Dhanki Mahajan

Vs

Rana Chandubha Wakhatsing & Others

Civil Appeal No. 38 of 1965

(R. S. Bachawat, K. S. Hegde JJ)

11.04.1968

JUDGMENT

HEGDE, J.-

This appeal by special leave arises out of the decision of Raju, J. of the Gujarat High Court in an application under s. 115 of the Code of Civil Procedure. That application was filed by respondents Nos. 1 to 3 herein. As they are the only contesting respondents in this appeal, they will hereinafter be referred to as the respondents.

The respondents are Bhayats and Girasdars of Dhanki village in Lakhtar Taluka of the Saurashtra region of the Gujarat State. On December 19, 1940, the respondents executed a joint usufractury mortgage in favour of Thakker Jethalal Dosabha (the third appellant herein) and another for a sum of Rs. 17,725. The liability incurred under the mortgage was a joint liability and under the terms of the deed each of the mortgagers was liable for the entire debt due under the mortgage. Till January 25, 1950, Dhanki village was a part of the former State of Bombay. As from January 26, 1950, that village became a part of the State of Saurashtra in view of the provisions in the Provinces and States (Absorption of Enclaves) Order, 1950. Prior to that date, the Bombay Agricultural Debtors' Relief Act, 1939, (Bombay Act No. XXVIII of 1939), hereinafter referred to as the Bombay Act, was in force in Dhanki village. As long back as 1945, respondent No. 2 had filed an application before the Civil Judge (Junior Division) Viramgam both on his behalf as well as on behalf of his minor cousin, the third respondent, for adjustment of their debts. At the same time, respondent No. 1 had also filed an application under the Bombay Act for adjustment of his debts. These applications were consolidated for the purpose of trial. Ultimately they were dismissed as the debts due from each of those persons were held to exceed Rs. 15,000 and that being so they could not be considered as "debtors" under the Bombay Act. In those proceedings it was further held that the debt due from the respondents under the mortgage is a joint debt and each one of them was liable for the entire debt. No appeal was preferred against that decision. At the time of the merger of Dhanki village in Saurashtra, in that State there was no statute similar to the Bombay Act. The Saurashtra Agricultural Debtors' Relief Act (Act No. XXIII of 1954) came to be enacted in 1954. This Act will hereinafter be referred to as "the Act". By and large the provisions of the Act are similar to those of the Bombay Act. In 1955, the respondents again made applications before the Debt Adjustment Board for scaling down their debts under the provisions of the Act. The appellants resisted those applications principally on two grounds, viz. :

> (1) The respondents cannot be considered as "debtors" under the Act as the total debts due from each of them exceeded Rs. 25,000 the limit fixed, under the Act, and

(2) their applications are barred by the principles of res judicata in view of the decision given earlier under the Bombay Act.

Both the Board as well as the appellate court upheld the contentions of the appellants that the respondents were not "debtors" as defined in the Act and that their present applications were barred by the principles of res judicata, in view of the earlier decision rendered under the Bombay Act. They held that the debt due under the mortgage is a joint debt and each of the mortgagers is liable for the entire debt. They repelled the plea of the respondents that the debt in question is liable to be split up under the provisions of the Act. But the High Court reversed the above findings. It held that in computing the total debts due from the respondents each one of the mortgagers should be held to be liable only for one-third of the mortgage debt and in that event the total debt due from each of them does not exceed Rs. 25,000. It may be noted that under the Act, a person whose debts exceeded Rs. 25,000 cannot be considered as a "debtor". It is admitted that if each of the respondents is held liable for the entire mortgage debt, the debts due from each of them would exceed Rs. 25,000 and in that event, they are not entitled to any relief under the Act. But it is equally true that if each one of them is liable only for one-third of the mortgage debt, then the total debts due from each of them do not exceed Rs. 25,000 and in that event their debts are liable to be scaled down and adjusted under the provisions of the Act. Therefore, the main question for decision is whether each one of the respondents can be held liable for the entire debt due under the mortgage. If the answer is in the affirmative, as opined by the Board as well as the appellate court, then the decision of the High Court is incorrect. But on the other hand, if we agree with the High Court that each of the respondents is only liable for one-third of the mortgage debt then the respondents' applications should have been entertained by the Board and dealt with according to law. As, in our opinion, the decision of the Board and of the appellate court that each of the respondents is liable for the entire mortgage debt is correct in law, it is not necessary for us to consider the other question whether the applications from which this appeal arises are barred by the principles of res judicata. For the same reason we are also not going into the question whether on the facts of this case it was competent for the High Court to reverse the decision of the appellate court by having recourse to its powers under s. 115 of the Code of Civil Procedure.

