

## **Mohan Lal And Ors. vs Gokaran Singh And Ors. on 15 December, 1953**

**Equivalent citations: AIR1954ALL716, AIR 1954 ALLAHABAD 716**

### **JUDGMENT**

Malik, C.J.

1. This is a Special Appeal against the decision of a learned single Judge. The facts of the case are that Bhola Singh and his son Hakim Singh had mortgaged certain properties to Mohan Lal and others in the year 1926. On 1-2-1932, Bhola Singh sold his half share in one of the villages to Subedar Singh. A suit, No. 35 of 1932, was filed by Mohan Lal and others against the mortgagors but Subedar Singh was not impleaded. The preliminary decree was passed on 21-4-1932, and the final decree on 4-3-1933. In the year 1936 Bhola Singh and Hakim Singh applied under the Encumbered Estates Act. Mohan Lal and others claimed that they were creditors and they proved their debt. On 11-3-1939 a decree under Section 14 of the Encumbered Estates Act was passed in their favour against the landlord applicants. In the year 1940 Subedar Singh sold the 8 Biswansi share purchased by him in 1932 to Gokaran Singh.

This share had been included, by Bhola Singh and Hakim Singh in the list of properties belonging to them. Gokaran Singh filed an objection under Section 11 of the Encumbered Estates Act in the year 1944. His objection was allowed and the 8 Biswansi share was excluded from the list of properties belonging to the landlord-applicants. Mohan Lal and others then filed an application under Section 9 (5) (a) of the Encumbered Estates Act for apportionment of the debt on the ground that Gokaran Singh, being in possession of a part of the mortgaged property, was liable to pay a portion of the debt and the debt should, therefore, be apportioned between the landlord-applicant and Gokaran Singh. The trial court granted the application and held that Gokaran Singh was liable to pay Rs. 741/-. Gokaran Singh filed an appeal and the learned District Judge allowed the appeal and set aside the order of the trial court on the ground that Gokaran Singh was not a joint debtor. On a further appeal to this Court the learned Judge affirmed the decision of the lower court and dismissed the appeal but for different reasons.

2. The learned Judge, however, gave leave to file a special appeal and this appeal has been filed against his decision. The appeal was rightly dismissed by the learned single Judge though in our view the appeal should have been dismissed for reasons other than those given by the learned single Judge. The learned Judge was of the opinion that a debtor under the Encumbered Estates Act was a person who was personally liable for the payment of a debt and the apportionment of a debt could, therefore, be made only between co-debtors personally, liable for payment. The learned Judge relied on the first part of Section 4 of the Encumbered Estates Act in support of the proposition. Relevant portion of Section 4 is as follows :

"At any time within one year after the date on which this chapter (chapter 3) comes into force any landlord who is subject to or whose immovable property or any part thereof is encumbered with private debts...." The learned Judge from this deduced that a landlord "is subject to" a debt for which there is personal liability, and, if, however, there is no personal-liability, he is not "subject to" the debt and the debt is only recoverable from the property.

3. We do not think that this reasoning was, with great respect to the 'learned Judge, sound. All that the Section means is that the landlord should be liable for secured or unsecured debts before he can apply under the Encumbered Estates Act. Even a debtor who is not personally liable but whose property is liable to be taken in satisfaction of his debts can apply under the Encumbered Estates Act. The word 'debtor' has not been denned but 'debt' includes (see Section 2 (a), Encumbered Estates Act) "any pecuniary liability except a liability for unliquidated damages." A debtor, therefore, is a person who has any pecuniary liability; it does not mean that the pecuniary liability must be personal liability and will not include a liability recoverable only from his property. We, therefore, do not agree with the reasoning of the learned Judge but there are other reasons why this appeal must fail.

4. We have already pointed out that when the mortgagees filed the suit on the basis of the mortgage in the year 1932 they did not implead Subedar Singh and the decree obtained by them was only against the original mortgagors, Bhola Singh and Hakim Singh, or their heirs. The mortgagees had no right to file a second suit on the basis of the same mortgage and obtain a decree against Subedar Singh. Order 34, Rule 1, Civil P. C. provides that "Subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage."

The Rule does not say what would be the consequence of non-joinder of some of the persons interested in the mortgage security or in the right of redemption. There has been considerable difference of opinion in the High Courts on the point whether the result of such non-joinder must prove fatal to the suit or it is possible to apply to it the provisions of Order 1, Rule 9 of the Code. If the defect is detected during the pendency of the suit and the period of limitation has not expired, it is always possible to remedy the defect by impleading those who had been wrongly left out, but unless the integrity of the mortgage has been broken the mortgage is one and the liability of the mortgagors is joint and several and it is difficult to see how a second suit can be brought against some of the mortgagors who were not impleaded in the first decree for sale. Even if, however, it be assumed that a second suit against Subedar Singh could be filed, the period of limitation for such a suit expired in the year 1938 on the expiry of twelve years from the date of the mortgage.

5. Sri Baleshwari Prasad, learned counsel for the appellants, has urged that limitation ceased to run after 1936, as a suit on the basis of a joint debt could not be filed by reason of the provisions of Section 7 of the Encumbered Estates Act. If there was a joint debt and Bhola Singh, Hakim Singh and Subedar Singh were co-debtors, it was not open to the mortgagees to file separate suits against each co-debtor for sale of the mortgaged property and obtain separate decrees. They should have, in accordance with the provisions of Order 34, Rule 1, Civil P. C., impleaded all the co-debtors as

parties to the suit. If, on the other hand, by some process of reasoning, not clear to us, the debt got so split up that the mortgagees had a right to file separate suits against each mortgagor, then there was no reason why the limitation against those who had not applied under the Encumbered Estates Act should not continue to run.

6. There is one more reason for dismissing this appeal. Gokaran Singh had filed an objection under Section 11 of the Encumbered Estates Act and his objection was allowed. In a proceeding under Section 11 of the Encumbered Estates Act the learned Special Judge has to determine whether the property claimed by an objector is liable to be sold or mortgaged in satisfaction of the debts of the landlord applicants. By granting the application under Section 11 of the Encumbered Estates Act the learned Special Judge must be deemed to have held that the property claimed by Gokaran Singh was not liable for the debts of the landlord-applicants. After that decision it was no longer open to Mohan Lal and others to claim that Gokaran Singh was a co-debtor and there should be apportionment of the debt.

7. The appeal has, therefore, no force and is dismissed with costs.