

Bhrigunandan Prasad and Ors.

Vs

The Appellate Officer & Ors.

Civil Appeal No. 102 of 1964

(K.N. Wanchoo, J. C. Shah, S. M. Sikri JJ)

25.03.1966

### JUDGMENT

#### WANCHOO, J.-

The only question raised in this appeal by special leave from the judgment of the Punjab High Court is the interpretation of s. 9(1) of the Evacuee Interest (Separation) Act, No. LXIV of 1951 (hereinafter referred to as the Act). The question arises in this way. The appellants were mortgagees of certain properties, including a house, on the basis of a mortgage-bond dated July 19, 1928. The consideration of the bond was Rs. 25,000 and interest was provided at nine per cent per annum compoundable annually. Out of the properties covered by the bond, one of the properties was sold to Bibi Chand Tara on October 23, 1937 subject to the earlier mortgage of 1928. In October 1949, Bibi Chand Tara was declared an evacuee.

In 1939 the appellant filed a suit against the original mortgagors and others including Bibi Chand Tara for the amount due under the mortgage. A preliminary decree was passed in their favour in March 1942 and the final decree followed in April 1945. It appears that certain sums were received by the appellants before they had filed the suit. Certain other sums were also received after the preliminary and final decrees. It further appears that certain Zamindari properties which were also included in the mortgage had been sold after the final decree and the money appropriate towards the decree. Another house which has also included in the mortgage bond was sold later and the sale money was again appropriated towards the decree. Eventually the appellants put the decree in execution in November 1952 against the house in dispute for a sum of Rs. 60,000 and odd. There was a sale in that execution proceeding, but it was set aside on the application of the Assistant Custodian, Patna. Thereafter the appellants made an application before the Assistant Custodian for the recovery of the mortgage money claimed by them and in this application their claim was for Rs. 40,000 and odd. This application was also dismissed as it was filed before a wrong authority. Eventually the appellants filed a claim for the same amount before the Competent Officer under the Act, inasmuch as the property in dispute was composite property in which the evacuee had mortgagor's interest while the appellants who are non-evacuees had mortgagees' interest which had ripened into a decree for sale. This application was resisted by the Custodian on a number of grounds. In the present appeal we are only concerned with one ground based on s. 9(1) of the Act. The contention of the Custodian was that the appellants were not entitled to any interest higher than five per cent per annum simple from the date of the mortgage under s. 9(1) of the Act. Therefore the Custodian claimed that the entire transaction should be reopened from the date of the mortgage and the amounts already received by the appellants should be taken into account after allowing interest at five per cent per annum simple to them and if more interest had been paid that should be credited towards the principal and after such accounting the sum if any due on the mortgage could be

claimed by the appellants.

The Competent Officer held that though the provisions of s. 9(1) were retrospective to a certain extent they could not be stretched to mean that if a mortgagee had already realised interest at a rate exceeding five per centum per annum simple even before the Act came into force the excess would go to liquidate the principal amount proportionately. He therefore held that in the absence of special provision to the effect that past accounts should be reopened, the amount received as interest prior to the decree could not be taken into account. The Competent Officer further held that the principal money could not be reduced on account of any excess realisation of interest when such excess was realised before the Act came into force. He therefore ordered that (1) the amount of interest exceeding five per cent per annum before the institution of the suit would not reduce the principal amount, (2) the appellants would be entitled to simple interest at six per cent per annum, i.e. the rate at which interest was decreed in their favour in the mortgage suit from the date of the institution of the suit till November 26, 1952 on the principal sum only, (3) the appellants would be entitled to interest at five per cent per annum simple from November 27, 1952, and (4) the appellants would also be entitled to costs of the suit decreed in their favour. The actual amount due was ordered to be worked out on these principles.

The Custodian took the matter in appeal to the Appellate Officer. The Appellate Officer held that on the words of s. 9(1) the entire account must be made afresh on the basis of interest being allowed at five per cent per annum simple on the principal amount from the date of the mortgage, and that any sums received over and above this would go to reduce the principal. He therefore allowed the appeal and set aside the order of the Competent Officer and ordered account to be taken in the manner indicated by him.

The appellants then applied to the Punjab High Court by a writ petition, which was dismissed in limine. Their application for leave to appeal to this Court was also dismissed. Thereafter they obtained special leave from this Court, and that is how the matter has come before us.