Before going into the question whether the respondents can be considered as "debtors" under the Act, it is necessary to dispose of a subsidiary controversy which appears to have troubled Raju, J. unnecessarily. Major portion of his judgment was devoted to the question whether a Single Judge of a High Court is bound by an earlier decision of another Judge of that High Court and whether the opinion expressed by a Full Bench of that Court is binding on Single Judges and Division Benches of that court. We think that matters so obvious as those should not have troubled any Judge of a High Court. His conclusions on those questions are rather startling. But there is no need to go into them in view of the decision of this Court in Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel. [A.I.R. 1968 S.C. 372.] That case also arose from one of the decisions of Raju, J. wherein the learned Judge had reached conclusions similar to those reached by him in the present case. This Court over-ruled those conclusions and held that a Single Judge of a High Court is ordinarily bound to accept as correct judgments of courts of co-ordinate jurisdiction, of Division Benches and Full Benches of his Court.

Reverting back to the principal point in issue, i.e. whether each of the respondents is liable for the entire mortgage debt, it may be noted that the term "debt" is defined in s. 2(5) of the Act as meaning 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 usufractury mortgage, or by an amalous mortgage in the nature of pura

chhoot of immovable property, but does not include arrears of wages payable in respect of agricultural or manual labour. "Debtor" is defined in s. 2(6)(i) and that definition to the extent material for this case says -

> "6. 'Debtor' means an agriculturist -
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> (i) whose debts do not exceed Rs. 25,000 on the date of filing an application to the Board under section 4; and
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> #....."##

The definition of "debt" takes in debts under usufractury mortgages as well. As mentioned earlier, the usufractury mortgage in question was executed by all the respondents jointly. The debt borrowed under it was a joint debt; each one of the mortgagors was jointly liable for the entire debt. That being so, under the provisions of the Transfer of Property Act, each of the respondents must be held to be liable for the entire mortgage debt. This position is not disputed. Therefore, we have to see whether there are any provisions in the Act which alter the position in law. As seen earlier, neither the definition of "debt" nor of "debtor" is of any assistance to the respondents in support of the contention that each of them is liable for one-third of the mortgage debt. The learned counsel for the respondents invited our attention ss. 7(1), 16, 19, 20(1)(a), 20(1)(c), 20(3), 21 and 29 Section 7(1) provides that 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 person, and if the surety or such other person is not a debtor, the debtor may make an application under 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. We do not think that this provision lends support to the contention of the respondents that a joint mortgage debt gent split up. It is not necessary for us in this case to consider as to what would happen in a case where some of the co-mortgagors are "debtors" and the others not "debtors". In the present case, all the respondents are held to be not "debtors". Section 16 merely provides that the question whether an applicant is debtor or not should be decided as a preliminary issue. Section 19 provides for the examination of creditor and debtor. Section 20 provides for taking accounts. Section 21 prescribes that in certain cases rent may be charged in lieu of profits. Section 29 provides for scaling down debts of debtors. None of these provisions lends any support to the contention that the debt due from the respondents under the mortgage is liable to be split up under the Act.

It was next urged by Shri Baxi, learned counsel for the respondents, that s. 7 of the Act permits one of the joint debtors to apply for adjustment of his debts, and if he so does, the Board is bound to scale down his debts so far as is concerned. That being so unless we hold that for the purpose of the Act joint debts are liable to be split up, complications would arise. He gave an illustration of a debt owned by three joint debtors, each of whom is a "debtor" within the meaning of the Act. According to him, in view of the provisions of the Act, if the total debt due from them is Rs. 30,000; the same may be scaled down in respect of one debtor to Rs. 18,000 another to Rs. 17,000 and the third to Rs. 16,000. As the awards against the several debtors are independent awards, each of those awards can be executed against the concerned debtor; in that event the creditor will be entitled to realise, instead of Rs. 30,000 due to him, Rs. 51,000. We do not think that there is any basis for this apprehension. It is not necessary for our present purpose to find out the true scope of s. 7 or what would be the effect of scaling down a joint debt on the application of one of the debtors. One possibility is that the debt as a whole may be scaled down and the creditor not entitled to collect more that the scaled down debt from any of the debtors. Another possibility is that though the creditor cannot collect

