Sansarman vs Mt. Ram Dulari And Ors. on 6 October, 1950

Equivalent citations: AIR1952ALL459, AIR 1952 ALLAHABAD 459

Author: Ghulam Hasan

Bench: Ghulam Hasan

JUDGMENT

Ghulam Hasan, J.

1. This second appeal has been referred to a Bench by Sankar Sarah J., as in his opinion there was a conflict of authority between the Allahabad High Court and the late Chief Courth of Avadh.

2. The facts leading to the reference are these:

> Two persons Nandkishore and Bhagwat Prasad made a posessory mortgage on 16th August 1912 in favour of Shri Krishen in respect of 11 plots measuring 2.54 acres for 15 years. Nandkishore died and Bagwat prasad made a simple mortgage of five plots on 30.7.1924 in favour of Sansarman, the son of the original mortgagee, Shri Krishen for Rs.600 giving credit for the consideration of the previous mortgage. Bhagwat Prasad also died and his window Ram Dulari sold the quity of redemption in a portion of the mortgaged plots to Dabhal and Mohan including certain other property for Rs. 750. (Ex. 2). Rupees 636 were made dehanid Sansarman filed a suit in 1937 on the basis of mortage of 1924 impleading Ram Dulari and her tranferees under B-1. A permilinary decree ofor recovery of Rs.1,249 6-0 by sale of the property was made on 3rd June 1937. On 31st May 1941, Ram Dulari applied for amendment of the decree under the Debt Redemption Act. The decree was amended in August 1941. A year later in August 1942 Sansarman made an application for making the preliminary decree final. Dabhal and Mohan resisted the application on the ground that the mortgage had been paid off by the usufruct of the deed of 1912. The Court of first instance made the decree final and dismissed the objection. The lower appellate Court allowed the appeal and found on accounting that nothing was due to the decree-holder except certain costs which were awarded to him under the preliminary and the final decree. The decree-holder has appealed.

3. The only point has been raised before us in whether the sale (Ex. B-1) had the effect of transferring the liability for the repayment of the loan to the transferee within the meading of

Section 2(9) U.P. Debt Redemption. Act, and whether on that account the judgement-debtors were deprived of the benefit of the Act. This point is raised in grounds Nos. 1 and 2 of the memorandum of appeal. This question has been the subject-matter of judicial decisions, both in Allahabad and Avadh on a number of occasions and has been authoritatively decided.

4. In Muneswar Bux Singh v. Jang Bahadur, 1944 Oudh W. N. 505, the matter came up before me and Madeley J. and it was decided that when there is a transfer of liablity from the transferor to the transferee, the debts ceases to be loan within the meaning of Section 2 (9) and the transferor renders himself disentitled to the benefits of the Act. This view was followed by a Bench of Misra and Kaul JJ. in Ram Prasad v. Bachcha Singh, 20 Luck

435. It was held that whenever tht liability of a borrower for the repayment of an advance is extinguished and that of another person is brought into existence by virtue of a transfer for valuable consideration, the transation ceases to be a loan within the meaning of the Debt Redemption Act. It was also held that the liability to repay the advance may be transferred either by voluntary alienation or may devolve on a purchaser at an auction sale in execution of a decree.

5. A similar view was taken by Kaul J. sitting singly in Bisheshar Nath v. Ram Nath, 1945 Oudh W.N. 151. This view received confirmation from another Bench of which I was a member in Minhin Lal v. Chittar, 1947 Oudh W.N. 576. The head-note of that case reads:

> "Where even a portion of the property morgaged is sold and the money is left with the venee to pay off the mortgagee, the mortgage-debt ceases to be loan as the liability is transferred and the mortagor renders him self to be disentitled to the benefits of the Debt Redemption Act.
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> The primary liability in all such cases vis-a-vis the creditor is that of the person who is in possession of the encumbered estate, and this liability devolves upon him by reason of the transfer which amounts to a contract for the purpose of Sub Section (9) of Section 2 fo the Act."

