

Indian & General Investment Trust Ltd.

Vs

Shri Purna Chandra Mardaraj & Co.

Civil Appeal No. 850 of 1964

(S. M. Sikri, C. A. Vaidialingam JJ)

04.01.1963

JUDGMENT

VAIDIALINGAM, J. –

This appeal, on certificate, is directed against the judgment of the Orissa High Court, dated January 4, 1963, and rendered in Miscellaneous Appeals Nos. 94 and 95 of 1960.

The circumstances, under which this appeal arises, may be briefly stated. The predecessor-in-title, of the respondents, had executed three mortgages in favour of the appellant-company, which is registered in London. The first mortgage was executed on October 23, 1903, securing a sum of Pounds 1,35,000/-. Inasmuch as, according to both parties, this mortgage has been completely redeemed in 1935, it is not necessary to make any further reference to this transaction. The second mortgage was executed on December 18, 1906, under which a sum of Pounds 77,500/- was borrowed by the mortgagor. Even according to the appellant, in respect of this mortgage, the respondents had paid a total sum of Pounds 1,77,349/- by way of interest which is more than twice the principal amount covered by the mortgage. The third mortgage was executed on October 21, 1935, under which a sum of Pounds 65,000/- was borrowed by the mortgagor.

The appellant demanded the repayment of the amounts due under these mortgages, but the mortgagor, so far as the mortgage of 1906 was concerned, repudiated the same on the ground that the entire transaction had been wiped off, by virtue of section 10 of the Orissa Money-Lenders Act, 1939 (Orissa Act III of 1939) (hereinafter called the Money-Lenders Act), inasmuch as he had paid more than double the original principal amount, as admitted by the mortgagor.

The appellant, however, did not accept this repudiation and, in consequence, the company took legal proceedings in London and obtained an ex parte decree. But attempts to execute the decree in India did not succeed, as will be seen from the decision of the Calcutta High Court in I. G. Investment Trust v. Raja of Khalikote (A.I.R. 1952 Cal. 508). The High Court held that the decree obtained by the appellant in London was not executable in India.

In the meanwhile, the mortgaged properties vested in the State of Orissa, under the Orissa Estates Abolition Act, 1951 (Act I of 1952) (hereinafter called the Abolition Act), on June 1, 1953, by virtue of the notification issued by the State Government under section 3 thereof. Inasmuch as the appellant had not realised the dues under the two later mortgages, they filed a claim petition before the Claims Officer, under section 18 of the Abolition Act.

Under section 18(1)(a) of the Abolition Act, every creditor, whose debt is secured by the mortgage

of, or is a charge on, any estate or part thereof, which has vested in the State Government under section 3, has to file a claim within the period mentioned therein, to the Claims Officer, for the purpose of determining the amount of debt 'legally and justly payable to each such creditor in respect of his claim.' Though the Claim included the third mortgage dated October 21, 1935, also, there does not appear to have been much of a serious contest about the liability under that mortgage, and, therefore, both the Claims Officer, as well as the High Court, on appeal, have substantially accepted the claim of the appellant. Therefore, the rights of the parties under that mortgage, do not also arise for consideration, in this appeal.

So far as the mortgage of December 18, 1906, under which the mortgagor had borrowed a sum of Pounds 77,500/-, is concerned, in the claim petition the particulars of the properties mortgaged were all given in detail. The appellant had also admitted having received, by way of interest, in respect of this mortgage, a sum of Pounds 1,77,349-18-0 and he had given, in a statement, details of this receipt. The rate of interest payable under the mortgage was 6 per cent. per annum.

It is also seen, from the said statement, that the appellant has given credit to payment of a sum of Pounds 29,000/- towards the principal amount and, as such, a balance of Pounds 48,500/- remained due as principal. The appellant had claimed this amount, as well as the balance of interest payable, in the sum of Pounds 17,460/-, as being due upto May 1, 1953. The appellant had also claimed certain other amounts which, according to him, were payable as commission and premium as per the terms contained in the mortgage deed. The equivalent of all these amounts, in Indian currency, was also given by the appellant in the claim petition. The appellant, in consequence, prayed for payment of these amounts, stated to be due to him under this mortgage.

The mortgagor contested the claim of the appellant before the Claims Officer. He pleaded that the claim of the mortgagee, under the mortgage, was no longer subsisting and that the mortgage liability had been discharged by payments and by operation of law. The mortgagor pleaded that, inasmuch as the appellant had realised interest which is, admittedly, far greater than the amount of the original loan, the liability under the mortgage had become extinguished, under section 10 of the Money-Lenders Act.

