

(1957) 11 AHC CK 0011

Allahabad High Court

Case No: Execution Second Appeal No. 775 of 1948

Beni Madho and Others

APPELLANT

Vs

Thakur Manohar Singh and
Others

RESPONDENT

Date of Decision: Nov. 12, 1957

Acts Referred:

- Uttar Pradesh Debt Redemption Act, 1940 - Section 2(9), 8

Citation: AIR 1958 All 400 : (1958) 28 AWR 150

Hon'ble Judges: J.N. Takru, J; D.N. Roy, J

Bench: Division Bench

Advocate: Jagdish Swaroop, for the Appellant; P.M. Varma, for the Respondent

Final Decision: Allowed

Judgement

D.N. Roy, J.

This is a decree holder's appeal arising out of proceedings u/s 8 of the U. P. Debt Redemption Act of 1940 for the amendment of decree. The appeal came up for hearing before a learned single Judge of this Court. He has referred it to a Division Bench as the case is of sufficient importance to merit decision by a Division Bench. The court of first instance held that the provisions of Section 8 of the U. P. Debt Redemption Act of 1940 were applicable to the case and that upon the reopening of the accounts the entire debt must be deemed to have been paid off.

The court, accordingly under the provisions of Section 7 of the Act, declared that nothing remained due under the decree and directed that the decree be amended accordingly. Against that decision an appeal was taken by the decree-holders, but it was dismissed by the lower appellate court. The lower appellate court concurred in the decision of the first court by holding that Section 8 of the Act was applicable to the case.

2. It is not disputed that the judgment-debtors had been agriculturists within the meaning of that term u/s 2 (3) of the Debt Redemption Act on all material dates. It is further not disputed that if the provisions of Section 8 of the Act were available to the debtor, then upon proper accounting the debt will be deemed to have been wiped off. The question therefore, is whether Section 8 of the Act has been rightly applied. To determine that question the facts may be briefly stated.

3. A mortgage was made on the 26th of February, 1918, in favour of one Malkhan Singh. A second mortgage was made with respect to the same property on the 11th of December, 1919, in favour of one Ghulam Sibtain and under this second deed money was left with Ghulam Sibtain for the payment of the entire dues under the 1st mortgage. Ghulam Sibtain did not make the payment to the first mortgagee. The mortgagor redeemed the mortgage of Ghulam Sibtain when the first debt still remained unsatisfied. It was on the basis of the mortgage of the 26th of February, 1918, that the present decree had been obtained. The question arose before the learned Munsif as to whether on facts stated above the decree can be said to be "a decree to which this Act applies" passed before the commencement of this Act within the meaning of Section 2 (6) of the Debt Redemption Act of 1940. That the decree was passed before the commencement of this Act was admitted. But was it a decree to which the Debt Redemption Act of 1940 applied? Section 2(6) of the Act says that

"decree to which this Act applies" means a decree passed either before or after the commencement of this Act in a suit to which this Act applies."

Sub-clause (17) of Section 2 then goes on to define by stating that

" "suit to which this Act applies" means any suit or proceeding relating to a loan but does not include proceedings under the provisions of the U. P. Encumbered Estates Act, 1934."

The term "loan" has been defined in Sub- Clause (9) of Section 2 and the relevant part of the definition is as follows:--

" "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 agriculturistbut does not include an advance the liability for the repayment of which has by a contract with the borrower or his heir or successor or by sale in execution of a decree been transferred to another person.. .."

The courts below in interpreting the words:--

"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"

relied upon a Full Bench decision of this Court in [Saran Singh Vs. L. Miththan Lal](#), and came to the conclusion that in the present case the liability for the repayment of the loan has not been transferred and the judgment-debtors were therefore entitled to the benefit of the Debt Redemption Act. In our opinion the courts below misconstrued the true import of the decision in *Saran Singh v. Miththan Lal (A)*, cited above.