The Act deals with separation of the interest of an evacuee from the interest of a non-evacuee in composite properties. Under s. 2(d) "composite property" inter alia means any property which, or any property in which an interest, has been declared to be evacuee property and in which the interest of the evacuee is subject to mortgage in any form in favour of a person, not being an evacuee. Under s. 2(h), "principal money" in relation to a mortgage deed executed by an evacuee inter alia means in the case of mortgage deed which has not been executed by way of renewal of a prior mortgage deed, the sum of money advanced by way of loan at the time of the execution of the mortgage deed, Under s. 3 the Act and the rules and orders made thereunder have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any such law, save as otherwise expressly provided in the Act. Sections 4 to 8 provide for machinery for separation of the claims of evacuees and non-evacuees in composite properties. Then we come to s. 9(1) which is in these terms :-

"(1) Notwithstanding anything to the contrary in any law or contract or any decree or order of a civil court or other authority, where the claim is made by a mortgagee, no mortgaged property of an evacuee shall, subject to the provisions of sub-section (2) be liable for the payment of interest at a rate exceeding five per cent per annum simple on the principal money advanced or deemed to have been advanced."

It is unnecessary to refer to s. 9 (2) for we are not concerned with that provision in the present

appeal.

We may however refer to s. 8(3) which is material and in these terms :-

"(3) If there is any dispute as to whether a liability is a mortgage debt or not or whether any claim submitted under section 7 exists, the Competent Officer shall decide such dispute :

Provided that a decree of a civil court (other than an ex parte decree passed after the 14th day of August, 1947) shall, subject to the provisions of sections 9 and 10, be binding on the Competent Officer in respect of any matter which has been finally decided by such decree; and where any matter was decided by an ex parte decree passed by a civil court after the 14th day of August, 1947, the Competent Officer may decide such matter afresh and on such decision being made the ex parte decree shall be deemed to have no effect."

Section 10 provides for separation of the interest of evacuee from the interest of claimants in composite properties and lays down how that will be done. Clause (b) specially provides for the manner in which the claim of a mortgagee will be dealt with by the Competent Officer, but we are not concerned with the details of that provision.

It will be seen from a consideration of these provisions that the Competent Officer is bound by the decree of a civil court except an ex parte decree passed after August 14, 1947 in respect of a mortgage subject to the provisions of ss. 9 and 10. Section 10 indicates how the Competent Officer is to separate the interest of an evacuee from the interest of a non-evacuee, even in the case of a decree except an ex parte decree passed after August 14, 1947. Section 9(1) provides for interest at five per cent per annum simple, and the decree in a mortgage suit except an ex parte decree passed after August 14, 1947 which is otherwise binding on the Competent Officer is subject to the provisions of s. 9(1) as to interest. It will also be noticed that there is no provision in the Act which specifically provides for reopening of transactions relating to mortgage and taking accounts from the date of the mortgage on the basis of interest provided in s. 9(1) and for crediting anything paid as interest over and above the rate provided in s. 9(1) towards principal. Prima facie therefore in the absence of such a provision it cannot be assumed that the legislature intended that a mortgage transaction should be reopened from the date of the mortgage and accounts taken afresh and anything paid in excess of five per cent per annum simple interest applied towards reduction of the principal amount. We have therefore to see whether there is anything in the words of s. 9(1) which leads to this result in the absence of a specific provision to that effect in the Act.

Section 9(1) begins with a non-obstante clause and lays down that it will apply notwithstanding anything to the contrary in any law or contract or any decree or order of a civil court or other authority. It then provides that where a claim is made by a mortgagee, as in the present case, no mortgaged property of an evacuee shall be liable for the payment of interest at a rate exceeding five per cent per annum simple on the principal money advanced. The key words in the provision are "no mortgaged property shall be liable". These words indicate that the Competent Officer when he comes to deal with a liability under a mortgage must calculate this liability on the basis that interest should be allowed only on the principal amount and only at the rate of five per cent per annum simple. The liability which the Competent Officer has to determine is with respect to the amount still due to the non-evacuee. Further as the non-obstante clause includes any decree of a civil court and as such decree is subject to s. 9(1) in view of the proviso to s. 8(3), the Competent Officer

would not be bound by the calculation of interest made by the civil court and would have to determine the liability still due on the mortgage himself on the basis of simple interest at the rate of five per cent per annum on the principal sum advanced. Any calculation made by the civil court in arriving at the sum decreed by it on the basis of interest at more than five per cent per annum so far as the liability still due is concerned would not be binding on the Competent Officer and he will have to make his own calculations on the basis of simple interest at the rate of five per cent per annum. Similarly in a case where there is no decree and there is still some liability on the mortgage, the Competent Officer would not be bound by the rate of interest mentioned in the mortgage deed and will calculate the liability still due on the basis of simple interest at the rate of five per cent per annum on the principal amount advanced. But s. 9(1) clearly shows that it applies only where the liability is still due and there is nothing in the words of s. 9(1) which gives power to the Competent Officer to reopen the account under the mortgage from the date of the mortgage and for that purpose treat anything paid as interest under the contract over and above five per cent per annum simple interest as payment towards reduction of the principal amount Section 9(1) in our opinion only deals with liability still due and does not contemplate that any payments made already under the contract as interest should be taken partly towards interest and partly towards principal if they are above five per cent per annum simple interest. As s. 9(1) speaks only of the liability of the mortgaged property it can only take in liability still due, for whatever has been paid in accordance with the contract towards interest is no longer a liability. This conclusion based on the words of s. 9(1) is enforced by the fact that there is no specific provision in the Act for reopening all accounts under the mortgage from the date of the mortgage, treating any interest paid already at a rate higher than five per cent per annum simple as going towards reduction of the principal sum.