The mortgagor further contended that the mortgage liability must be considered to have been extinguished, under section 17 of the Money-Lenders Act, inasmuch as the mortgage, in question, is a possessory mortgage and the mortgagee had been in possession and enjoyment of the mortgaged security for a period of 15 years. There were also certain other objections, raised by the mortgagor to the claim made by the mortgagee by way of commission and premium.

The Claims Officer accepted the plea of the mortgagor that the mortgage of December 18, 1906, is a possessory mortgage and the mortgagees were in possession and enjoyment of the properties for 15 years from the date of the mortgage. In consequence, the Claims Officer held that, in terms of section 17 of the Money-Lenders Act, the mortgage of 1906 should be deemed to have been extinguished on the expiry of 15 years from the date of the mortgage, i.e., long before 1953, and even long before 1947, when the mortgagor repudiated his liability under the mortgage. But the Claims Officer was not prepared to accept the plea of the mortgagor that under sections 10 and 11 of the Money-Lenders Act, the transaction should be considered to have been extinguished. So far as the applicability of sections 10 and 11 of the Money-Lenders Act is concerned, the view of the Claims Officer appears to be that those provisions can be invoked only when a claim is made by the mortgagee in a 'suit', and when a 'Court' has to adjudicate upon the same. According to the Claims Officer, he is not a 'Court' and the proceedings before him, initiated by the mortgagee, by way of a

claim, under the Abolition Act, is not a 'suit', so as to attract the provisions of sections 10 and 11.

Therefore, the Claims Officer held that sub-sections 10 and 11, of the Money-Lenders Act, did not apply. But, inasmuch as he held in favour of the mortgagor, applying section 17 of the Money-Lenders Act, that the mortgage claim had been extinguished, no relief was granted in favour of the appellant, so far as this transaction was concerned.

Both the appellant and the respondents, had filed appeals under section 21 of the Abolition Act to the Board, which, in this case, was the High Court, as provided under section 22 of the Abolition Act. The appellant had challenged the rejection of his claim, in respect of this mortgage, by the Claims Officer, relying upon section 17 of the Money-Lenders Act. Certain other reliefs, which had been denied by the Claims Officer, were also the subject of this appeal. The respondents had filed their appeal, similarly, regarding certain claims which had been allowed in favour of the appellant; and, in particular, challenged the decision of the Claims Officer regarding the non-applicability of section 10 and 11 of the Money-Lenders Act, to this transaction.

Both the appeals have been disposed of by the Board, by a common judgment, dated January 4, 1963. So far as this mortgage is concerned, the Board has held that the view of the Claims Officer, that it has been extinguished, in view of section 17 of the Money-lenders Act, is not correct. The Board has, after a consideration of the evidence on record, come to the conclusion that the mortgagee has not been in possession for the requisite period referred to in section 17 and that, on the other hand, the mortgagor himself had been in possession. Therefore, the Board, differing from the conclusions arrived at by the Claims Officer, has held that the mortgage cannot be considered to have been discharged under section 17 of the Money-Lenders Act.

But, the mortgagor, pressed before the Board the contention that, applying sections 10 and 11 of the Money-Lenders Act, the mortgage claim, in any event, must be considered to have been extinguished. Though this contention, as we have pointed out, did not find acceptance at the hands of the Claims Officer, the Board, ultimately, upheld this plea of the mortgagor. No doubt, the Board was of the view that the Claims Officer, though not a 'Court', could exercise larger powers and grant relief to the mortgagor, because it is a tribunal and its jurisdiction must be considered to be wider. On this basis, the Board, after reference to section 20(1) of the Abolition Act, was of the view that, in considering the question whether the amount was 'legally and justly due,' to the appellant, the Claims Officer could have due regard to the provisions contained in the Money-Lenders Act. In this view, the Board, ultimately, held that inasmuch as, even according to the appellant, the mortgagee had paid a sum of Pounds 1,77,349/-, the entire balance of principal and interest claimed by the mortgagee should be considered to have been fully paid. The Board was also of the view that certain claims made, by way of premium and commission, had also been paid off by the excess amounts paid by the mortgagor. Therefore, the Board, like the Claims Officer, ultimately held that no amount at all was payable under the second mortgage.

