor elects to retain the security, he may apply to the Tribunal, having jurisdiction in this behalf as provided in Section 10, for a declaration of the amount due under this debt.

(3) Where in any case, the creditor elects to retain his security, if the displaced debtor receives any compensation in respect of any such property as is referred to in Sub-section (1), die creditor shall be entitled:

(a) Where the compensation is paid in cash, to a first charge thereon:

Provided that the amount of the debt in respect of which he shall be entitled to the first charge shall be that amount as bears to the total debt the same proportion as the compensation paid in respect of the property bears to the value of the verified claim in respect thereof and to that extent the debt shall be deemed to have been reduced;

(b) where the compensation is by way of exchange of property, to a first charge on the property situate in India so received by way of exchange:

Provided that the amount of the debt in respect of which he shall be entitled to the first charge shall be that amount as bears to the total debt the same proportion as the value of the property received by way of exchange bears to the value of the verified claim in respect thereof and to that extent the debt shall be deemed to have been reduced.

(4) Notwithstanding anything contained in this section, where a debt is secured by a mortgage of agricultural lands belonging to a displaced person in West Pakistan and the mortgage was with possession, the mortgagee shall, if he has been allotted lands in India in lieu of the lands of which he was in possession in West Pakistan, be entitled to continue in possession of the lands so allotted until the debt is satisfied from the usufruct of the lands or is redeemed by the debtor:

Provided that in either case the amount of the debt shall be only that amount as bears to the total debt the same proportion as the value of the lands allotted to the creditor in India bears to the value of the lands left behind by him in West Pakistan and to that extent the debt shall be deemed to have been reduced.

(5) Where a creditor elects to be treated as an unsecured creditor, in relation to the debt, the provisions of this Act shall apply accordingly.

27. In all cases in which the Tribunal passes a decree on the application of a displaced person, it shall prepare a complete schedule of the creditors and of the assets and liabilities of the displaced person.

28. It shall be competent for the civil Court which has been specified as the Tribunal for the purposes of this Act to execute any decree or order passed by it as the Tribunal in the same manner as it could have done if it were a decree or order passed by it as a civil Court.

32. (1) Where, on the application of a displaced debtor u/s 5 or Sub-section (2) of Section 11, the Tribunal has determined the amount due in respect of each debt in accordance with the provisions of this Act, it shall proceed to determine the paying capacity of the debtor.

(2) If the paying capacity of the debtor is equal to or exceeds the aggregate sum of all the debts so determined (exclusive of any debt in respect of which the creditor has elected to retain the security in accordance with the provisions of Section 16), the Tribunal shall pass a decree for the aggregate sum so determined, specifying the amount due to each creditor and shall allow repayment thereof in instalments, in accordance with the provisions contained in Section 33, unless for reasons to be recorded it directs otherwise.

(3) If the paying capacity of the debtor is less than the aggregate sum referred to in Sub-section (2) the Tribunal shall divide the decree into two parts and provide in the first part thereof (hereafter referred to as the first part of the decree) that the sum equivalent to the paying capacity shall, subject to the provisions contained in Section 33, be realised from the assets of the debtor in India, and provide in the second part thereof (hereinafter referred to as the second part of the decree) that the balance be realised subject to the provisions contained in Sub-section (6), from any compensation which the debtor may receive:

Provided that if no such compensation is received, the balance shall be irrecoverable.

(4) A creditor who has elected to retain his security u/s 16 shall have no right to realise any money due to him from the assets of the debtor in India, but nothing in this Sub-section shall affect any of the rights given to him by Section 16.

(5) A creditor shall have the right at any time at least six months before the receipt by the debtor of compensation to apply that the whole or the balance of the first part of the decree, in so far as any debt due to him is concerned, may be added to the second part of the decree, and thereupon he shall have no right to realise any money from the assets of the debtor in India.

