Sheo Balak vs Sarabjit Singh And Ors. on 7 December, 1951

Equivalent citations: AIR1952ALL516, AIR 1952 ALLAHABAD 516

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Bench: V. Bhargava

JUDGMENT

Kidwai, J.

1. On 5-1-1917, Lal Bahadur, Sant Bux Singh, Bhagwan Bax Singh and Gajadhar Singh, mortgaged some property to Hardat Singh to secure a loan of Rs. 1,800 which they took from him. Out of this sum Rs. 1000 was to be paid to Lal Bahadur and the other three mortgagors were to get Rs. 800.

2. The money payable to Lal Bahadur was not paid to him bat it was utilised by the other three mortgagors. Lal Bahadur pressed for payment but, since his co-mortgagors could not pay it in cash, they on 6-1-1917, executed a mortgage leed in Lal Bahadur's favour by which they hypothecated 41 bighas 11 biswas 15 biswansis of land belonging to them and delivered possession 60 the mortgagee.

3. On 11-1-1945, Sarabjit Singh, Hansraj Kaer and Janak Kaj Kuer, the successors of Sant Bux Singh, Bhagwan Bux Singh and Gajadhar Singh, applied under Section 12, U. P. Agriculturists' Relief Act, against Sona Kunwar, Nanda Sheo Balak and Lotawan, the successors-in-interest of Lal Bahadur for redemption of the mortgaged property. They did not make any deposit for payment to the mortgagee because they alleged that, on accounting in accordance with the provisions of the Debt Redemption Act, the entire debt would be found to have been discharged out of the usufruct of the mortgaged property.

4. The successors of the mortgagee pleaded that the mortgagors-applicants were not entitled to the benefits of the U. P. Debt Redemption Act since the transaction was not a loan within the meaning of that Act.

5. The learned Munsif upheld this contention and allowed redemption on payment of Rs. 1,000. The mortgagors appealed, and the learned Additional Civil Judge of Sultanpur allowed the appeal. He held that the mortgage in question was a "loan" within the meaning of that term as used in the U. P. Debt Redemption Act and that the entire amount of the debt had been paid off out of the usufruct, He accordingly ordered redemption without payment of any money.

6. Nanda and Sheobalak applied in revision and the case came up for disposal before our learned

brother Brij Mohan Lal, J. who found that there existed a conflict of opinion as to whether a mortgage such as the one involved in these proceedings is or is not a loan within the meaning of that term as used in the U. P. Debt Redemption Act. He accordingly framed the following question for decision by a Full Bench :

> "Where some of the co-sharers appropriate money due to another co-sharer and in satisfaction of that liability execute a mortgage deed in favour of that other co-sharer, does the transaction evidenced by the mortgage deed amount to a loan within the meaning of the term as defined in the Agriculturists Relief Act and the Debt Redemption Act?"

7. This Full Bench has accordingly been constituted to decide the question referred.

8. The definition of loan in Section 2 (9) of the U. P. Debt Redemption Act reads as follows :

> "'Loan' means an advance in cash or kind made before the 1st day of June, 1940, recoverable from an agriculturist or 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 an advance. ....."

9. The question that arises is whether in a case such as that contemplated by the question referred there is "an advance in cash or kind."

10. Mr. Ayub, who appeared for the appellant, contended that there was no advance at all. All that had happened was that money intended for Lal Bahadur Singh had fallen into the hands of others who were bound to return it to him or to compensate him for it. Thus, although a pecuniary liability arose, which was satisfied by the execution of the mortgage deed in question, there was no "advance in cash or kind" and consequently no "loan" as defined in Section 2 (9), U. P. Debt Redemption Act.

11. The Avadh Chief Court and the Allahabad High Court are agreed that, if goods are purchased on credit, the unpaid price of goods is not a "loan" within the meaning of the Agriculturists' Relief Act, the definition in which is very similar to the definition in the U. P Debt Redemption Act: vide Nihal Singh v. Ganesh Dass Ram Gopal, 1936 Oudh W. N. 1158 and Khincha Mal Hari Kishan Firm v. Khub Ram Munna Lal, 1937 ALL. L. J. 766.

12. In these two cases, there was a sale of goods on credit and all that the vendee was entitled to receive was the purchase price. That price had, in view of the nature of the transaction, been agreed to be paid later but it was nevertheless the price : vide Section 54, T. P. Act. There was no question of any loan having been advanced.

13. In the first of the cases mentioned, the transaction was held not to have become a loan merely by reason of the passing of a decree for the balance of the price This must be so because the decree did not alter the nature of the original transaction and the decree was passed for the balance of the price and not for a refund of a loan.

14. The next case to which reference was made, the Full Bench case of Har Prasad v. Sewa, 1938 Oudh W. N. 753 (F. B.), is not relevant because in that case money was actually advanced and the Court interpreted the agreement entered into at the time of the advance as indicating a loan and not the payment in advance of the price of sugarcane which was agreed to be supplied in repayment of the advance.