more than what is due to him jointly from all debtors, his right to proceed against an individual debtor and his property has to be determined on the basis of the provisions of the Act. We do not think that there is any need to go into these complications in the present case. It is likely that while applying the provisions of the Act along with the provisions of the Transfer of Property Act or the Contract Act, in certain cases, some difficulties may arise. All these difficulties will be solved by reasonably interpreting the relevant provisions of the Act. For our present purposes, all that we have to see is whether on the basis of the provisions of the Act, there is any justification for departing from the ordinary rule that in the case of a joint debt, each one of the debtors is liable for the entire debt. We see no such justification.

The learned Judge in support of his conclusion that the mortgage debt in this case is liable to be split up has placed reliance on the decision of this Court in V. Ramaswami Ayyangar v. T. N. V. Kailasa Thavar [[1951] S.C.R. 292.]. That was a case arising under the Madras Agriculturists' Relief Act, No. IV of 1938. The facts of that case were these : In a suit to enforce a mortgage executed by defendent No. 1 on his own behalf and on behalf of defendants Nos. 2 to 7, the defendant No. 1 remained ex parte and the others contested the suit. A decree for Rs. 1,08.098 was passed by the trial court. The Madras Agriculturists' Relief Act was passed during the pendency of an appeal and cross appeal, and on the application of defendants Nos. 2 to 7 under the said Act the amount of the decree was scaled down to Rs. 49,255 so far as defendants Nos. 2 to 7 were concerned. So far as defendant No. 1 was concerned, the decree for the full amount remained as it was defendant No. 1 thereupon applied for scaling down, but his application was rejected. Defendants Nos. 2 to 7 deposited certain amounts and got their properties released. Defendant No. 1 deposited the balance of the amount that remained due under the decree as scaled down on the application of defendants Nos. 2 to 7 and prayed that full satisfaction of the decree may be recorded. The Subordinate Judge rejected this application and the High Court, on appeal, held 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. On further appeal, this Court reversed the judgment of the High Court and restored that of the Subordinate Judge. Mukherjea, J. (as he than was), speaking for the Court, observed in the course of judgment, "The learned Judges (of the High Court appear to have overlooked the fact that they were sitting only as an executing court and their duty was to give effect to the terms of the decree that was already passed and beyond which they could not go. It is true that they were to interpret the decree but under the guise of interpretation they could not make a new decree for the parties." From this observation, it is clear that the main consideration which influenced this Court to reverse the decree of the High Court was that whether the decree passed in the suit was correct or not, the executing court could not have gone behind it. This Court also noticed yet another reason for departing from the normal rule that each one of the joint debtors is liable for the entire joint debt. Section 14 of the Madras Agriculturists' Relief Act provides for separation of debt incurred by a joint Hindu family, some of the members of which are agriculturists while others are not. Our attention has not been drawn to any provision in the Act, nor is it the case of the respondents that they belong to a joint Hindu family. Hence the ration of the decision in V. Ramaswami Ayyangar's case [[1951] S.C.R. 292.] is inapplicable to the facts of the present case.

The provision of the Bombay Act in material particulars are similar to the provisions of the Act. Interpreting the provisions of the Bombay Act in Ambu Rama Mhatro v. Bhau Halya Patel [A.I.R. (1957) Bom. 6.], the Bombay High Court, speaking through Shah, J. (as he than was) held that it cannot be disputed that when a mortgage is created jointly on property in which several persons are interested each of the mortgagors is liable in the absence of a contract to the contrary to pay the entire debt, and the liability of a mortgagor is not proportionate to the extent of his interest in the mortgaged property; and that position is not altered under the provisions of the Bombay Act. This

decision was followed by Bhagwati, J. (as he then was) of the Gujarat High Court in Dave Sadashiv Jayakrishna v. Rana Govubha [(1962) 3 Guj. L.R. 1007.]. We are in agreement with that conclusion.

For the reasons mentioned above, we allow the appeal, set aside the order of the High Court and restore that of the appellate court with costs throughout.

Appeal allowed.##

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