

# **BOMBAY HIGH COURT**

Manubhai Mahijibhai Patel

Vs.

Trikamlal Laxmidas

Civil Revn. Appln. No. 3 of 1957

(Miabhoy, J.)

29.09.1956. 24.04.1958

## **ORDER**

### **Miabhoy, J.**

1. This revision petition raises an interesting point of law. The facts necessary to be stated in order to dispose of this point of law are as follows : One Fakirbhai Jijibhai was the owner of S. No. 53. He mortgaged the same on 13-3-1924 to one Mahijibhai Patel for Rs. 975/-. The mortgage was a usufructuary mortgage. The mortgagor Fakirbhai subsequently sold on 3-4-1926 his equity of redemption for Rs. 1499/-, and the vendee was one Laxmidas. That! Laxmidas was the father of opponent No. 1. Out of the sum of Rs. 1499/-, a sum of Rs. 524/- was paid to the mortgagor Fakirbhai and the balance of Rs. 975/- was retained by the purchaser for payment to the mortgagee Mahijibhai Patel. That mortgagee was the father of the present petitioners. Subsequently, on 3-6-1926, the mortgagor Fakirbhai again purported to sell the same equity of redemption for a sum of Rs. 1300/-, and the vendee was the mortgagee Mahijibhai himself. In 1947, Laxmidas, father of opponent No. 1. filed an application under Section 4 of the B.A.D.R. Act for adjustment of the aforesaid mortgage-debt. An award was passed by the B.A.D.R. Court on 21-7-1955. From that, an appeal was preferred to the District Court, and the same was dismissed on 29-9-1956. The petitioners have come in revision to this Court against that appellate order.

2. The only point which is urged on behalf of the petitioners is that, having regard to the aforesaid facts, there was no debt which the purchaser Laxmidas owed to the mortgagee, the father of the petitioners, and, therefore, the application for adjustment of that debt did not lie. The contention is based upon the definition of the word 'debt' as given in section 2. sub-section (4) of the B.A.D.R. Act. Before I mention that definition, it is necessary for me to state the provisions of Section 4 of the B.A.D.R. Act, under which the application was made by Laxmidas, the father of opponent No. 1. The relevant portion of that section is as follows :

'Any debtor . . . . may make an application . . . . to the Court for adjustment of his debts.'

Therefore, it is quite clear that the object of the aforesaid application under Section 4 is the adjustment of the debt of the debtor. In this connection, it is important to notice that a person may be a debtor and, satisfy the conditions laid down in sub-section (5) of Section 2, but still, before any debt can be adjusted it is necessary that the debt must be his debt. Therefore, the question for consideration is whether, having regard to the aforesaid facts, the mortgage-debt which is sought to be adjusted in the present case is the debt of the purchaser of the equity of redemption viz. Laxmidas aforesaid.

3. Now, turning to the word 'debt', it is defined as follows :

'debt' means 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 usufructuary mortgage of immoveable property) but does not include arrears of wages payable in respect of agricultural or manual labour.'

Therefore, in order that a thing may come within the definition of the word 'debt', it is necessary that there should be a liability, and that liability must be due from a debtor. Now, having regard to the aforesaid facts, the debt was created by the mortgagor Fakirbhai Jijibhai. Therefore, the mortgage debt was the debt which was owed by Fakirbhai. The question for consideration is whether, having regard to the fact that Laxmidas became the purchaser of the equity of redemption, and also, having regard to the fact that Laxmidas retained a sum of Rs. 975/- from out of the purchase price to be paid to the mortgagee Mahijibhai Patel, Laxmidas became a debtor of the mortgagee Mahijibhai in respect of the aforesaid mortgage debt. Mr. Hirendra K. Shah, who appears on behalf of the petitioners, contends that, by the aforesaid transaction, the purchaser of equity of redemption, Laxmidas, did not become a debtor of the mortgagee Mahijibhai. For this purpose, he relies on the ruling reported in *Jamnadas v. Ram Autar Pande*<sup>1</sup>, In that case, it was held

'that the purchaser of an equity of redemption who by agreement with his vendor the mortgagor retains the amount of the mortgage debt out of the price due does not thereby become personally liable to the mortgagee in respect thereof. The mortgagee was not a party to the agreement, and Section 90 of the Transfer of Property Act does not apply.'