15. In Shah Chaturbhuj v. Mauji Ram, 1938 Oudh W.N. 763, (Full Bench) it was held that a decree for defendants for malicious prosecution could not be held to be a decree based on a loan. In such a case at no stage is there any advance of any money or other commodity by one person to another; it is only money made payable to a person in order to compensate him for the tortious act of another.

16. In Narain Das v. Mt. Radha Kuar, A.I.R. (26) 1989 ALL. 47, the decree was passed for the refund of the price of goods paid in advance because the goods were not eventually supplied and for breach of contract. For the same reason as those given in respect of the earlier case no part of the decree could be deemed to be based on a loan.

17. In Rehana Khatun Bibi v. Iqtidar Uddin Hasan, A. I. R. (30) 1943 ALL. 184, a Bench of the Court held that the mahr payable by a Muslim husband to his wife is not a loan within the meaning of the U. P. Debt Redemption Act, because there was never any advance, Mahr stands entirely on a different footing to a loan. It is not payable because the wife has advanced anything to the husband or because she has sold herself to him. It is payable because, in view of the facility with which a Muslim husband can dissolve his marriage, the Shariat law felt it necessary to secure to the wife a certain measure of financial independence, depending upon the contract between the parties. Mahr is sometimes called a consideration for the marriage (which gives rise to the analogy of purchase price) and sometimes a token of respect to the wife. The wife does not get it as a return for money or other commodity which she has advanced to the huaband. Such a transaction can, therefore, not be a loan. This decision also, therefore, does not assist the contention of the appellant.

18. The case of Mohammad Shibli Khan v. Ish Datt Dikshit, A. I. R. (26) 1939 ALL. 398 is, however, of considerable assistance to the appellant's contention. In that case a share in a motor lorry was sold and in order to secure payment of the unpaid price, the share sold and some plots of land were mortgaged. It was held by Mulla J. that the Bale of a share in the motor lorry was not an advance in cash or kind and that the execution of the mortgage deed does not convert the whole transaction into one of "loan." He, therefore, held that the decree obtained on the basis of the mortgage was not a decree based on a loan.

19. This decision was followed by another learned Single Judge in Chitar Singh v. Roshan Singh, A. I. R. (30) 1943 ALL. 301, which was also the case of unpaid purchase price to secure repayment of which a mortgage deed had been executed. The learned Judge held that a decree on the basis of this mortgage was not a decree based on a loan but was a decree for the unpaid purchase price. He was simply content to follow the decision of Mulla J. in the earlier case.

20. In Sudama v. Brij Gopal Dass, A. I. R. (35) 1948 ALL. 36, a Bench of the Allahabad High Court followed the decisions in Shibli Khan's case, A. I. R. (26) 1939 ALL. 398 and in Chitr Singh's case, A.

I. R. (30) 1943 ALL. 301. The learned Judges do not give any reasons for their decision but simply mention the two cases and state that they agree with the decision. They were pressed with the same remarks of Sulaiman J. in Surendra Prasad v. Gajadhar Prasad, A. I. R. (27) 1940 F. C. 10 and with the decision of a Full Bench of the Allahabad High Court in Pratap Singh v. Gulzari Lal, 1942 ALL. L. J. 3 but they say quite rightly that the decisions in these oases were on different points and not on the question raised before them. It seems, however, that the Division Bench decision in Padam Singh v. Raj Saran Singh, A.I.R. (32) 1945 ALL, 144, was not placed before the learned Judges and they did not consider the reasoning upon which that case is based.

21. In Ram Prasad v. Lala Hansraj, A.I.R. (37) 1950 ALL 106, Wanchoo J. also followed the view of Malla J. in Shibili's case, A. I. R. (26) 1939 ALL. 398 He noted that in Padam Singh v. Raj Saran Singh, A I. R. (32) 1945 ALL, 144, a different view had been taken by a Division Bench of the Court, of which Mulla J. was also a member, but he thought that case could be distinguished because in that case the original transaction on which the decree was based "was certainly a loan." He concluded that in the case before him, in which a mortgage-deed had been executed to secure the unpaid price of some land "there is no question of their (the sellers) advancing any money to the judgment debtors appellants who are the purchasers. The mortgage was taken merely as a security for the unpaid price and the transaction cannot, therefore, amount in substance to a loan."

22. With all respects, it must be submitted that the distinction which the learned Judge draws between the case before him and the case of Padam Singh, A. I. R. (32) 1945 ALL. 144 does not in fact exist and further other later decisions of the Court do not seem to have been placed before the learned Judge. In Padam Singh v. Raj Saran Singh, A. I. R. (32) 1945 ALL. 144, a pronote was executed to satisfy the balance of the amount due under a decree. In a suit on the basis of that pronote relief was claimed under the provisions of the Agriculturists' Relief Act. The learned Judges take care to point out "We do not think that the pronote in suit was the renewal of any previous loan. Indeed there is nothing to show that there was any loan within one meaning of the Agriculturists' Relief Act which formed the basis of the decree." (Thus the distinction which Wanchoo J. draws is clearly negatived.) The learned Judges then proceed :

> "The question, however, remains whether the execution of the pronote in suit was not in itself a transaction which was in substance a loan within the meaning of Section 2 (10) (a) of the U. P. Agriculturists' Relief Act and we think that the answer must be in the affirmative. It is evident that, if the sum of Rs. 9,000 odd had actually been advanced on 23-1-1937, and a pronote had been obtained by the plaintiff-appellant from the defendant-respondent, there could be no doubt that the transaction would have been a loan. We do not see any difference in principle in the money due under the decree, though not actually paid at the time, bang treated as an advance to the defendant-respondent and the pronote in suit being obtained from him. In our judgment, this transaction was clearly a transaction which was in substance a loan as contemplated by the Agriculturists' Relief Act, It is true that no money was paid in cash or no advance was made in kind at the time, but in substance and in effect the transaction was undoubtedly a transaction of loan."