In that case a simple mortgage was created in 1915 by the mortgagor over 136 bighas of land to secure repayment of the principal sum of Rs. 400/- and interest. In 1917 the mortgagor created a second mortgage over the same property to secure repayment of Rs. 7,000/- and interest, and at the same time, by agreement with the second mortgagee, left in his hands a sum of Rs. 436/- out of the second mortgage consideration for the express purpose of the first mortgage and interest thereon up to that date being discharged by the second mortgagee.

In 1924 the mortgagor sold part of his equity of redemption in the mortgaged property and as a result of this sale the position in 1925 was that the equity of redemption in 75 bighas expectant on the mortgages of 1915 and 1917 had passed to certain purchasers, while the equity of redemption in the remaining 61 bighas remained vested in the mortgagor. Throughout this time the first mortgage of 1915 remained undischarged by the second mortgagee; and in 1927 the first mortgagee brought the suit for sale.

As between the first mortgagee on the one hand and the mortgagor and the second mortgagee, on the other hand, there was no answer to the suit, and on October 29, 1927, the court passed a decree for sale in respect of Rs. 5,816/- in favour of the first mortgagee. In 1940 the first mortgagee applied for execution of his decree and conversely the mortgagor applied as an agriculturist for amendment of the decree of 1927 u/s 8 of the U. P. Debt Redemption Act.

The question which arose was whether having regard to the definition of a "loan" contained in Section 2(9) of the Act, the sum secured by the first mortgage of 1914 could any longer be regarded as a "loan" once the second mortgagee had in 1917 as between himself and the mortgagor retained the sum of Rs. 436/- out of the advance made to the mortgagor on the second mortgage and thereby, as between himself and the mortgagor assumed the responsibility as on that date for paying it to the first mortgagee together with interest thenceforth accruing on it

It was held that as between the mortgagor and the second mortgagee the effect of the 1917 transaction was to transfer the whole of the burden of the mortgage debt to the second mortgagee; and the mortgagor ceased to be beneficially interested in it, except possibly as a mere vehicle of being used and in that case he had an immediate right over against his second mortgagee. It was further observed that it was neither here nor there that this right of indemnity might have proved worthless in practice, since what the court had to construe was to construe the Act, not in the

light of untoward contingencies, but on the footing of the legal position of the parties.

In *Saran Singh v. Miththan Lal (A)*, the previous decision of this Court had been reviewed. *Saran Singh's case (A)* appears to have been followed and approved by another Full Bench of this Court in [Mahmud Hasan Khan and Others Vs. Narain](#), , and by a later Full Bench constituted of five learned Judges of this Court in [Har Narain Vs. Sri Ram](#), . It was again followed by a Division Bench of this Court in *Chandra Shekhar v. Ram Tej* ILR (1951) All 46 (D).

4. Mr. Prem Mohan Varma has appeared on behalf of the respondents and has raised before us a very ingenious argument which was not advanced before the learned Judge who made the reference, nor was it advanced in either of the two courts below. His submission is that in the present case the liability has been sought to be transferred" and "not actually transferred." His submission further is that the second mortgagee was only an agent of the mortgagor and since that agency was terminated by the payment of the second mortgagee, the loan does not cease to be a "loan" within the meaning of the term under the Debt Redemption Act.

In support of his argument he has relied upon the following observations made in paragraph 10 of the report of the decision in [Har Narain Vs. Sri Ram](#), , at pages 253 and 254:--

"Transference of liability can be made in two ways: Firstly a liability may be transferred by agreement with the creditor. In that case, no further liability of the debtor remains. Secondly, liability may be transferred without the concurrence of the creditor. In such a case if the transferee does not repay the advance, the creditor can always recover it from the original debtor or his property. But in that case, if the transference of liability was complete as between the debtor and the transferee, the debtor can recover back from the transferee what he is obliged to pay to the creditor.

In both events the debtor is ultimately relieved of the liability. It is obvious that the transference of liability must be such as makes the debtor completely free from liability even though that freedom is obtained not against the creditor but as between himself and the transferee. It could hardly be the intention of the legislature that the aforesaid Clause should come into play only when the liability is transferred with the concurrence of the creditor.