It will be seen that both the Claims Officer, as well as the Board have come to an identical conclusion in favour of the mortgagor, viz., that no amount is payable under the mortgage of December 18, 1906. While the Claims Officer came to the conclusion by applying section 17 of the Money-Lenders Act, the Board, on the other hand, reached the same conclusion, by applying sections 10 and 11 of the Money-Lenders Act read with section 20(1) of the Abolition Act. The mortgagee-appellant has come to this Court, challenging this decision of the Board that no amounts are due by the mortgagor under the mortgage of December 18, 1906.

Though, in this Court, on behalf of the mortgagors-respondents, Mr. G. L. Sanghi, learned counsel, has challenged the correctness of the decision of the Board about the non-applicability of section 17 of the Money-Lenders Act, we do not think it necessary to go into that aspect, because we are accepting his contention that the Board was justified in holding that the mortgage has been extinguished under section 10 and 11 of the Money-Lenders Act.

Before we advert to the contentions of Mr. B. Sen, learned Counsel for the appellant, it is necessary to refer to the material provisions of the two Acts, referred to above.

The Money-Lenders Act has been enacted in 1939; and the preamble says that it was found expedient, by the Legislature, to regulate money-lending transactions and to grant relief to debtors in the State of Orissa. Section 9 provides the maximum rates at which interest may be decreed. Sub-sections (1) and (2) of section 10, which are relevant for our purpose, are as follows :

"10. (1) Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any other contract, no Court shall, in any suit, whether brought by a moneylender or by any other person, in respect of a loan advanced before or after the commencement of this Act, pass a decree for an amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through Court or otherwise, is greater than the amount of the loan originally advanced.

(2) Where, in any suit, as is referred to in sub-section (1), it is found that the amount already realised as interest through Court or otherwise, for the period preceding the institution of the suit, is greater than the amount of the loan originally advanced, so much of the said amount of interest as is in excess of the loan shall be appropriated towards the satisfaction of the loan and the Court shall pass a decree for the payment of the balance of the loan, if any."

Sub-sections (3) of section 10 gives jurisdiction to the executing Court to grant similar appropriate relief. Section 11, again, enables the Court to reopen the transaction and appropriate excess interest towards the loan.

In particular, it will be seen, that under sub-section (2) of section 10, extracted above, if it is found that the amount already realised as interest through Court, or otherwise, for the period preceding the institution of the suit, is greater than the amount of the loan originally advanced, it is necessary to appropriate towards the satisfaction of the loan, so much of the said amount of interest as is in excess of the loan, and the Court can pass a decree only for the payment of the balance of the loan, if any. Pausing here for a moment, it may be stated that, in this case, the mortgagor when a demand was made for payment of the amount by the mortgagee, has, by his letter dated September 14, 1947, repudiated his liability, relying on these provisions of the Money-Lenders Act.

Coming to the Abolition Act, section 18 provides for a creditor, whose debt is secured by a mortgage or is a charge on any estate or any part thereof vested in the State Government, to apply to the Claims Officer for determining the amount of debt 'legally and justly payable' to each such creditor in respect of his claim. Sub-sections (1) and (2), of section 20, of the Abolition Act, which are material, are as follows :

"20. (1) The Claims Officer, shall, in accordance with the rules prescribed, determine

the principal amount legally and justly due to each creditor and the interest (if any) due at the date of such determination in respect of such principal amount.

(2) In determining the principal amount and interest under sub-section (1), the Claims Officer shall, notwithstanding the provisions of any agreement or law to the contrary, proceed in the following manner :-

(a) he shall ascertain the amount of the principal originally advanced in each case, irrespective of the closing of accounts, execution of fresh bonds, or decree or order of a Court;

(b) he shall ascertain the amount of the interest already paid or realised and shall set off towards the amount of the principal any amount paid or realised as simple interest in excess of six per centum per annum or the stipulated rate of interest whichever is lower;

(c) he shall separately specify the amount of the principal and the amount of the interest, if any, due to the creditor, such interest being calculated at the rate mentioned in clause (b) and being limited to the amount of the principal originally advanced;

(d) if he finds that in any case the creditor has received or realised by way of interest an amount equal to or more than the amount of the principal, he shall not allow any further interest to run on such principal.

