Har Narain vs Sri Ram on 11 April, 1951

Equivalent citations: AIR1951ALL252

Author: V. Bhargava

Bench: V. Bhargava

JUDGMENT

Agarwala, J.

1. This is a defts'. second appeal in a suit for accounting under section 33, U. P. Agriculturists' Belief Act, read with Section 9, U. P. Debt Redemption Act.

2. One Mohan Singh executed a usufructuary mtge. on 31-10-1901, for a sum of Rs. 199/- in favour of Beni Prasad & Mangal Prasad. The mortgaged property consisted of 11 Biswansi, 14 Kachwansi, 9 Nanwansi & 11 7/9 Athwansi zamindari share including two groves in village. Kalauli, pargana Halamau, tahsil Sandila, district Hardoi. After the execution of the mtge. two deeds of further charge were executed by Mohan Singh in favour of the mtgees. - one on 20-8-1902, for Rs. 50/- and the other on 6-6-1902,, for Rs. 40/-. The original mtgor. Mohan Singh died & was succeeded by his widow, Srimati Ram Kuer. The latter transferred the mortgaged property, with the exception of certain specific plots including one of the groves & the trees standing, thereon, in favour of the pltf. respondent by means of a sale deed dated 18-8-1911. In the sale deed executed by Srimati Ram Kuer no amount was left with the vendees for payment of the amount due under the usufructuary mtge. & the deeds; of further charge. Indeed, no mention of any of the encumbrances was made & the property was sold free from these encumbrances. The original mtgees. also died & the defts. applts. are their legal representatives.

3.4. The pltf. respalleged that the original mtgor. was an agriculturist on the date of the loan & that he (the pltf.) was also an agriculturist, on the date of the suit & that he was entitled to the benefit of the Agriculturists' Relief Act & the Debt Redemption Act & claimed accounting in accordance with the principles laid down Under section 9, Debt Redemption Act. According to him the entire mtge. debt had been paid off. The deft, l alone contested the suit on the ground that the pltf. being a transferee, had no right to get the benefits of the Debt Redemption Act, because the loan had ceased to be a loan in his hands, & further the profits of the property were meagre & that the whole of the debt advanced under the principal mtge. as well as under the two deeds of further charge was still due & payable.

5. The Munsif held that the loan still retained the character of 'loan', because there being no mention in the sale deed of the mtge. & the further charges, there was no contract between the borrower &

the transferee whereby any liability for the re-payment of the loan had been transferred to the transferee within the definition of 'loan' in Section 2 (9), Debt Redemption Act. He further found that the debt had been entirely paid off & gave a declaration to that effect. The lower appellate Ct. confirmed these findings. It, however, was of the opinion that the loan had ceased to be a loan because the transfer of the mortgaged property was only partial.

6. The defts. filed a second appeal in this Ct. The appeal came up before my brother, Misra J., who refd. it to a Bench & the Bench, on account of the apparent conflict; of authority in the decisions of the Allahabad H. C. & of the late Chief Ct. of Oudh, was of opinion that the case may be decided by a F. B. of five Judges.

7. The only point for consideration in this appeal is whether the transaction in respect of which accounting is sought does or does not constitute a 'loan' within the meaning of Section 2 (9), U. P. Debt Redemption Act.

8. On account of the well-known economic slump of the years 1929 & 1930 great distress was caused among the agricultural community. To relieve agriculturists from their indebtedness an Act was passed in the year 1934. This was the Agriculturists' Relief Act. It provided for reduction of interest according to a certain scale & also for payment of debts due by agriculturists by instalments. Another Act was passed in the same year to give relief to landlords - big or small. This was the Encumbered Estates Act. Experience showed that the provisions of these Acts failed to reduce agricultural debts to a level which would enable any measures which may be passed to put agricultural credit on a sound basis in future to be effective. It was, therefore, consd. that further measures of reducing agricaltural indebtedness were necessary. The U. P. Debt Redemption Act, 1940, was passed, as its preamble shows, to provide "for further relief from indebtedness to agriculturists & workmen in the United Provinces". This Act applied to loans incurred before 1-8-1940. A supplementary Act, called the U. P. Regulation of Agricultural Credit Act, 1940, was passed to apply to debts to be incurred from 1-6-1940, onwards. The U. P. Debt Redemption Act applied to suits or decrees passed in respect of loans. 'Loan' was defined in Section 3 (9) 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 & other persons jointly or from the property of an agriculturist or workman & 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 Provincial Govt. or by a local authority authorised by the Provincial Govt. to make advances or by a Co-operative Society or by a scheduled bank;
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> Provided that an advance recoverable from an agriculturist or from an agriculturist & 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 & other persons jointly".