The Allahabad cases are in conformity with this view. In Saran Singh v. L. Miththan Lal, A.I.R. (33) 1946 ALL. 174, a Full Bench of the Allahabad High Court construed the words "recoverable" and "liability for repayment" in Section 2(9) in a wider sense so as to refer to the right to recover and the liability to repay in the sense of the ultimate incidence of the burden of mortgage-debt. The learned Chief Justice, sitting with Varma and Braund JJ., held that in a case in which a mortgagor, as between himself and a second party or a purchaser of the equity, has left a sufficient part of the mortgage or purchase money in the hands of the second mortgagee, or purchase, he has certainly as between them transferrd the entire liability for the mortgage in the sense of the ultimate burden of bearing it. There is thus a transfer of the liability for repayment by contract with the borrower within the meaning of Section 2(9) of the Act and from that moment the mortgage-debt ceases to be a loan within the meading of the Act. The decision of Plowden J. in Badri Das v. Qibul Chand, 1943 ALL. L w 288 to the effect the transfer by a mortgagor of his entire equity of redemption might effect a transfer within a meaning of Section 2(9) but the transfer of a part of the equity would not, was not

approved, The view of Plowden J. was also shared by some members of the Court in certain cases unreported. It was remarked by the learned Chief Justice:

> "It is not, we think, transfer of the quity in the land that is the determining factor, but the transfer of the liability for repayment."

The Avadh view expressed in Muneshwar Bux Singh's case, (1944 oudh W.N. 505) was followed.

6. This decision was followed by another Full Bench of the Allahabd High Court consisting of Malik C. J., waliullah and Seth JJ. in Mahmud Hasan Khan v. Narayan, A.I.R. (36) 1949 ALL. 210. The case was referred to the Full Bench, in the case of Saran Singh v. L. Miththan Lal (A.I.R.(33) 1946 ALL. 174) did not fully consider the decision in Shiam Sunder Lal v. Data Ram, A.I.R. (33) 1946 ALL. 147. This matter is dicussed in para. 9 of the report. The decision in Shiam Sunder Lal's case has been relied upon before us as well. That case decided that liability in the proviso to Section 2 (9) means the whole liabilkity. It also held that the original borrower, not having trasnferred either the liability to repay the debt or the whole of the mortgaged property, remained liable for its repayment and the debt, theredore, did not cease to be a loan, The learned Chgief Justice rightly remarks that both these points were fully considered in Saran Singh's case by the Full Bench and though the former view was upheld, the latter namely, that ehte transfer of the entire mortgaged property must take place, was not accepted, it being remarked that the question whether the debt continues or ceases to be a loan did not depend upon the transfer of the mortgaged property but on transfer of the liability for its repayment. The contention raised on behalf of the respondents based upon Shiam Sunder Lal's case has been effectively answered by the Full Bench. It appears clear, therefore, that there is no conflict whatever between the views taken by the two Courts prior to the amalgamation.

7. It was also contended for the respondents that there was a partial transfer of the liabilty in that only Rs. 636 were left for payments to the mortgagee while he obtained a decree for Rs. 1249. A reference to the deed shows that what was transferred was the whole liability under the simple morgate of 1924. Whatever the amount of the liability may be of course in the recital of consideration at the foot of the deed the principal consideration of Rs. 600 had to be mentioned but the obvious intention of the vendor was that the liability under the deed had to be satisfied by the vendee whatever the amount. The reference to the deed was only descriptive. In Saran Singh's case (A.I.R. (33) 1946 ALL. 174) as well the facts were similar. Rs 436 were lefts with the transferee but the mortgagee ultimately got a decree for over Rs. 5000. This point was considered in Minhin Lal v. Chattar, 1947 Oudh W.N. 576 where it was remarked that the primary liability in all such cases vis a-vis the creditor is that of the person who is in possession of encumbered estate, and liability devolves upon him by reason of the transfer which amounts to a contract for the purpose of Sub-section (9) of Section 2 of the Act.

8. The result of the foregoint discussion is that this appeal must be allowed. The appeal is accordingly allowed, the decree of the lower appellate Court is set aside and the objection of the judgment debtor is dismissed and the final decree stands. The appellant will be entitled to his costs from the respondents in all the Courts.