Explanation : In the case of a usufructuary mortgage, or a lease executed in lieu of an advance made of an estate or in the case of possession of such estate or part thereof by a widow in lieu of her dower debt, the net amount of rents and profits accruing from such estate shall be deemed to be the interest for the purposes of this section:

(e) in other cases, the amount of the principal ascertained to be due to the claimant shall carry interest at such rate not exceeding six per centum per annum as may be prescribed by the State Government;

(f) no future interest shall run on any interest ascertained to be due to a creditor.

Mr. B. Sen, learned counsel for the appellant, attacks the order of the Board, applying the provisions of sections 10 and 11 of the Money-Lenders Act, to the transaction in question. According to the learned counsel, these provisions do not apply, when a claim is made by a secured creditor before a Claims Officer, and which claim is adjudicated upon by that Officer exercising his special jurisdiction under the Abolition Act. According to learned counsel, the Abolition Act is a self contained Code and, in particular, has very elaborately laid down, in section 20, the various matters, which alone could be taken into account, by the Claims Officer, in determining the principal amount and interest that is payable to a creditor. Counsel points out that the Claims Officer, exercising jurisdiction under this special enactment, viz., the Abolition Act, can have, and should have, recourse only to the provisions of that statute. Mr. Sen also points out that there is absolutely no indication in the Abolition Act that the Claims Officer can take into account provisions contained in the Money-Lenders Act. Inasmuch as the Legislature has not made the provisions of the Money-Lenders Act applicable to proceedings under the Abolition Act, Mr. Sen points out, the Board has acted illegally in applying the provisions of the Money-Lenders Act and, in consequence, holding in

favour of the mortgagor. Counsel also points out that the provisions in the two statutes cannot be applied in respect of the same transaction; because, the provisions regarding the adjudication of a claim under the Money-Lenders Act will have to be done on a basis entirely different from that contained in the Abolition Act. Therefore, the short contention, of the learned counsel, is that sections 10 and 11 of the Money-Lenders Act should not have been applied at all so as to non-suit his client.

Mr. Sanghi, learned counsel for the respondents, on the other hand, pointed out that the mortgagor had, as early as 1947, repudiated his liability under the mortgage, relying on the provisions of the Money-Lenders Act. In the absence of any indication in the Abolition Act that a debtor cannot avail himself of relief granted to him under other ameliorative measures - in this case, the Money-Lenders Act - the Board, according to the learned counsel, was perfectly justified in applying sections 10 and 11 of the Money-Lenders Act to find out whether at all any principal amount was due to the mortgagee. Counsel also points out that the object of a claim being filed by a creditor, like the appellant is, as indicted in section 18(1)(a) of the Abolition Act, for the purpose of determining the amount of debt, "legally and justly payable, to each such creditor in respect of his claim." Counsel further points out that, even under section 20(1) of the Abolition Act, the duty of the Claims Officer is to determine the principal amount 'legally and justly due' to each creditor. For the purpose of adjudicating on the claim of the appellant, and finding out what is the principal amount 'legally and justly due to him,' the Board was perfectly justified in relying upon the provisions of the Money-Lenders Act. Counsel also points out that if, by applying the provisions of the Money-Lenders Act, the liability of the mortgagor is extinguished, that, certainly, will clearly show that there is no principal amount 'legally and justly due' to the appellant. If the appellant had instituted a suit in the Orissa Courts to enforce his claim on this mortgage, the Courts would have certainly applied the provisions of the Money-Lenders Act and held that the appellant's claim had been satisfied. Because of the fact that the claim is made under the Abolition Act, counsel points out that it could not have been the intention of the Legislature to make the position of creditors, like the appellant, better than it is under the Money-Lenders Act.

Though we are not inclined to accept the reasons given by the Board for applying the provisions of sections 10 and 11 of the Money-Lenders Act, we are, nevertheless, in agreement with the views expressed by the Board that those provisions can be applied. If so, the conclusion arrived at by the Board, that the mortgage liability has been extinguished, is correct. We do, no doubt, see force in the contention of the learned counsel, for the appellant, that there is no specific provision in the Abolition Act making any reference to the Money-Lenders Act. We are also conscious that the Abolition Act does lay down some principles in clauses (a) to (f) of sub-section (2) of section 20, as to how exactly the calculation has to be made. There is also a slight difference in the method of calculation adopted the Money-Lenders Act and the Abolition Act. But, notwithstanding these circumstances, we are of opinion that, in order to determine 'the principal amount legally and justly due to each creditor' as laid down in section 20(1) of the Abolition Act, it is the duty of the Claims Officer to find out whether, in respect of a claim that is made by a creditor, there is a legal impediment for recognising the same, i.e., whether the claim is such which will be recognised by a Judicial Tribunal.