9. It is conceded that the original mtgor. in: the present case was an agriculturist within the meaning of the Act & the pltf. the transferee from the original mtgor. was also an agriculturist on the date of the suit. The proviso to the section, therefore, need not detain us. We are also not concerned with an advance by the Central or Provincial Govt. or by a local authority authorised by the Provincial Govt. to make advances or by a Co-operative society or by a scheduled bank. This clause also may be disregarded for the purposes of the present case. A 'loan', therefore, is an advance in cash or kind (or any transaction which in substance amounts to such advance) which is recoverable, (a) from an agriculturist or a workman, or (b) from any such person or other persons.jointly, or (c) from the property of an agriculturist of workman.'Since the original-loan in the present case is recoverable from the property of the pltf. befalls under Clause (c) mentioned!" above. So far, therefore, he satisfies the definition of loan. Then we have to consider the exception to the rule. The exception comes into play when two conditions are satisfied : (i) The liability for the repayment of the advance has been transferred to another person, & (ii) the transference of liability, is made by a contract with the borrower or his heir or successor or by sale in execution of a decree. The first condition is transference of the liability for the repayment of the loan, & the second condition is merely a mode by which the transfer is made. Both are necessary. Now, what sort of transference of liability is contemplated by the clause we are considering ?

10. Transference of liability can be made in two ways : Firstly, a liability may be transferred by agreement with the creditor. In that case, no further liability of the debtor remains. Secondly liability may be transferred without the concurrence of the creditor. In such a case if the transferee does not repay the advance, the creditor can always recover it from the original debtor or his property. But in that case, if the transference of liability was complete as between the debtor & the transferee, the debtor can recover back from the transferee what he is obliged to pay to the creditor. In both events the debtor is ultimately relieved of theliability.lt is obvious that the transference of liability must be such as makes the debtor completely free from liability even though that freedom is obtained not against the creditor but as between himself & the transferee. it could hardly be the intention of the legislature that the aforesaid clause should come into play only when the liability is transferred with the concurrence of the creditor. If that were so, it would have been a case of substitution of one debtor by another debtor & there would have been no reason why if the substituted debtor were also an agriculturist, he also should not be given. he relief provided by the Act. Again, the language of the clause we are considering does not mention the creditor at all. And further, since he transference of liability can be made by a sale in execution of a decree it is clear that the legislature never intended that the creditor should concur in the transference of the liability. There, fore, we are left with the second kind of the transference of liability, namely, a transference of liability as between the debtor & the transferee, 11. Another point which is clear is that it cannot be said that the liability has been transferred unless it is a transfer of the whole of the liability. If a part of the liability is transferred, the debtor still remains liable for the balance of the liability & it cannot be said that liability for the repayment of the loan has been transferred. 'Therefore, transference of the liability for the repayment of the advance in part will not take the case out of the definition of 'loan'.

12. A third thing which is clear is that there can be no transference of liability if the original debtor is ultimately liable for the payment of the debt. For instance, where the debt is recoverable from the

property of an agriculturist debtor & the property is fraudulently transferred by him to another person after taking full price of the property without disclosing the debt in question, which is an encumbrance upon that property, the debt may be recovered from the property which has now became the transferee's property, but the debtor is still liable to pay the same because the transferee can recover it from him under the provisions of Section 55(1)(g), T. P. Act. That section provides for the duty of the seller:

> "to pay all public charges & rent accrued due in respect of the property up to the date of the sale, the interest on all ineumbranees on such property due on such date, & except where the property is sold subject to incumbrances to discharge all incumbranees on the property then existing."

When the seller transfers to the buyer the property without disclosing to him encumbrances, the seller is himself liable to discharge the encumbrances. As the encumbrances are recoverable from the property, the creditor may be entitled to recover them from the property, which means from the transferee, as the property has become the property of the transferee, but the liability for the debt still remains on the shoulders of the debtor, because the transferee can claim the amount back from him with interest & costs. In such an event, therefore, it could not be said that the liability has been transferred.