This is a direct ruling which is on all fours with the facts of the present case, and, having regard to this particular ruling, there is no doubt whatsoever that, unless the opponent No. 1 is able to satisfy that there was a tripartite agreement between the mortgagor, the mortgagee and Laxmidas, under which Laxmidas took the liability of the mortgagor to pay the mortgage-debt, Laxmidas would not become personally liable for the mortgage debt. Such is not the case of opponent No.

1. Therefore, there is no doubt whatsoever that, having regard to the aforesaid ruling, the mortgage-debt was not one which was due from Laxmidas to the mortgagee Mahijibhai.

4. Mr. M. C. Shah, who appears on behalf of opponent No. 1, however, contends that, when the aforesaid Privy Council ruling was given, section 59A of the Transfer of Property Act was not in existence. He contends that Section 59A of the Transfer of

<sup>139</sup> Ind App 7 (PC)

Property Act makes the difference. Now, that section is as follows :

'Unless otherwise expressly provided, reference in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.'

Now, in my opinion, this section cannot be brought into aid for making a purchaser of the equity of redemption personally liable for a mortgage debt, where, otherwise, he is not so liable. This section only states that wherever the word mortgagor occurs in the Chapter IV of the Transfer of Property Act, the word Mortgagor shall also mean a transferee from the mortgagor. But that does not necessarily mean that the transferee from the mortgagor becomes personally liable for the mortgage-debt. Unless and until Mr. M. C. Shah is in a position to show some section in the Transfer of Property Act which makes a purchaser of the equity of redemption personally liable for the debt, the aforesaid argument cannot be accepted. Then Mr. M. C. Shah referred me to Section 60 of the Transfer of Property Act. That section only deals with the right to redeem a mortgaged property. But, it does not deal with the question of personal liability of the debtor. That section only gives a right of redemption to the transferee from the mortgagor. But it does not state that the transferee from the mortgagor will be personally liable for the mortgage debt, where, otherwise, according to the substantive law, he is not so liable.

5. The next argument of Mr. M. C. Shah is based upon Section 7 of the B.A.D.R. Act. That section is as follows :

'No application shall lie under Section 4 for adjustment of any debt due from a debtor to whom such debt has been transferred or assigned after the 1st January 1938 by any person who is not himself a debtor.'

Mr. M. C. Shah contends that this section is clearly an authority for the proposition that an application for adjustment of debts can be made not only by a person who is personally liable, but also by a person who was not originally personally liable for the debts. I cannot agree with this submission. In the first instance, it is important to notice that this is a disabling section. It does not confer any right upon any person to make an application for adjustment of debts. That

right is conferred only by Section 4 and it is to that section that one must turn to answer the question raised. But even if the principle of section 7 is brought in aid for the purpose of interpreting Section 4 of the B.A.D.R. Act, in my opinion, it does not help opponent No. 1 in meeting the point which is raised on behalf of the petitioners. Even if the aforesaid section is so interpreted as to confer a right upon a transferee or assignee of the original debtor, the transferee or assignee, in order to succeed, must prove that he is either a transferee or an assignee of the mortgage debt. Therefore, in my opinion, Section 7 of the B.A.D.R. Act cannot help opponent No. 1.

6. Mr. M. C. Shah also referred to Order 34, rule 1. He contended that, in a suit for redemption, the mortgagor is a necessary party. This is so. But that does not mean that the debt which is to be adjusted is the debt of the purchaser of the equity of redemption. It may be that if Fakirbhai himself had filed an application under Section 4 of the B.A.D.R. Act, then, Fakirbhai would have been entitled to get the present mortgage-debt adjusted. Whether a purchaser of the equity of redemption would have got any benefit out of that or not is a question which does not fall to be determined in the present application. But the fact is that Fakirbhai has not made an application. The fact that Fakirbhai would be a necessary party to a suit for redemption does not necessarily mean that the debt is one in which Laxmidas is personally interested. Therefore, in my opinion, order 34, rule 1 of the Civil Procedure Code also cannot help opponent No. 1 in meeting the aforesaid point.

