

(1944) 10 AHC CK 0021

In the Allahabad High Court

Case No : Section 115 Application No. 67 of 1943

Muneshwar Bux Singh and Others

APPELLANT

Vs

Jang Bahadur Singh and Others

RESPONDENT

Date of Decision : 20-10-1944

Acts Referred:

Uttar Pradesh Agriculturists Relief Act, 1934 — Section 30(1)

Citation : (1944) 10 AHC CK 0021

Hon'ble Judges : Madeley, J; Ghulam Hasan, J

Bench : Division Bench

Advocate : R.N. Sinha, for the Appellant; N. Banerji, for the Respondent

Final Decision : Dismissed

Judgement

Ghulam Hasan and Madeley, JJ.—This revision application arises out of proceedings for redemption u/s 12 of the U.P. Agriculturists' Relief Act. The application is filed by the mortgagors (Sic). The facts are these:--

2. One Gajraj Singh made a mortgage on the 17th July, 1915, in favour of Umrai Singh, the father of Jang Bahadur Singh, opposite-party, for Rs. 1,850. The property mortgaged was two biswas and ten biswansis share in village Pipona. The deed provided for payment of interest at two per cent per mensem compoundable six monthly. Repayment of the mortgage money was to take place within five years, in default of which the mortgagee was given the right to take possession over the mortgaged property and appropriate the profits in lieu of interest. A deed of further charge was executed on 7th October, 1915, for Rs. 70 with interest at Re. 1 per cent per mensem compoundable six monthly. On the 5th July, 1919, Gajraj Singh sold one biswa and ten biswansis share out of the mortgaged property to certain vendees for Rs. 5,000 and directed the vendees to pay Rs. 4,504-8-0, made dehanid in the sale deed, to the prior mortgagee on account of the deeds of mortgage and further charge (vide Ex. A3). Admittedly the dehanid money left with the vendees was not paid. On the 6th April, 1927, Umrai Singh took possession of the mortgaged property, as the mortgagor had

not paid the mortgage money. Gajraj Singh died and the present applicants who are his representatives filed an application for redemption u/s 12 of the U.P. Agriculturists' Relief Act. The applicants alleged that the sale deed (Ex. A-3) was without consideration, that it was fictitious and was not acted upon and the vendees had acquired no rights under it. It was alleged by the applicants that the mortgage money had been paid out of the usufruct of the property and they claimed redemption without payment of any money.

3. The main defence of the opposite-parties was that the profits of the properties were not sufficient to satisfy the mortgage debt, that in view of the transfer of liability by the applicants under the sale deed (Ex. A-3) they were not entitled to the benefits of the Debt Redemption Act which they claimed, that the sale deed was not without consideration and fictitious and that this question was res judicata between the parties.

4. The trial Court held that they were entitled to redemption of one biswa share without any payment. The findings on the main issues were that the sale deed was binding upon the mortgagors, that the question of its validity was not res judicata and that they were entitled to the benefits of the Debt Redemption Act, despite the sale deed executed by them. In view of these findings the trial Court allowed redemption of one biswa share which did not form part of the sale deed, without any payment.

5. The lower appellate Court in appeal agreed with the trial Court in its finding on the question of the genuineness of the sale deed and res judicata but disagreed with the view that the applicants were entitled to the benefit of the Debt Redemption Act. The case was remanded to the trial Court for a finding as to what amount, if any was due to the mortgagee, in case the accounting was done in accordance with the provisions of the U.P. Agriculturists' Relief Act.

6. The Trial Court, on remand, returned the finding that Rs. 9,163 were due to the mortgagee. The lower appellate Court accepted this finding and declared that the applicants are entitled to redeem the property on payment of this sum. Against this decision the present revision application has been preferred.

7. Two main points have been argued in support of this revision application. Firstly, it has been contended that the mortgagors were entitled to the benefit of the Debt Redemption Act. It is not denied that if this is so, then the entire mortgage money is paid out of the usufruct and the applicants are entitled to redeem without any payment. In the second place, it is contended that the principal sum on which interest should have been calculated was Rs. 1,850, the consideration of the mortgage deed, and not Rs. 7,339-14-9 which the lower appellate Court held to be due on the 31st December, 1929, to the mortgagee. In this connection, it has also been argued that the decision of this Court dated the 15th December, 1926, that the sum of Rs. 6,339-14-9 was due to the mortgagee was unnecessary and did not constitute res judicata.

8. The lower appellate Court has held that as under the sale deed (Ex. A-3) the

mortgagors transferred to the vendee their liability for repayment of the mortgage debt, they are hit by the exception which takes the case out of the definition of the word "loan" in Section 2(9) of the Debt Redemption Act. The Sub-section says that

"loan" means an advance in cash or kind made before the first day of June, 1940 recoverable from an agriculturist... or from the property of an agriculturist... and includes any transaction which in substance amounts to such advance, but does not include an advance the liability for the repayment of which has, by a contract with the borrower or his heir or successor... been transferred to another person...".