13. The same conclusion is reached when we consider the mode of transfer provided in the clause we are considering The transfer must be either (a) by a contract with the borrower or his heir or successor, which means a contract between the borrower, his heir or successor, & the transferees; or (b) by sale in execution of a decree. The contract may be express or implied. But it must be a contract. For instance, when the property is transferred, it may be agreed between the transferor & the transferee that the debt payable out of the property will be paid by the transferee in which case the property is transferred subject to the debt & the debt is specified & the contract is express. If the debt is not pecified & yet the contract is that the transferee is liable to pay all encumbrances upon the property whatever may be found due, the contract is implied. In both events the debt has been transferred completely. But if there is no such contract & the property is sold free from encumbrances, it is clear that the liability for the repayment of the advance has not been transferred, though the transferee may be, in the first instance, liable to pay off the debt out of the property. It is, therefore, clear that there can be no transfer of liability for the repayment of an advance unless the debtor has been relieved from the ultimate payment of the loan.

14. Where part of the property from which a debt is recoverable is transferred by the debtor & the transferee is not made liable by an agreement between the debtor & the transferee for the payment of the whole of the debt recoverable not only out of the property transferred but also out of the property retained by the debtor, it is obvious that the debtor's liability has not been discharged in full. In such a case, there is no transfer of liability for two reasons: firstly, even in the first instance the creditor can recover the liability from the property exempted from sale, that is, from the debtor's property, & secondly that even if the creditor realises the whole of the liability from the transferee the transferee can recover it from the debtor.

15. The mode by which transference of the liability has to be effected is also important. Because it is to be by contract, it cannot be done when there is a gift of the property encumbered with the debt. In the case of a gift of the entire encumbered property where the debt can be recovered from the property of the debtor, the donee becomes liable to pay the debt out of the property gifted & there is a transference of liability because the donee cannot claim the amount back from the donor. The donee has to take the property subject to the encumbrances; but this is not the sort of transference of liability contemplated by the section. The reason is that such transference is not effected by means of a contract.

16. Turning now to the case law on the point, I find that with the exception of two cases, namely, Ram Prasad Singh v. Bachcha Singh, 20 Luck. 435 & Minhin Lal v Ghittar, A. I. R. (36) 1949 Oudh 53 in which certain observations have been made which require consideration, none of the other oases is in conflict with the view I have expressed above.

17. In Pirthi Nath v. Raj Dutt, 1944 O.W.N. 144 there was a transfer of the entire mortgaged property & apparently the entire loan was left with he transferee. It was held that the liability for the repayment of the loan was transferred & the loan ceased to be a loan. It was observed that the contract by which the transference of the liability is effected may be express or implied & further that the creditor need not be a party to the contract.

18. In Muneshwar Bux Singh v. Jang Bahadur Singh, 1944 O. W. N. 505 decided by Ghulam Hasan & Madeley JJ., there was a transfer of a part of the mortgaged property, but the entire mtge. money was left with the transferee. It was held that there was a transference of the liability & the debt ceased to be a loan. It was observed that the contract by which transfer of liability was effected might be express or implied that the contract need not be with the creditor & that the transfer may not be of the whole of the property so long as it is of the whole of the liability.

19. In Ram Prasad Singh v. Bachcha Singh, 20 Luck. 435 the whole of the mortgaged property was transferred by the mtgor, but there was no contract for the payment of the mtge. amount & the property was sold free from the mtge. in dispute. It was still held that since the liability to pay the mtge. was transferred, the debt ceased to be a loan. The learned Judges observed as follows:

> "The only ease where the legal obligation to discharge the debt can be transferred to another person is where the liability was on the property of the borrower & the property was subsequently transferred to another person. In such a case the person, who for the time being becomes the owner, has also the liability to discharge the loan. The obligation of the agriculturist or the workman borrower may thereupon effectively cease. The use of the words 'by a contract' "appears at first sight somewhat to militate against this interpretation, but I am unable to visualise a transference of liability by a mere contract between the borrower & another person independently of the creditor. Since the legislature could scarcely have contemplated a tripartite contract the word 'contract' must be taken to signify a transfer for valuable consideration. Whenever, therefore, a liability of a borrower for the repayment of an advance is extinguished & that of another person is brought into existance by virtue

> of a transfer for valuab'e consideration, the transaction ceases to be a loan within the meaning of the Act." Later on their Lordships futher obaerved:
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> "The fact that the purchasers of the property which was avowedly sold free from encumbrance could by reason of the covenant of title, still sue the transferors for making good the loss occasioned to them in meeting the encumbrance is, to my mind, besides the point for what would be sought to be enforced in such a suit would be not the repayment of liability for the advance, but the liability for breach of a covenant."