7. The last point which was urged by Mr. M. C. Shah was based upon the definition of the word 'debtor' as given in the B.A.D.R. Act, in section 2, sub-section (5). That section states that a debtor is one, who, amongst other things, is indebted. Mr. M. C. Shah contended that a person may be indebted although he may be personally liable for the debt. He contended that though the word 'debt' has been defined in sub-section (4) of Section 2 aforesaid, the word 'indebted' has not been defined. He contended that, having regard to the object of the B.A.D.R. Act, which was to adjust all the debts of agricultural debtors, in whatever way they may have been incurred, I should put a liberal construction upon the word 'indebted' and construe the word in such a way as to include the case of opponent No. 1. In my opinion, even if the aforesaid contention of Mr. Shah were to be upheld, it would not help him at all. This is so because, as already pointed out, in order that that person may be entitled to make an application under Section 4 of the B.A.D.R. Act, the debt to be adjusted must be his debt. If a debtor has an adjustable debt and is entitled to make an application, even then, he is not entitled to include in the application a debt which is not his own according to the substantive law. The debt included in the application must be 'his debt'. Therefore, before a person can succeed in an application for adjustment of a debt, it is necessary for him to establish that the debt which he seeks to adjust is his debt.

8. In view of the aforesaid discussion, I have come to the conclusion that the opponent No. 1 has failed to establish that the mortgage debt, which he seeks to adjust in the present case, is his debt, and, consequently, in my opinion, the award which was passed by the B.A.D.R. Court and upheld by the appellate Court is not sustainable.

9. The view which I have taken that a purchaser of equity of redemption is not liable for the mortgage-debt also derives support from the observations made by Mr. Mulla in his Transfer of Property Act (4th Edn.) at page 444. This is what Mr. Mulla says :

'The personal covenant does not run with the land and no personal decree can be made against purchaser of the equity of redemption. Thus in 39 Ind App. 7 (PC) a purchaser of equity of redemption retained a part of the purchase money under an agreement with the mortgagor to pay the mortgage debt, but the judicial committee held that he was not personally liable to the mortgagee under Section 90 of the Transfer of Property Act, now the Code of Civil Procedure, Order 34, rule 6, as he was not party to the sale, nor could he be held liable on the ground that he held the money in trust for the mortgagee.'

Before I part with this case, there is one more point which I wish to mention, and that is regarding that part of the definition of the word 'debt' which states that the 'debt includes mortgage money the payment of which is secured by the usufructuary mortgage of immovable property.' In my opinion, this part of the definition does not make the successor-in-title of a usufructuary mortgagor personally liable for the debt. The aforesaid part of the definition is only intended to include in the definition a case which otherwise would have been excluded from its purview by the general law, and would have debarred a usufructuary mortgagor from taking advantage of the B.A.D.R. Act. The general law is that usufructuary mortgagor is not personally liable for the mortgage debt. Therefore, if the aforesaid part of the definition were not there, then, it could have been contended that the usufructuary mortgagor was not liable for payment of the mortgage debt, and, therefore, not entitled : to make an application under the B.A.D.R. Act. It is in order to meet such an argument that the aforesaid part of the definition appears to have been introduced by an amendment which was made in the Act by Bombay Act 70 of 1948.

10. For the aforesaid reasons, I have come to the conclusion that the debt which the present opponent No. 1 seeks to adjust is not his debt within the meaning of section 4 of the B.A.D.R. Act, and consequently, the application for adjustment of that debt did not lie. The revision application, therefore, deserves to be allowed. Accordingly, I make the rule absolute. The award and the order of the Appellate Court are set aside. The B.A.D.R. Application is dismissed.

11. Having regard to the fact that this point was not raised in any of the Courts below and was raised for the first time in this Court, there will be no order as to Costs.

Revision allowed.