The legislature emphasises upon this aspect even in section 18(1)(a) of the Abolition Act. The purpose of a claim being made by a secured creditor, under section 18(1)(a) is, as we have already pointed out, 'for the purpose of determining the amount of debt legally and justly payable to each creditor in respect of his claim.' The same idea is, again, reiterated by the legislature in section 20(1) of the Abolition Act when it makes it obligatory on the Claims Officer 'to determine the principal

amount, legally and justly due to each creditor.' No rules, as contemplated under section 20(1) of the Abolition Act, have been brought to our notice. The expression 'legally and justly due' must, certainly, in our opinion, mean that before a claim is recognized by the Claims Officer he must be satisfied that the principal amount covered by that claim is 'legally and justly due' i.e., that such a claim, if sought to be enforced in a Court or Judicial Tribunal, will find recognition on the basis that it does not suffer from any legal infirmity.

In this case, even according to the appellant, in respect of the principal amount of Pounds 77,500/- advanced under the mortgage of December 18, 1906, admittedly, a sum of Pounds 77,349-18-0 has been received by him as interest. This amount is more than two times the principal amount advanced under this mortgage. If, in spite of this, the present claim had been made for recovery of further amounts, on the basis of this mortgage, by the appellant, in any Court, it is needless to state that the Court would have applied the provisions of the Money-lenders Act. By applying sections 10 and 11 of this Act, the Court would have come to the conclusion that the appellant is not entitled to recover any more amounts inasmuch as the entire claim must be considered to have been satisfied by the respondent, having paid a sum of Pounds 1,77,349-18-0 by way of interest. That means, the Court would have come to the conclusion that no further amounts, by way of principal, are 'legally and justly due' to the appellant; and, quite naturally, the further finding would be that no interest at all is due. If no Court would have recognized the present claim of the appellant, the same principles must be applicable when the Claims Officer is also called upon, under section 20(1) of the Abolition Act, 'to determine the principal amount legally and justly due.' For the purpose of determining whether the principal amount is 'legally and justly due' he would be perfectly justified in relying on any provisions of other statutes bearing upon that subject - in this particular case, the provisions of the Money-Lenders Act.

Mr. B. Sen, learned Counsel, has urged that in order to consider a claim made by the creditor, the jurisdiction of the Claims Officer is restricted, by the various provisions contained in clauses (a) to (f) of section 20(2) of the Abolition Act. We are not inclined to accept this large contention of the learned counsel for the appellant. For instance, if a plea of discharge is raised by a debtor in a claim proceeding, or, if a plea is raised by a debtor that the claim is barred by the law of Limitation, no provision is made in clauses (a) to (f) of section 20(2) giving jurisdiction to the Claims Officer either to entertain such objection or to investigate the same. Acceptance of the contentions of the learned counsel for the appellant, will lead to this conclusion that when a claim is made under the Abolition Act, the Claims Officer will have, straight away, to determine the principal amount and interest under sub-section (2) of section 20 without considering the question as to whether the claim is true or whether it is barred by any other law, or whether the claim is still subsisting. These are all matters which, in our opinion, properly arise for consideration when a Claims Officer has to determine the principal amount under section 20(1) of the Abolition Act. The expression 'legally and justly due', occurring in section 20(1), clearly indicates that the first and initial duty of the Claims Officer is to find out whether any principal amount is at all due to the creditor which he is entitled to recover either in law or justly. It may be that, after arriving, on this aspect, at a conclusion, one way or the other, and depending upon that decision, the Claims Officer will have to adjudicate upon the rights of the parties, having due regard to the various matters mentioned in clauses (a) to (f) of sub-section (2) of section 20. We are therefore satisfied that the Board is correct when it held that the provisions of the Money-Lenders Act can be taken into account by the Claims Officer, under section 20(1) of the Abolition Act. If the provisions of the Money-Lenders Act apply, as they have been applied by the Board, there is no controversy that the claim under the mortgage of December 18, 1906, must be considered to have been extinguished and that no further amounts will be due, as held by the Board.

The result is that the appeal fails and is dismissed. In the circumstances of the case, there will be no order as to costs.

Appeal dismissed.

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