Two situations may arise before the Competent Officer in such circumstances when calculating the liability under a mortgage. In one case there may be no decree already passed in favour of the mortgagee. In such a case in calculating the liability still due on the mortgage, the Competent Officer will calculate that liability on the basis of simple interest at the rate of five per cent per annum on the principal money advanced and may ignore the rate of interest mentioned in the contract. But even so, the words of s. 9(1) do not give him power to reopen the accounts and whatever has been paid towards interest, if it is not in excess of the contractual rate of interest though it may be in excess of the rate of five per cent per annum simple interest, cannot be taken into account in reducing the principal amount. But whatever is still due under the mortgage will have to be worked out on the basis of simple interest at the rate of five per cent per annum on the principal amount advanced. We may illustrate this by an example. Suppose a mortgage was entered into on January 1, 1949 and the interest is nine per cent per annum. Suppose that interest for the years 1949 and 1950 has been paid at the contractual rate but nothing has been paid thereafter. In such a case, the amount paid in excess of five per cent per annum for 1949 and 1950 will not go to reduce the principal; but thereafter interest will be calculated at five per cent per annum to arrive at the liability on the mortgaged property or what is still due.

The second case which may arise before the Competent Officer would be a case where a decree has been passed on the mortgage bond except an ex parte decree passed after August 14, 1947. In such a case also the Competent Officer cannot take into account anything paid in excess of five per cent per annum simple interest before the date of the suit provided it is not at more than the contractual rate; but as the decree is subject to s. 9(1), the Competent Officer will have to calculate interest at five per cent per annum simple from the date of the suit and cannot award more interest in calculating the liability still due under the mortgage. Of course in both the cases if before the suit nothing has been paid towards interest or if something has been paid but it is less than five per cent per annum simple interest on the principal amount advanced, the Competent Officer in calculating the liability

still due on the mortgage will have to allow five per cent per annum simple interest from the date of the mortgage to make up the deficiency, if any. As we read s. 9(1), we find no provision in it for reopening the account from the very beginning and utilising any interest paid in excess of five per cent per annum simple but within the contractual rate towards reducing the principal amount. Section 9(1) only deals with the liability of the mortgaged property which may still be due when the claim is made before the Competent Officer. Though the provision is retrospective in the sense that where the liability is still there, interest has to be calculated at five per cent per annum simple there is nothing in the words of s. 9(1) which authorises the reopening of accounts and utilising the excess over five per cent per annum towards reduction of principal provided the payment of interest already made is within the contractual rate.

In this view the order of the Appellate Officer by which he ordered the reopening of the accounts and which was upheld by the High Court is incorrect. At the same time we are of opinion that the order of the Competent Officer is also not quite correct, though it is more in accord with the interpretation of s. 9(1) which we have indicated above. On the view we have taken the liability will be calculated thus : Any amount paid before the date of the suit i.e. December 11, 1939, provided it is not more than the contractual rate of interest though it may be above five per cent per annum simple will not go to reduce the principal amount. From the date of the suit till the date of the final decree i.e. April 25, 1945, the appellants will only be entitled to simple interest at the rate of five per cent per annum on the principal amount advanced for the decree though binding on the Competent Officer is subject, under the proviso to s. 8(3), to s. 9(1). Further from the date of the final decree also the appellants will be entitled to simple interest at the rate of five per cent per annum on the principal amount only. Any payments made after the date of the suit will be adjusted first towards interest at the rate of five per cent per annum simple and any payment made in excess thereof will go to reduce the principal. The appellants will also be entitled to the costs of the suit which was decreed in their favour, but there will be no interest on such costs. The account will be made up accordingly to determine the liability due under the mortgage. Thereafter it will be for the Competent Officer to deal with the matter as provided under s. 10(b) or (c).

We therefore allow the appeal. The writ petition is allowed and the order of the Appellate Officer is set aside and the order of the Competent Officer varied in the manner indicated above. The appellants will get their costs from the Custodian Evacuee Property.

Appeal allowed.

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