If that were so, it would have been a case of substitution of one debtor by another debtor and there would have been no reason why if the substituted debtor were also an agriculturist, he also should not be given the relief provided by the Act. Again, the language of the Clause we are considering does not mention the creditor at all. And further since the transference of liability can be made by a sale in execution of a decree it is clear that the legislature never intended that the creditor should concur in the transference of the liability. Therefore, we are left with the

second kind of the transference of liability, namely, a transference of liability as between the debtor and the transferee."

We have not been able to appreciate how the observation aforesaid supports his contention that in the present case the liability has been sought to be transferred and not actually transferred or that the second mortgagee was only an agent of the mortgagor and that the agency was terminated by the payment of the second mortgagee. The question of agency was considered in the case of ILR (1951) All 46 (D), and it was repelled.

It was held that the liability for the repayment of the debt had been transferred and that consequently the advance ceased to be a loan and the debtors were not entitled to the benefit of the Debt Redemption Act.

5. In [Nandoo Singh Vs. Ganga Saran and Others](#), the facts were these. Nandoo Singh executed a deed of simple mortgage on the basis of which a final decree for sale was obtained by the mortgagee. He alleged that he fell into evil ways and Khazan Singh who was a co-applicant with him in the application u/s 8 got a fictitious simple money bond executed by him in order to save him from ruin.

Subsequently Khazan Singh obtained a decree on foot of that bond and in its execution purchased the property which had been mortgaged. Later, Khazan Singh sold that property to one Amin Chand. Amin Chand subsequently executed a deed of surrender in favour of Nandoo Singh. Nandoo Singh's contention was that all the transactions beginning with the simple money bond in favour of Khazan Singh and ending up with the deed of surrender in favour of Nandoo Singh were collusive and as such null and void, the whole idea being to save the property from the clutches of the creditors.

It was contended that the aforesaid transaction should be taken as non-existent and the question whether or not the advance made by the original mortgagees was a loan should be considered without any regard to these fictitious transfers. According to the finding arrived at by the learned Civil Judge the liability for the repayment of the mortgage debt was in the case transferred by a sale in execution of a decree and it was clear that after the auction sale the advance ceased to be a loan.

The question was raised in that case when the appeal was heard by this Court as to whether the advance retained the character of a loan when the property came back to Nandoo Singh and the liability for the mortgage debt was retransferred to him. A division Bench of this Court held that if an advance once ceases to be a loan, it cannot retake the character of a loan; and that once the liability for the repayment of a loan is transferred, either in execution by sale or by a contract entered into by the borrower, it ceases to be a loan. That was also the view in the earlier case of *Banwari Lal v. Ajudhiya Prasad* 1944 ALW 4 (F), which was taken by a learned single Judge and it was approved of in *Nandoo Singh v. Ganga Saran* (E), cited above.

6. The decision in *Saran Singh v. Miththan Lal (A)*, which still holds the field, would make it amply clear that in a case in which the mortgagor parts with the whole or part of his equity of redemption in the mortgaged property, at the same time leaving in the hands of a non-agriculturist transferee or second mortgagee sufficient to satisfy the outstanding mortgage up to that date there is a transfer of the

"liability for repayment by contract with the borrower"

within the meaning of Section 2(9) of the U. P. Debt Redemption Act, and as from that moment the mortgage debt ceases to be a "loan" within the meaning of the Act and that the provisions of Section 8 of the Act could not be availed of by the mortgagor. In our opinion, therefore the courts below have misconstrued this Full Bench decision in coming to the conclusion that in the present case the liability for the repayment of the loan had not been transferred and that the debtors were entitled to the benefit of the Debt Redemption Act.

7. For reason stated above we allow this appeal, set aside the decision of the court below and dismiss the application u/s 8 of the U. P. Debt Redemption Act with costs to the decree-holders in all the courts.