20. With all respect I may say that this interpretation of the section does away entirely with the words 'by a contract.' Since the property was sold free from the encumbrance in dispute the debtor still remained liable aa between himself & the transferee for the repayment of the debt. The liability as between himself & the transferee was not at all transferred & the debt could not, therefore, be said to have been taken out of the definition of 'loan', because neither there was a contract for the transfer of liability with the borrower nor indeed there was a transference of liability, because ultimately the debtor still remained liable as between himself & the transferee to pay the debt, though the creditor may not be able, to realise it from the original debtor. Further, the argument that the transferees could note recover the amount from the debtor's as a loan but only as damages for breach of a covenant is hardly sound. Even though the transferee may sue for a breach of the covenant, he will thereby be enforcing the liability of the original debtor to pay the encumbrances on the property as laid down in Section 55(1)(g), T. P Act.

21. The same Bench, however, in a later decision, Lalji Singh v. Lakshmi Narain, 20 Luck-545 clearly held that under Section 2 (9), U. P. Debt Redemption Act, the transfer of liability for repayment of a debt from the borrower to another person has the effect of taking the case out of the definition of the word 'loan' only if such transfer is the result of a contract & that, therefore, the donee of a property subject to an encumbrance,, provided he fulfils other conditions, is entitled to the benefit of the provisions of the U. P. Debt Redemption Act, there being no contract, express or implied, to repay the debt. I respectfully agree with this statement of the law & this is, in effect the answer to what was stated by the same Bench, in the earlier case.

22. In Shiam Sunder Lal v. Data Ram,,. A. I. R. (38) 1946 ALL. 147 Iqbal Ahmad, C. J. & Sinha, J. held that the words 'the liability' in Section 2 (9) mean the whole of the liability & note merely a portion of it. Where the mtgor. has transferred not the liability nor the whole of the property but only a portion of the mortgaged property & a portion of the property is still with him, he cannot be deprived of the benefits of the Act.

23. In Sarnam Singh v. Hiththan Lal, I.L.R. (1947) ALL. 449, F. B. the debtor transferred & portion of the mortgaged property with the covenant that the entire mtge amount was to be paid by the transferee. The F. B. which decided the case held that there was a transfer of liability even though the property transferred was only a portion & even though the creditor could recover the amount of the debt from the debtor. The reason assigned for this view was that the debtor as between himself & the transferee had transferred the whole of the debt & even if he might be liable to the creditor in the first instance, he could ultimately recoup himself from the transferee.

24. In Minhin Lal v. Chittar, A. I. .R. (36) 1949 Oudh 53 the facts were these : Loan was taken on the security of two villages, Pachkaura & Abdulpur. The mtgors. left three heirs, Tila Singh,, Ranjit Singh and Sheo Baran Singh. There was a transfer of the entire mortgaged property in village Abdulpur. There was also a transfer of the shares of Tilak Singh Baran Singh's share in Pachkaura which was not transferred was, however, freed from the liability of the mtge. By areason of a decree passed in Encumbered Estates .Act proceedings. The result, therefore, was that the whole of the mortgaged property had been either freed from the mtge. or had been transferred. It was held in these circumstances that the loan had ceased to be a loan. It is not clear whether the mtge. amount was left with the transferees when the transfer of the property was made. The Bench folld. the earlier decision in Ram Prasad Singh v. Bachcha Singh 20 Luck 435. It was observed: "The primary liability in all such caaes vis-a vis the creditor is that of the person who is in possession of the encumbered estate, & this liability devolves upon "him by reason of the transfer which amounts to a contract for the purposes of Sub section (9) of Section 2." It may be stated with respect that unless there is a contract for the transference of the liability of the debt in dispute the exception which takes a debt out of the definition of loan is not brought into play. A contract for the transfer of the property without there being a contract for the transfer of the liability of the debt in question is uite a different matter altogether.

