

BOMBAY HIGH COURT

Ambu Rama Mhatre

Vs.

Bhau Halya Patil

Civil Revn. Appln. No. 1482 of 1955, Kolaba at Alibag in A. No. 35 of 1954

(Shah, J.)

08.08.1956

JUDGMENT

Shah, J.

1. Bhau Halya Patil, whom I will hereafter refer to as the "first respondent", and four others filed Debt Adjustment Application No. 682 of 1947 in the Court of the Civil Judge, Junior Division, at Pen against four creditors for adjustment of their debts, alleging that they were agricultural debtors or agricultural labourers within the meaning of the B. A. D. R. Act. The applicants claimed that the transfer of lands S. No. 51 Pot Hissa Nos. 3 and 4, S. No. 90 Pot No. 1 and S. No. 155 Pot Nos. 2 and 3 under a sale deed executed on 12-10-1911, by Halya Patil, father of respondent 1 Bhau Halya Patil and certain other persons, in favour of one Shaikh Husain Shaikh Sileman, for Rs. 1,137/4/- was in the nature of mortgage and the transferees from Shaikh Husain Shaikh Sileman acquired the rights only of mortgagees. The application was resisted by the transferees from Shaikh Husain Shaikh Sileman. The learned trial Judge held that the sale deed, dated 12-10-1911, in favor of Shaikh Husain Sileman was in the nature of a mortgage and that the transferees from him were not protected by Section 25 (2) of the B. A. D. R. Act and that they were transferees merely of mortgagee rights, and he made an award declaring that respondent 1 Bhau Halya Patil alone was a debtor and directing the transferees from Shaikh Husain Shaikh Sileman to put respondent 1 Bhau Halya Patil in possession of the lands conveyed under the said deed.

2. In appeal to the District Court at Alibag the finding as to the nature of the impugned transaction, was affirmed but the award was set aside and the proceedings were remanded to the trial Court to ascertain whether respondent 1 was entitled to redeem the whole property. The learned trial Judge on remand held that respondent 1 was entitled to redeem the mortgage in its entirety. He also held that Rs. 1,100/6/- were due under the mortgage, and made a fresh award on that finding.

3. Against that award an appeal was preferred to the District Court at Alibag and in appeal the learned District Judge partially modified the award by substituting the figure Rs. 1,200/- for Rs. 1,100/6/-, but in all other respects he confirmed the award made by the trial Court. Against the order passed in appeal this revision application has been filed by two out of the transferees from Shaikh Husain Shaikh Sileman.

4. The principal contention urged in support of this revision application is that when on the findings of the Courts below respondent 1 alone was a debtor, an order declaring that the impugned transaction in its entirety was in the nature of a mortgage and enabling respondent 1 on payment of the amount declared to be due under the mortgage to obtain an order for redemption of the mortgage and for possession of the entire property could not in law be passed. It was urged that respondent 1 alone being a debtor, the impugned transaction can be declared a mortgage to the extent of his interest in the property and that in any event the mortgage-debt can be scaled down to the extent of a transaction of the debt equal to the traction interest which respondent 1 has in the property, and that the rest of the debt cannot be scaled down under the B. A. D. R. Act.