(6) For the purposes of this Act, the amount payable from compensation for the satisfaction of die second part of the decree shall be that amount as bears to the aggregate amount of all the debts in the second part of the decree including therein any sum added to it under Sub-section (5) and the sum determined in favour of the secured creditor in the manner specified in the proviso to Clause (a) of Sub-section (3) of Section 16 as the compensation in respect of the property of the debtor payable to him under the Displaced Persons (Claims) Act, 1950 (XLIV of 1950) bears to the verified claim; and the balance of the compensation, if any, shall be refunded to the displaced debtor.

(7) Every instalment paid by the displaced debtor in respect of the first part of the decree and any sum payable from the compensation in accordance with Sub-section (6) shall be distributed rateably amongst the decree-holders, if more persons than one are entitled thereto. Provided that the secured creditor who has not elected to be treated as an unsecured creditor u/s 16 shall be entitled to a prior charge on the amount payable from the compensation.

(8) Where a displaced person receives compensation by way of exchange of property, then, subject to the prior charge, if any, of a creditor u/s 16, the aggregate sum payable in respect of the second part of the decree shall be a second charge upon the property received by way of exchange, but the amount of the second charge shall be that amount as bears to the total sum the same proportion as the value of the property received by way of exchange bears to the value of the original property verified and valued under the Displaced Persons (Claims) Act, 1950 (XLIV of 1950).

(9) Where a displaced person makes a default in the payment of any instalment fixed in respect of die first part of the decree or does not pay the amount determined in accordance with Sub-section (4) of Section 16 or Sub-section (8) of this section for which the first or die second charge may have been created upon the property received by way of exchange, the creditor may apply for the execution of the decree by the attachment and sale of the attachable assets of the judgment-debtor or by the sale of the property obtained by way of exchange upon which the charge has been created, as the case may be, and. the amount realised by such execution shall be distributed rateably among the decree-holders:

Provided that nothing contained in this Sub-section shall affect the rights of any charge-holders.

(10) For the purposes of this Act, where die compensation is paid in cash, the amount which shall be available for purposes of satisfaction of the debts in the second part of the decree shall in no case exceed seventy-five per cent, of the amount of such compensation;'' and where it is by way of exchange of property, the extent of the property which shall be available for the said purposes shall in no case exceed seventy-five per cent, in value of such property.

Explanation: In this section the expression ''paying capacity'' means the aggregate of the market value of all the attachable assets in India of the displaced debtor plus the income which is likely to accrue to him for the next three years succeeding, excluding from the computation of such income a sum calculated at the rate of two hundred and fifty rupees a month.

52. (1) Every Tribunal shall communicate to the prescribed authority, in such manner as may be prescribed, the amount of the prior charge declared under Sub-section (3) of Section 16, and shall also forward to it a copy of the decree passed on the application of a displaced debtor u/s 5 or Sub-section (2) of Section 11, and also of any order passed under Sub-section (5) of Section 32. specifying the amount due to the creditor mentioned therein on the date of the order.

(2) The prescribed authority shall scale down the debts reported to him in accordance with Sub-section (6) of Section 32 and shall, subject to any rules made in this behalf, meet the prior charge of the secured creditor in accordance with Sub-section (2) of Section 16 in the first instance and thereafter distribute the balance of the compensation available for distribution within the meaning of Sub-section (10) of Section 32 rateably amongst the other decree-holders whose decrees have been reported to him.

Provided that in making any such rateable distribution, the prescribed authority shall have due regard to the provisions contained in Sub-section (2) of Section 33.

(3) The balance from the amount of the compensation payable shall be refunded

to the displaced debtor.

(4) Any amount paid by the prescribed authority to any decree-holder under the provisions of this section shall, to that extent, be a valid discharge of the debt due by the displaced debtor.

If these provisions are read together, it is abundantly, clear that the option is given to the secured creditor to either retain the security or to give it up. In case he gives up the security, then he is treated like the other ordinary creditors of the judgment-debtor and is entitled to a decree for such amount as is determined after scaling down the debt according to the provisions of the Act. Thereafter, execution is levied against the attachable assets of the judgment-debtor and the compensation may be paid to him either in the form of property or cash. In case the creditor decides to retain the security then all that the Tribunal is required to do is to determine the debt and to declare the amount due after scaling it down in accordance with the provisions of the Act.

