

(1962) 02 GUJ CK 0003
In the Gujarat High Court

Mehr Bhima Viram

APPELLANT

Vs

Mehr Jetha Giga and Others

RESPONDENT

Date of Decision : 17-02-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 1

Citation : (1963) 4 GLR 135

Hon'ble Judges : V.B. Raju, J

Bench : Single Bench

Judgement

V.B. Raju, J.—This civil revision application raises some difficult questions under the S.A.D.R. Act, which will hereinafter be referred to as the Act, and one of them is whether when a mortgage is executed by four persons one of them alone can file an application for the adjustment of debts, in a case where the other three mortgagors are also debtors. The other point raised in this application is that the mortgage was executed on 8-9-54 subsequent to the date on which the Act came into force, namely on 5-8-54 and that therefore an application for the adjustment of such debts cannot be made. The last point urged is that the four mortgagors are members of a joint Hindu family and therefore one of them alone cannot file this application for the adjustment of debts of the joint Hindu family. These three questions will be dealt with seriatim.

Under Section 4(1) of the Act any debtor ordinarily residing in any local area for which a Board has been constituted u/s 5 of the Act or any of his creditors may within twelve months of the date of coming into force of the Act or within three months from the date of constitution of the Board whichever is later make an application to the Board for adjustment of debts. Debt is defined in Section 2(5) of the Act as follows:

"Debt" means any liability in cash or kind whether secured or unsecured due from a debtor whether payable under a decree or order of any Civil Court or otherwise and includes mortgage money the payment of which is secured by the usufructuary mortgage or by anomalous mortgage in the nature of Parachute of

immovable property but does not include arrears of wages payable in respect of agricultural or manual labour.

It is contended that the liability referred to in this definition may be individual liability or joint or several liability. But it is contended that u/s 44 of the Act save as otherwise expressly provided in the Act the provisions of the CPC 1908 shall apply to all proceedings under Chapter 11 of the Act. It is therefore argued that the provisions of Order 34 Rule 1 C.P. Code apply and that therefore all the interested persons must be made parties when a person wants to redeem a mortgage. The contention is that the application is an application to redeem a mortgage and that once an application is filed under the Act the provisions of the CPC have to be applied to all proceedings under Chapter 11 of the Act.

Section 7 of the Act reads as follows:

(1) If the payment of debt due by a debtor is guaranteed by surety or if a debtor is otherwise jointly and severally liable for any debt along with other persons and if the surety or such other person is not a debtor the debtor may make an application u/s 4 for relief in respect of such debt and the Board after consideration of the facts and circumstances of the case proceed with the adjustment of debts under the Act in so far as such applicant is concerned.

(2) Whenever the debts due by a debtor which are guaranteed by a surety are adjusted under Sub-section (I) the surety shall be discharged from liability in respect of the debts or portion of the debts of such debtor which are extinguished under Sub-section (1) of Section 14 Sub-section (3) of Section 16 Sub-section (5) of Section 24 Section 32 or Sub-section (2) of Section 33 and the surety shall not be entitled to proceed against the debtor in respect of such debts or portion.

When a debt is payable jointly and severally even then a debtor can make an application even though the other person is not a debtor. It is contended that the consequence of this provision is that all the persons who are jointly and severally liable as debtors should join together in making an application for the adjustment of debts. This argument is sought to be reinforced by the fact that the question of paying capacity and the scaling down of debt would depend on the number and identity of the debtors. This contention cannot be accepted in view of the provisions contained in Section 12(1) of the Act which reads as follows:

Where two or more applications for adjustment of debts u/s 4 are presented by or against the same debtor all such separate applications shall be consolidated. Where such separate applications are presented by or against joint debtors all such applications shall be heard together.

It is therefore clear that even in the case of a joint debt payable by joint debtors separate applications may be made by joint debtors. The Act therefore contemplates the possibility of separate applications being filed by joint debtors in respect of a joint debt with regard to the adjustment of debts including the

joint debts.

2. It is next contended that in view of the decision in *Ambu Rama Mhatre and Another Vs. Bhau Halya Patil and Others*, even if the application u/s 4 of the Act is made by one of the joint debtors the whole debt would have to be scaled down. But as held by their Lordships of the Supreme Court in *V. Ramaswami Ayyangar and Others Vs. T.N.V. Kailasa Thevar*, a joint debt whether it be a simple debt or a joint mortgage debt can be split up e. g. in the case where one of the joint co-mortgagors is a joint debtor. The view of the Madras High Court that defendant No. 1 was entitled to the benefit of the scaling down in favour of defendants Nos. 2 to 7 as the mortgage-debt was one and indivisible was negated by their Lordships of the Supreme Court. Their Lordships pointed out that there was no objection to a decree for a reduced amount being passed against an agricultural debtor while the same relief was not given to his co-debtors. Section 12 of the Act contemplates separate applications even in the case of joint debtors. Section 12 of the Act therefore contemplates the splitting up of the debt between the joint debtors. There is also nothing inconsistent in Section 7(1) of the Act which clearly gives discretion to the Board to consider all the facts and circumstances of the case and to proceed with the adjustment of debts in so far as one of the debtors who has made the application for the adjustment of debts is concerned. There is nothing in Sub-section (1) that when a person jointly and severally liable for a debt along with other persons who happen to be debtors under the Act makes an application for adjustment of debts the other persons must be joined in the application for adjustment of debts. As already pointed out Section 12 of the Act contemplates separate applications by joint debtors. The contention that there must be a joint application by all the joint debtors is therefore rejected. It is clear from the provisions of Section 12 of the Act and the decision of the Supreme Court in *V. Ramaswami Ayyangar and Others Vs. T.N.V. Kailasa Thevar*, that in cases such as this the proper course would be to split up the debt between the persons jointly liable for the debts and to scale down the debt after doing so.

3. The next point urged is that the mortgage was executed on 8-9-54 whereas the Act came into force on 5-8-54. It is contended that having regard to the preamble of the Act and Sections 17 and 20 of the Act the adjustment of debts should be concerned with the debts which existed on the date when the Act came into force and not debts created on subsequent dates. No doubt there is something to be said for this view. But in view of the wording of Sections 4 and 6 and the definition of the word debtor in Section 2(6) of the Act the better view would be to hold that the Board should adjust the debts of debtors as they stood on the date of the application. Debtor is defined as agriculturist whose debts do not exceed Rs. 25000/- on the date of filing an application to the Board u/s 4 of the Act. There is nothing in Section 4 of the Act to restrict the debts to debts which existed of the date on which the Act came into force. Moreover u/s 13 of the Act a statement of debts has to be given to the Court and such statement should staff all the debts existing on the date of the application u/s 4. In view of

this provision it is difficult to agree with the contention that the adjustment of debts should be concerned with the debts which existed on the date of the coming into force of the Act and not the debts existing on the date of the application to the Board. The last contention is that the four joint mortgagors were the members of a joint Hindu family. But on this point there is no finding of the Board whether they constituted a joint Hindu family and in the absence of any finding on this question of fact this Court will not interfere in revision on this ground.

The revision application is therefore dismissed but there will be no order as to costs.