5. Now, the original sale deed was executed by Halya Balu - father of respondent 1, Mahadu Balu, Joma Balu and Sakhi - widow of Balu. This transaction was ostensibly in the form of a sale-deed. The Courts below have held that the transaction was in the nature of a mortgage but they have held that respondent 1 was alone a debtor within the meaning of the B. A. D. R. Act and the other applicants were not debtors. The transaction incorporated in the sale deed, dated 12-10-1911, being in the nature of mortgage, respondent 1 as one of the mortgagors has the right to redeem the mortgage in its entirety. That is clear from the terms of Section 91, Transfer of Property Act which provides that "any person who has any interest in, or charge upon the property mortgaged or in or upon the right to redeem the same" has the right to redeem the property. But under the provisions contained in the Evidence Act evidence to vary the terms of a document which is in the form of a sale deed, cannot be led back showing that the parties to the deed intended to incorporate a mortgage. An agricultural debtor, notwithstanding any provision to the contrary contained in any law, or custom or contract, is under Section 24 of the B. A. D. R. Act entitled to show that a transfer of land is in the nature of a mortgage, even though such transfer is in form a transaction of a different character. A debtor having the right to show that a transaction whereby property is transferred is in the nature of a mortgage, that right cannot in my judgment, be limited to the debtor's interest in the property subject to the mortgage. Under Section 24 of the B. A. D. R. Act it is open to the Court having regard to the circumstances connected therewith to declare a transfer by the debtor, or by any other person from whom he has inherited the right, to be in the nature of a mortgage. There is nothing in the section to support the view that the declaration of the real nature of the transfer will be limited to the interest which the debtor has in the property transferred. In its very nature a mortgage is an indivisible transfer and it cannot be partially a mortgage and partially a sale or transfer of another character. The contention that the right of respondent 1 as a debtor is limited to obtaining a declaration that to the extent of his interest only in the property there is a mortgage outstanding in favor of the

transferees from Shaikh Husain Shaikh Sileman cannot be accepted. The declaration to be made by the Court, must, be a declaration that the entire transaction, dated 12-10-1911 is in the nature of a mortgage. If the impugned transaction be held to be in the nature of a mortgage, the B. A. D. R. Act makes it obligatory upon the Court to take an account of the transaction in the manner prescribed by Section 22 of the Act.

After taking accounts the Court is required to determine certain particulars prescribed by Section 27 and to ascertain the paying capacity of the debtor, and to scale down the debts. After the amount of debts due by the debtor are ascertained the Court makes an award under Section 32 of the Act.

6. As respondent 1 is one of the co-mortgagors he is liable for the whole debt jointly and severally with the other mortgagors, and he is entitled to redeem the entire property on payment of the debt declared to be due under the mortgage. The account of the transaction will therefore embrace the entire debt, and the scaling down must also be of the entire debt, and the award must also relate to the entire debt and cannot be limited to the fractional interest of the debtor in the property encumbered by the mortgage. 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. The Court has, therefore, to take an account of the entire debt due under the mortgage even though some of the mortgagors are not debtors within the meaning of the B. A. D. R. Act, and an award must be made in respect of the entire debt. Once an award is made, the debtor is entitled, on payment of the amount declared to be due by the debtor under the B. A. D. R. Act, to redeem the mortgage in its entirety and to obtain possession of the property.

7. I agree with the view of the learned appellate Judge that when the Court finds that the transaction is a mortgage though expressed in the form of a sale deed, it amounts to a finding of a single mortgage. It can be redeemed only as a whole. But once it is found that it is a mortgage, then even one mortgagor can redeem it.

8. Mr. Limaye on behalf of the petitioners has invited my attention to a judgment of the Supreme Court reported in - '*V. Ramaswami Ayyengar v. Kailash Thevar*¹', , in support of the contention that where by a statute dealing with adjustment and scaling down of liabilities of certain classes of debtors relief is intended to be given to persons who fall within that class and not to other persons, if a debt is scaled down, the benefit of that scaling down cannot be obtained by persons who did not satisfy the requirement of the statute. Now, in '*Ramaswami Ayyengar*'s case, a suit was filed to enforce a mortgage which was executed by defendant 1 for himself and on behalf of defendants 2 to 7. A preliminary mortgage decree was passed against defendant 1 and defendants 3 to 7 for Rs. 1,08,098/- and interest, and the suit was dismissed against defendant 2. Appeals were preferred against that decree by the plaintiff and defendants 3 to 7 and during the pendency of the appeals the Madras Agriculturists' Relief Act, 1938, was enacted by the Legislature and on the application filed by defendants 2 to 7 the amount of the decree was scaled down to Rs.

