

## **Brahma Din And Ors. vs Bachan Pershad And Ors. on 17 March, 1952**

**Equivalent citations: AIR1953ALL242, AIR 1953 ALLAHABAD 242**

### **JUDGMENT**

Beg, J.

1. This is a first appeal arising out of an application for redemption under Section 12, U. P. Agriculturists' Relief Act, 1934. The facts giving rise to the case may be briefly stated as follows:

2. On 23-12-1889, Salik Ram and Shrimati Rukmin executed two mortgage deeds for Rs. 5,500/- and Rs. 300/- in favour of three persons named Daljit, Ram Ratan and Niranjan. On 17-4-1936, one Data Ram, a successor-in-interest of the mortgagors, gifted the property in question to Brahma Din, the father of the applicant Bachan Prasad. Thus, after the death of Brahma Din the applicant became the sole representative-in-interest of the original mortgagors. He gave this application impleading 18 persons as opposite-parties. These 18 persons are the successors-in-interest of the three original mortgagees.

The two mortgage transactions in respect of which the application for redemption was given appear to be mortgages by conditional sale. Under the terms of the said deeds the mortgagees were put in possession of the mortgaged property and they were entitled to take its profits in lieu of interest. The period given in the mortgage deeds was 40 years. The applicant filed the application under Section 12, U. P. Agriculturists' Relief Act, on 17-11-1944, alleging that the entire mortgage money relating to the two mortgage deeds had been paid off from the profits of the property realised by the mortgagees and that a huge amount remained due to him. He accordingly prayed for a decree for redemption in respect of the mortgaged property without payment of any dues.

3. The application for redemption was resisted by the opposite-parties on various grounds, all of which were decided against them by the trial Court. The trial Court decreed the suit for redemption without payment of any amount by the applicant. Dissatisfied with the judgment of the trial Court, 16 opposite-parties filed this appeal in this Court impleading Bachan Prasad, the applicant, as respondent 1 and the two remaining opposite-parties as respondents 2 and 3.

4. Before the argument started the learned Counsel for respondent 1 took a preliminary objection based on the ground that Ram Bharosey, appellant 2, Ram Ball appellant 4, Ragu-bans appellant 7, Shrimati Ram Bitana appellant 8 and Maharaj Gajadhar Prasad respondent 3, having died during the pendency of the appeal & their legal representatives not having been brought on the record within time the whole appeal had abated. The facts relevant to this objection were incorporated in

Civil Miscellaneous Application no. 419 of 1949 dated 24-3-1949. In reply to the said application, a counter-application was filed in this Court on behalf of the appellant Sheo Dutt (Civil Misc. Application No. 855 of 1949) in which a prayer was made for impleading the heirs of the deceased parties under Order 1, Rule 10 and Section 151, Civil P. C. The learned counsel for respondent 1, however, did not press his application and wanted the case to be argued on the merits. In these circumstances it is not necessary to give a decision on the preliminary point which was raised on behalf of respondent 1 by his application No. 419 of 1949.

5. The main point argued by the learned Counsel appearing for the appellants in this case is that the transactions embodied in the mortgage deeds in question do not relate to loan as defined in Section 2 (9), U. P. Debt Redemption Act, and, therefore, the trial Court was not justified in giving the benefit of the said Act to the applicant. In this connection the learned Counsel referred to the terms of Ex. 2, the mortgage-deed for a sum of Rs. 5,500/- dated 23-12-1889, and of Ex. 3, the second mortgage deed for a sum of Rs. 300/- of the same date. According to the terms of the deeds in question the mortgagees were put in possession of the mortgaged property for a period of 40 years in lieu of the interest on the amount advanced. After the expiry of 40 years it was stipulated that the mortgage money due under the said deeds shall be paid to the mortgagees and the property shall be redeemed. If the mortgagors did not pay up the said amount, the mortgaged property shall be deemed to have been sold to the mortgagees, who would be considered to have become vendees of the same.

The definition of loan as given in Section 2 (9), U. P. Debt Redemption Act, is as follows:

" "loan" means an advance in cash or kind made before the first day of June, 1940, recoverable from an agriculturist or a workman or from any such person and other persons jointly or from the property of an agriculturist or workman and includes any transaction which in substance amounts to such advance, but does not include an advance the liability for the repayment of which has, by a contract with the borrower or his heir or successor or by sale in execution of a decree been transferred to another person or an advance by the Central or States Government or by a local authority authorised by the States Government to make advances or by a co-operative society or by a Scheduled bank :

"Provided that an advance recoverable from an agriculturist or from an agriculturist and other persons jointly shall not be deemed to be a loan for the purposes of this Act unless such advance was made to an agriculturist or to an agriculturist and other persons jointly".

Learned counsel appearing for the appellants placed emphasis on the word "recoverable" in the above definition and argued that in order that a transaction should be a loan under the Debt Redemption Act it is necessary that the money should be recoverable as such either from the person of the mortgagor-agriculturist or from his property. In the present case the loan was not recoverable in either manner hence it could not be a "loan" under the U. P. Debt Redemption Act. We have given our serious consideration to this argument of the learned Counsel and we find ourselves unable to

accept his contention. It is, no doubt, correct that in a deed of mortgage by conditional sale of the nature of Exs. 2 and 3, which are before us, the mortgagees have no right to recover the money from the mortgagor personally or from his property but it does not follow from that that the loan in question was not recoverable in the manner mentioned in Section 2 (9), U. P. Debt Redemption Act.