The moment the amount due is declared, it automatically becomes a charge by operation of law on the property allotted to him (debtor) in lieu of the property originally charged and left in Pakistan. No decree is passed in favour of the creditor, who has elected to retain his security, neither any machinery is provided in the Act as to how he is to enforce his charge. Section 16(5) enjoins that where a creditor elects to be treated as unsecured creditor in relation to a debt (secured debt) the provisions of the Act shall apply indicating thereby that if he clects to retain the security, then, the provisions of the Act will not apply. Section 27 contemplates what has to happen when a decree is passed. According to this provision, a complete schedule of creditors and of the assets and liabilities of the displaced person are to be shown in the decree that is prepared.

This is not done in the case of a person, who elects to retain a charge u/s 16. It is significant that only a decree that is passed under the Act is made executable u/s 28 of the Act. The complete answer to the argument that no separate suit lies to enforce the charge is furnished by Section 32 of the Act. Section 32(2) excludes the secured debt in respect of which the creditor has elected to retain the security out of the categories of debts in regard to which a decree can be passed by a Tribunal. The only right that the Act gives to such a creditor is mentioned in Section 32(4), that right being his right to be treated as a secured creditor with regard to that part of the property, which has been allotted to his debtor in lieu of the property that was left by him in Pakistan. Moreover, the proviso to Section 32(9) abundantly makes it clear that nothing in Sub-section (9) of Section 32 affects the right of any charge-holder.

5. All that remains to be examined is the scope and effect of Section 15(c) of the Act. Section 15(c) has been reproduced in the earlier part of the judgment. It bars fresh suit or other proceedings against displaced debtor in respect of any debt mentioned by him in the relevant schedule to the application. Once the amount is determined under the Act on the basis of that debt, it cannot be said

that it is the debt mentioned by him in the relevant schedule to that application. What comes into being after the scaling down of that debt is a fresh obligation and it is not the debt mentioned by him in the relevant schedule, if the matter is viewed in this perspective, it cannot be said that a suit to enforce the charge created on the immovable property u/s 16 of the Act cannot be enforced by a separate suit, because under the Act all proceedings in respect of the debt come to an end after the debt had been scaled down and the amount due arrived at after that scaling down.

By operation of law the amount so determined becomes a charge on the property allotted to the debtor in lieu of the property left by him in Pakistan. It will be further clear from the fact that the relief granted by Section 15(c) is to a displaced person. Take a case where the displaced person sells the charged property to a non-displaced person and the charge-holder brings a suit to enforce the charge against the transferee, can it be said in these circumstances that the suit is barred by reason of Section 15(c)? Mr. Tuli was unable to contend that it would be so barred.

6. Take also another case of a sale contemplated by the Act u/s 32(9). The creditors who have obtained decrees under the Act can get the allotted property put to sale in execution of their decrees. Whatever the auction purchaser will purchase would be subject to the charge created under the Act. Can it be said that a suit against the auction purchaser to enforce the charge is barred by Section 15(c) of the Act?

7. If the matter is viewed in this light, it can admit of no doubt that the moment a creditor elects to retain his security u/s 16 of the Act, he is thereafter left to the ordinary remedies under the law and so far as the Act is concerned, his rights come to an end. It is significant that no personal decree can be passed against the debtor and the amount of charge can only be recovered from the property charged. The other property of the debtor is not liable for the amount of the debt due which is made a charge on the property u/s 16 of the Act. I have already said that no machinery is provided in the Act whereunder such a secured creditor can enforce his security.

I cannot read Section 15(c) in the isolated manner as the learned Counsel would want me to. Read along with the other provisions of the Act, it presents no difficulty, as I have already indicated. I, therefore, repel the argument of Mr. Tuli that no separate suit lies to enforce the charge created u/s 16 of the Act.

8. For the reasons given above, I would dismiss this appeal, but in view of the fact that the matter involved was not free from difficulty, I leave the parties to bear their own costs throughout.