49,255/-and interest thereon at 6 per cent. from 1-10-1937 in so far as defendants 2 to 7 were concerned, but as against defendant 1, the decree for the full amount decreed by the trial Court was maintained. Under the preliminary decree the amounts declared were not paid, and a decree absolute for sale was passed. In execution of the decree there was a settlement. Under the settlement the decree-holder agreed to receive Rs. 24,000/- from defendant 2 and to release him and his share in the mortgaged property. Likewise the decree-holder agreed to receive Rs. 48,000/- from defendants 3 to 7 and to release them and their share of the mortgaged property. It was also agreed that the amount payable by defendant 1 was settled at Rs. 37,500/- and that amount was to be paid by one Yacob Nadar and in payment of that amount the decree against defendant 1 was to be assigned to the said Yacob Nadar. Defendants 2 to 7 paid the amounts agreed to be paid by them and got released their share in the property mortgaged. Yacob Nadar, however, did not pay the amount, but defendant 1 paid Rs. 3,215/- in Court and filed an

¹1951 SCR 292

application praying that as the amount deposited by him together with the payments already made by defendants 2 to 7 completely wiped out the debt due under the decree as scaled down full satisfaction may be recorded and the property of defendant 1 be exonerated from liability for the mortgage-debt. This application was rejected by the Subordinate Judge. On appeal to the High Court of Madras it was held that defendant 1 was entitled to the benefit of the scaling down in favor of defendants 2 to 7 as the mortgage-debt was one and indivisible. Against the decree passed by the Madras High Court an appeal was preferred to the Supreme Court and their Lordships of the Supreme Court held that the ratio decidendi of the cases in which it was held that a purchaser of mortgaged properties was entitled to the benefit of a decree which had been scaled down, even though the purchaser himself was not an agriculturist, was not applicable to the case before them. Their Lordships pointed out that under the provisions of the Act, there was no objection to a decree for a reduced amount being passed against an agricultural debtor, while the same relief was not given to his co-debtors, and defendant 1 was, therefore, not entitled to claim the benefit of the scaling down of the decretal amount in favor of defendants 2 to 7. The Supreme Court, therefore, reversed the decree passed by the Madras High Court and restored the decree passed by the learned trial Judge.

9. Mr. Limaye placed strong reliance upon the observations made by Mukherjea, J. at page 299 (of SCR) :

"thus in cases of a mortgage-debt when the loan has been advanced to more than one person, if one of the debtors happens to be an agriculturist while others are not, the agriculturist debtor would certainly be entitled to have his debts scaled down under the provisions of the Act in spite of the provisions of general law which prevents a mortgagor from denying the liability of the interest which he owns in the mortgaged property to satisfy the entire mortgage debt. There is, therefore, nothing wrong in law in scaling down a mortgage decree in favor of one of the judgment-debtors, while as regards others the decree is kept intact", and contended that the scaling down of the mortgage-debt must be

limited to the extent of the interest of the mortgagors who are agricultural debtors and the debt cannot be scaled down to the extent of the interest of the non-agricultural debtors. It is, however, to be noted that in 'Ramaswamy Ayyangar's case, a preliminary decree was expressly passed against defendant 1 whereby his liability was fixed at Rs. 1,08,098/- and the liability of defendants 2 to 7 was reduced to Rs. 49,255/-.