23. In Gaya Prasad Sahu v. Ram Abhilakh, 1947 Oudh W. N. 234, a decree had been obtained on the basis of a pronote. The pronote had been executed for the unpaid price of some grain purchased by the judgment-debtor. The question arose whether the pronote was a loan within the meaning of that term in the U. P. Debt Redemption Act. I preferred the decision in Padam Singh's case, A. I. R. (82) 1945 ALL. 141 to the decision in Shibli Khan's case, A. I. R. (26) 1939 ALL. 398, on the ground that the execution of the bond was evidence of the intention of the parties to place themselves upon an entirely new footing and to convert the liability for the unpaid purchase price into a liability to pay the consideration of a bond.

23a. The same reasoning was adopted by the two Division Benches of this Court, of both of which My Lord the Chief Justice was a member, in Joti Prasad v. Mohammad Mohtarim, 1949-4 D. L. R. (ALL.) 240 and Qanayat Husain v. Mt. Sajidunnisa Bibi, A. I. R. (36) 1949 ALL. 499. In the first of these cases, a pronote was executed for the unpaid price of goods sold to the debtor and it held that this was a loan.

24. In the second case a husband owed dower to his wife. A decree was passed in her favour for this dower. The husband then executed a mortgage-deed of which the consideration was this dower debt. In a suit by the wife on the basis of this mortgage-deed, it was held that the transaction was a loan within the meaning of the D. P. Debt Redemption Act. In the course of his judgment, My Lord the Chief Justice said :

> "The claim was, however, not to recover dower debt hut to recover the money due on the basis of a mortgage-deed. It is true that the plaintiff's decree against her husband was for recovery of money due to her as dower and it was to pay up this decree that the mortgage-deed was executed. But when the mortgage deed was executed, the decree was satisfied and a fresh liability was created under the deed."

25. The cases of Shibli Khan, A. I. R. (26) 1939 ALL. 398 and Padam Singh, A. I. R. (32) 1945 ALL. 144, were then considered and the reasoning of the later case was accepted. These two cases do not seem to have been brought to the notice of Wanchoo J. when he was deciding Ram Prasad v. Lala Hansraj, A. I. R. (37) 1950 ALL. 106, although they are decisions of this very Court. The position accepted in them is, if I may say so with respect, the only logical position.

26. Before the mortgage-deed in the present case was executed, there existed only a liability on the part of the mortgagors to pay to Lal Bahadur money which they had received and utilised although it was meant for him. By the execution of the mortgage-deed that liability was satisfied by a contract of the parties; no claim could be based upon it and in its place the mortgagors became liable to pay the money due under the mortgage. The proof required, the Court in which the suit could be filed and the nature of the decree that could be passed in the suit were all changed, but the most important factor was that, the mortgagee having been put into possession of the mortgaged property could sue for recovery of his money only, if certain conditions were satisfied. Thus his right to enforce the pecuniary liability of Sant Bux Singh, Bhagwan Bux Singh and Gajadhar Singh came to an end and the only right left to Lal Bahadur was his right to enforce his claim under the mortgage.

27. If an existing pecuniary liability is substituted by a fresh liability secured, by a mortgage or pronote, the claim under the mortgage or the pronote must be held to be loan irrespective of the manner in which the original liability arose. In the present case, the effect of the execution of the mortgage in favour of Lal Bahadur was to extinguish the original liability of the mortgagors in respect of the money which they had received on behalf of Lal Bahadur and ultilised themselves and they became liable to Lal Bahadur on the mortgage alone. The effect of the execution of the mortgage was to extinguish the previous liability. The mortgage must, therefore, be considered to have evidenced a transaction of loan in which there was an actual advance which was appropriated by Lal Bahadur in satisfaction of the previous liability of the mortgagors to him.

It is not necessary for me to express any opinion whether where the pronote or the mortgage is obtained merely as a collateral security and the rights existing prior to the execution of the pro-note or the mortgage are not entirely extinguished so that the creditor retains the right to proceed on the basis of the original liability in addition to the rights accruing to him under the mortgage or the pronote the same result will follow. In a case where the original liability is completely extinguished, the execution of the mortgage or the pronote must be held to be a transaction involving an advance, the money advanced being paid by satisfaction of the original liability.

28. Having regard to these considerations I would answer the question referred in the affirmative.

Malik C. J. and Bhargava, J.

29. We agree and have nothing to add.