25. In Mahmud Hasan Khan v. Narain, I. L. R. (1949) ALL. 502 a F. B. of this Ct. had to deal with a case in which the whole of the mortgaged property was transferred free from the mtge. & there was no contract for the mtge. debt being paid by the vendee. A decree was passed upon the mtge. in favour of the creditor against the mtgor. & the vendee. The mtgor. applied for the benefit of the Debt Redemption Act. It was held that he could claim the. benefit of the Act sas he was ultimately liable for the payment of the amount.

26. In Gauri Shankar Lal v. Tulsi Singh, A. I. R. (37) 1950 ALL. 47, decided by Mootham & Wanchoo JJ. three persons had mortgaged sixteen villages to A to secure an advance. In 1933 A obtained a mtge, decree, but before steps were taken to execute that decrea. the co-operative Bank obtained a simple money decree against one of the mtgors. & in execution of that decree the interest of that mtgor. in eight of these sixteen Tillages was sold. the other two mtgors. then applied Under section 8, Debt Redemption Act for amendment of the mtge, decree. It was held that the appln. was maintainable as the mtgors'. liability for the re-payment of the advance was not transferred to the auction purchaser by virtue of the execution sale & that, therefore, there was a loan within the meaning of Section 2 (9) of the Act.

27. In Mt. Bam Piari v. Nand Kumar', 1950 A. W. R. 172 my brother Kidwai J. held that where there is no transfer of liability by an agreement between the debtor & a third person, but by reason of an arbitration award one alone of several joint debtors is made liable to repay the .debt, the advance does not cease to be a loan under section 2(9), Debt Redemption Act.

28. In Raghbir Gir v. Badam Gir, 1950 A. W. R. 364, Dayal & Bhargava JJ. held:

> " The contract contemplated in the definition of the word ' loan' in Section 2, Sub section (9), U. P. Debt Redemption Act, means a contract witn the entire body of

borrowers. There is nothing In the definition of the word 'loan' or in any other provision of the U. P. Debt Redemption Act which can justify the Ct. to split up the transaction of loan into 'separate transactions. The use of the words ' another person' in conjunction with the words ' the borrower" in the definition of the word 'loan' -learly indicates that the contract transferring the liability for the repayment of the loan should between the borrower & a third person A transfer inter ss between co-borrowers is not contemplated."

29. On a consideration of the entire matter, I have come to the following conclusions: (l) That a debt ceases to be a 'loan' only if two conditions are satisfied; (i) that there must be a transfer of the whole of the liability and not only of a part, & (ii) that the transfer must be of the liability & need not necessarily be of the whole of the property; (2) That in the case of a voluntary transfer the mere transfer of property does not transfer the liability for the payment of the debt which is an encumbrance on the property unless at the same time there is a contract between the debtor & the transferee for the payment of the whole of the debt by the transferee; (3) That the contract may be express or implied ; but if the transfer of all the property is free from the liability for the payment of the debt in question there is no such contract even though in the first instance the creditor is able to recover the debt only from the property which is in the hands of the transferee & not at all from the dubtor, the principle being that one has to see the ultimate liability of the debtor as between himself & the transferee & where the debtor is ultimately liable for the payment of the debt & not the transferee, there is no transfer of the liability for its repayment; (4) That in the case of a gift since there is no contract for the transfer of the liability, there is no transfer of the liability within the meaning of the section ; (5) That in the case of a transfer oi property in execution sale against the debtor there must be a transfer of the whole of the pro. perty, because the transfer of a part of the property will not relieve the dubtor of the whole of the liability. In the present case, as already stated a portion of the property was transferred & there was no contract between the mtgor's. widow & the transferee for the payment of the debts in question. There was, therefore, no transfer of the liability foe the repayment of the loan & loan does no cease to be a loan. The view taken by the Cts. below is, therefore, perfectly correct. There is no force in this appeal and. it is diamissed withcosts.

Malik, C.J.

30. I agree.

Misra, J.

31. I agree.

V. Bhargava, J.

32. I agree.

Kidwai, J.

33. I agree.