The mortgagee in such case possesses a right to foreclosure as denned in Section 67, T., P. Act, according to which he has, at any time after the mortgage money has become due to him and before a decree has been made for the redemption of the mortgaged property or the mortgage money has been paid, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property. It seems to us that the right of foreclosure given to the mortgagee of the mortgage by conditional sale under Section 67, T. P. Act, is nothing but a method prescribed by law for the recovery of the loan advanced by him by seeking the relief of foreclosure against the mortgagor's property.

The effect of passing such a decree for foreclosure in favour of the mortgagee would be to destroy the right of redemption possessed by the mortgagor in the mortgaged property thereby making the mortgagee the owner of the entire right, title and interest possessed by the mortgagor in the said property. It appears to us that the right of foreclosure is nothing but a process for the recovery of loan given to the mortgagor by seeking the relief prescribed under Section 67, T. P. Act.

6. The meaning of the word "recoverable" as given in the Iyer's Law Lexicon is as follows:

"The plain, ordinary and natural meaning of the word "recoverable" is that which is able to be, or is capable to be, or is capable of being recovered; obtaining 'obtainable from a debtor or possessor, as by legal process'. It means that which can be recovered as a matter of a legal right."

The argument advanced by the learned counsel for the appellants seems to us to proceed on the erroneous assumption that a loan can be said to be recoverable only by payment in the form of money. The Transfer of Property Act has prescribed various methods of the satisfaction of loans advanced by way of mortgage. Sale of property is one of the methods and foreclosure is another method of the satisfaction of the loan. In the case of sale the satisfaction may be effected by the mortgagee being paid in the form of cash and in the case of foreclosure the loan can be said to be discharged by vesting the mortgagee with the enlarged rights that accrue in his favour as a result of the decree of foreclosure being passed in respect of the property.

We can find no warrant for the meaning sought to be attributed to the word "recoverable" by the learned Counsel appearing for the appellants. He has, however, argued that the word "recoverable" should be strictly construed and if that method of construction is adopted, then a transaction of mortgage by conditional sale would be excluded from the definition of the word "loan" in Section 2 (9), U. P. Debt Redemption Act. If the preamble of an Act is a guide to the interpretation of the sections, then it seems to us that there can be absolutely no justification for including all other kinds of mortgages within the definition of "loan" in Section 2 (9), U. P. Debt Redemption Act, and excluding mortgages by conditional sale only from the definition. There seems to be no ground for

making any such distinction.

The purpose of the Act as defined in the preamble of the Act is "to provide for further relief from indebtedness to agriculturists and workmen in the Uttar Pradesh". A mortgagor who enters into a transaction of mortgage by conditional sale is as much indebted as a mortgagor who enters into a transaction of simple mortgage or usufructuary mortgage or an English mortgage or an anomalous mortgage. Under Section 58(a), T. P. Act, a mortgage is defined as a transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. This is a feature which is common to all mortgages of whatever kind or species they may be.

Mortgage by conditional sale, like other mortgages, is stamped with the same characteristic as there is in it as in all other mortgages a transfer of interest in immoveable property for the purpose of securing the payment of money advanced. The relief of foreclosure is, therefore, a method for the purpose of satisfying the claim of the mortgagee to the payment of money by taking away the right of redemption which the mortgagor possessed in the property. We have no doubt in our minds that the transactions in question are loans within the meaning of the Debt Redemption Act and the applicant was entitled to the relief granted to him by the trial Court.

7. The learned Counsel for the appellants has next argued that the transactions in question cannot be deemed to be a loan on another ground which he advanced as an alternative argument in favour of the appellants' case. He based this argument on the deed of gift (Ex. 1) executed by Data Ram in favour of Brahma Din, the father of the applicant, and he argued that the liability for the repayment of the loan having been transferred by the said deed, the loan in question would cease to be a loan under the definition of the same in Section 2 (9), Debt Redemption Act. This argument ignores the obvious words of the section in question according to which the exemption would apply only where such a liability is transferred "by a contract with the borrower or his heir or successor or by sale in execution of the decree." In the case of a gift it cannot be said that there has been any transfer by a contract with the borrower or his heir or successor or by sale in execution of a decree. The transaction in question must, therefore, be held to be a loan and cannot be deemed to have gone out of the ambit of the definition of loan as a result of the deed of gift referred to on behalf of the appellants.

8. Lastly the learned counsel for the appellants argued that it is open to this Court in appeal to vary the decree in favour of the mortgagees, who are not parties to this appeal. In this connection he relied on Order 41, Rule 4, Civil P. C. This question would only have arisen if we had accepted his initial contention that the transaction in question is not a loan. In view of the conclusion arrived at by us that the decision of the trial Court was right and the transaction in question is a loan, it is not necessary for us to go into this matter.

9. No other ground mentioned in the memorandum of appeal has been pressed on behalf of the appellants. We find no force in this appeal, which is accordingly dismissed with costs. The connected applications (civil Misc. Applications NOS. 419 and 855 of 1949) are also dismissed. Stay order,

dated 10-12-1945 is vacated.