Thereafter defendants 2 to 7 paid amounts which they had agreed under the settlement with the decree-holder to pay and they got released their shares in the mortgaged property. Defendants 2 to 7 only redeemed their shares in the property and did not redeem the entire property on payment of the amount declared to be due on the mortgage. Defendant 1 who was ordered to pay Rs. 1,08,098/- then applied to the Court and sought to redeem by paying the balance of the amount remaining due by defendants 2 to 7 in order to obtain full benefit of the scaling down, and defendant 1 claimed that the decree be marked satisfied. Evidently the liability of defendant 1 being for Rs. 1,08,098/-, the decree against him could not be satisfied on payment of an amount less than the amount which was directed to be paid by him. It was held that having regard to the terms of the decree and the provisions of the Act which provided for adjustment of liability of debtors and also the adjustment of the decree, defendant 1 could not claim benefit of the scaling down of the debt in favor of defendants 2 to 7. The Supreme Court held that the unity of the mortgage was broken up by a term implicit in the decree and the settlement between the decree-holder and defendants 2 to 7. Their Lordships observed that it was a 'plain implication' of the decree that on payment of the amount directed to be paid by defendants 2 to 7 their interest alone in the mortgaged property would not be liable to be sold. It is evident that if under the preliminary decree defendant 1 desired to redeem the mortgage he had to pay Rs. 1,08,098/- and if defendants 2 to 7 desired to redeem the mortgage they had to pay Rs. 49,255/-. It also appears from the observations made at page 300 (of SCR) : (at pp.. 192-193 of AIR) that under Section 14, Madras Agriculturists' Relief Act separation of a debt incurred by a Hindu family, some members of which were agriculturists while others were not, afforded a clear indication that the splitting up of a debt in certain circumstances was quite in accordance with the scheme of the Act. But under the B. A. D. R. Act there is no provision whereby debts jointly due, can be split up between promisors who are debtors within the meaning of the Act and promisors who are non-debtors. There is nothing in the judgment of the Supreme Court which supports a general proposition that in a mortgage suit where some of the mortgagors are entitled to the benefit of a special statute like the Madras Agriculturists' Relief Act and the rest are not, the right of the former is limited to redeeming only their fractional interest in the property and not the mortgage in its entirety. 'V. Ramaswamy Ayyangar's case, therefore, has, in my judgment, no application to the facts of the present case.

10. Reliance was also sought to be placed upon the judgment in - '*Akella China Venkatavadhamula v. Mathangi Bachi Ramayya*²', That was a case in which the mortgagee filed a suit against the mortgagors some of whom were agriculturists entitled to the benefit of the Madras Agriculturists' Relief Act and some were non-agriculturists and it was held by the Full

Bench of the Madras High Court, relying upon the Supreme Court judgment referred to earlier, that a discharge of a debt as scaled down by the agriculturists mortgagor did not extinguish the debt against the non-agriculturists mortgagor. In this case we are not called upon to decide the question whether the debt due by non-agricultural debtors may be deemed to be discharged by redemption of the mortgage by respondent 1. The case does not negative the right of respondent 1 to redeem the entire mortgage on payment of the debt declared to be due by him under the award.

11. Reliance was also sought to be placed by Mr. Limaye upon Section 6 of the B. A. D.

R. Act. Sub-section (1) of Section 6, in so far as it is material, provides :

"If the payment of a debt due by a debtor is guaranteed by a surety or if a debtor is otherwise jointly and severally liable for any debt along with any other person and if the surety or such other person is not a debtor, the debtor may make an application under Section 4 for relief in respect of such debt and the Court may after consideration of the facts and circumstances of the case proceed with the adjustment of debts under this Act in so far as such applicant is concerned."

Relying upon the expression "in so far as such applicant is concerned", Mr. Limaye contended that jurisdiction is conferred upon the Court to adjust only a fraction of the debt due by the debtor. There is, in my view, no warrant for such a contention. The Legislature has by Section 6 provided that in the case of a joint liability the debt will be adjusted qua the debtor leaving it to the creditor or the debtor to take such proceedings as

²ILR 1954 Mad 158

are open to them for enforcement of the liability of the non-debtor. Sub-section (2) of Section 6 was also sought to be relied upon. That sub-section provides in effect that in the event of adjustment being made under Sub-Section (1) the surety shall be discharged from liability in respect of debts or portion of the debts of such debtor which are extinguished under the provisions of the Act and the surety shall not be entitled to proceed against the debtor in respect of such debts or portion. In other words, when the liability of the principal debtor is extinguished, to that extent the liability of the surety also is extinguished and the surety cannot proceed against the debtor in respect of that portion of the debt which has been extinguished. That sub-section also can, in my judgment, have no bearing on the question to be decided in this case.

12. In my view, the learned District Judge was right in holding that respondent 1 was entitled to redeem the whole property on payment of Rs. 1,200/-declared to be due by him.

13. Rule is, therefore, discharged with costs.

Rule discharged.