9. The question which fall for determination is whether the lower appellate Court's view is correct. It is contended that there can be no transfer of liability within the meaning of this exception unless the prior mortgagee is a party to the sale, for his remedy to enforce his claim on the mortgage deed against the mortgagor subsists in spite of the transfer. We cannot accept this contention. The Sub-section on a plain interpretation of its language shows that once the liability for the repayment of the advance has been transferred by a contract with the borrower, the advance ceases to be a loan. It does not lay down that the creditor affected by the transfer must be a party to the transaction of transfer if the exception is to take effect. To so hold would be to insert into the definition qualifying words which do not find a place there. The exception is couched in the widest possible language and does not appear to lay down any such qualification as is urged by Counsel. Counsel contends that there can be no transfer of liability by one person to another without the creditor being agreeable to it. He relies upon the definition of the word "liability" by Salmond on Jurisprudence (p. 137) (9th edition) as meaning exposedness to civil proceedings. Strictly speaking this is true, but that is not the sense in which these words are used in Section 2(9). The "liability" in this Sub-section is used in a wide sense and not in the sense defined by Salmond. Whether the transfer of liability from one person to another binds the creditor is beside the point. As between the transferor and the transferee, the transfer is binding and no action can be taken against the transferor after the transfer. In the present case the property itself which is subject to a liability existing in favour of the prior mortgagee is transferred with a specific direction to the transferee to discharge that liability and money is left with him for the purpose. There can be no doubt, that on the true construction of the language of the exception the liability for the repayment of the money due to the prior mortgagee has by a contract with the transferor been transferred to transferee.

10. It has also been argued that as mortgagors did not transfer the entire property mortgaged to the transferee but retained one biswa share to themselves against which the mortgagee could enforce the claim, the liability for repayment of the debt should not be deemed to have been transferred. This contention also does not seem to be warranted by the language of Sub-section

(9), which relates to the transfer of the liability and not to the transfer of the property. It was held by a learned single Judge of this Court that where mortgage property is sold, and money is left with the vendee to pay off the debts of the mortgagor, the vendee is not entitled to the benefits of Section 12 of the U.P. Agriculturists' Relief Act read with Section 7 of the U.P. Debt Redemption Act (vide *Pirithi Nath v. Raj Dutt* 1944 O.A. (C.C.) 87 : A.W.R. (C.C.) 87 : O.W.N. 144). This case no doubt deals with the rights of transferee but the principle on which it proceeds is that when there is a transference of liability from the transferor to the transferee, the debt ceases to be a loan within the meaning of Section 2(9). On a parity of reasoning it must follow that the transferor renders himself equally disentitled to the benefits of the Act as the liability has been transferred. It is true that in this case the entire mortgaged property was transferred but that as we have already observed makes no difference to the principle.

11. Reliance is placed on behalf of the applicants on a decision of Plowden J. in *Badri Dass v. Qabul Chand* 1943 A.L.W. 288 : 1943 S.L.R. 107. In this case the mortgagor had transferred only a portion, of the mortgaged property to another and it was held that the mortgage debt did not cease to be a loan within the definition in Section 2(9). The facts given in the judgment are meagre and do not show that any liability was transferred under the sale. The learned Judge observed

"I cannot see why the judgment-debtor should be deprived of the benefit of Act XIII of 1940 merely because 30 years after he took the loan he sold a portion of the mortgaged property"

12. This case, therefore, does not help the applicants. Accordingly we hold that the view taken by the lower appellate court on this point is correct.

13. The next contention is that u/s 30(1) of the U.P. Agriculturists' Relief Act the word "loan" used in that Sub-section must be taken to mean the original loan taken by the mortgagor (915 in the present case) and not the amount of interest which has accrued on that loan till the 31st December, 1929. This point is concluded by two Bench decisions of this Court vide *Kailash Kuer v. Amarnath* 1936 O.W.N. 471 and *Kushal Chand v. Pirthipal Singh* 1937 O.W.N. 875. It was held in these cases that the word "loan" used in Section 30(1) of the U.P. Agriculturists' Relief Act means not only principal amount, but the whole amount including the principal and interest due under the terms of a contract or decree up to the 31st December, 1929. Hence interest from January 1, 1930, should be calculated not only on the principal amount, but on the whole amount due for the principal and interest on the 1st January, 1930. We prefer to follow the view enunciated by this Court in these two cases in preference to the view held by the Allahabad High Court in *Chaudhri Raghubir Singh Vs. Mulchand* and Another on which learned Counsel for the applicants relies. Apart from the reasons given in the Oudh decisions. We consider that view is more equitable to take.

14. The third point raised is that the decision of this Court dated the 15th December, 1926, (vide Ex. A-5) is not *res judicata* between the parties. It appears that Umrai Singh, the mortgagee, filed a suit for possession on the basis of the mortgage deed dated the 17th July, 1915. The defence to the suit was that the deeds of mortgage and further charge were not executed for any legal necessity or for the payment of any antecedent debt. The second defence was that the rate of interest agreed to by Gajraj Singh was not justified by any necessity. The first defence was repelled and in regard to the second the trial Court had reduced the interest from two per cent per mensem compoundable to one per cent simple. This Court agreed with the reduction of interest from two per cent to one per cent per mensem but did not agree that it should be reduced to simple interest and accordingly modified it by making it compoundable as provided for in the deed of mortgage. The mortgagors got the benefit of this reduction, as it was given effect to in the decree. It appears to us clear that the question was definitely raised by the mortgagors in defence that it was persisted in up to the Court of appeal and a finding was given against them. Under the circumstances therefore even though the question of the determination of interest was unnecessary in a suit for mortgagee possession, the point having been raised and decided must be held to be binding upon the mortgagors.

15. Lastly it has been argued that the mortgagee who was the Appellant in the lower appellate Court was liable to pay *ad valorem* court-fee under Schedule 1, 2-B of the Courts Fees Act. Learned Counsel for the mortgagee does not contest this. The office will, therefore, determine the amount of deficiency payable by Jang Bahadur Singh, the mortgagee, before the lower appellate Court and Jang Bahadur Singh shall be called upon to pay this deficiency, in this Court, within a month from the receipt of notice on his Counsel Mr. Banerji. This amount shall be taxed in the decree and shall be added to the costs which the applicants will be liable to pay to Jang Bahadur Singh.

16. The result is that we dismiss this revision with costs.