

A

KIDAR NATH

v.

MANGAT RAI & ORS.*October 31, 1969*

B

[J. C. SHAH AND K. S. HEGDE, JJ.]

Transfer of Property Act (4 of 1882); s. 58 (f), anomalous mortgage, what is.

Punjab Relief of Indebtedness Act, 1934, s. 30—Whether legal representatives of debtor entitled to apply for relief—Scope of.

C

Usurious Loans Act, 1918, ss. 2(3)(a) (b) and (c) and s. 3(2)(e)—Scope of.

D

In a suit for redemption of a mortgage with possession under a mortgage deed of 1896, the Court declared the amount due on the mortgages. No payment was made under the decree by the mortgagor. Instead, on his death, his representatives applied for relief under s. 30 of the Punjab Relief of Indebtedness Act, 1934 and the Usurious Loans Act, 1918, as amended by the East Punjab Amendment Act, 1948. The applicants were given relief by the High Court and the representatives of the mortgagee appealed to this Court.

E

HELD : (1) Under the covenants in the mortgage deed, there is a stipulated rate of interest payable by the mortgagor, and the amount recovered from the income was to be first applied towards interest and the balance towards principal. It was an anomalous mortgage and not a usufructuary mortgage. The liability of the mortgagor to pay the money due under the mortgage and to pay interest accruing due creates a debt, even if it be assumed that the mortgagee had no right to enforce the mortgage by sale but only had a right of foreclosure. [217 H, 218 C]

F

(2) The obligation is enforceable against the estate of the debtor in the hands of his legal representatives. When it is so sought to be enforced, in the absence of an express provision to the contrary, the representatives may set up the defence which the original debtor could, if he had been sued. There is no warrant, therefore, for the contention that the jurisdiction of the court under s. 30 of the Punjab Relief of Indebtedness Act, is attracted only when the original debtor is the applicant and not on the application of his legal representatives. [218 H; 219 A]

G

(3) The legal representatives were not entitled to claim the benefit of the Usurious Loans Act, 1918. Section 2(3) (a) and (b) do not apply to a suit for redemption by the mortgagor and cl. (c) only applies in those cases where the security is given after the commencement of the Usurious Loans Act. [219 G]

H

(4) The legal representatives were entitled to the benefit of the Punjab Relief of Indebtedness Act. The application of s. 30 of the Act does not depend upon the suit being one to which the Usurious Loans Act applies. Even if the suit is not within the definition in s. 2(3) of the Usurious Loans Act by virtue of s. 30 of the Punjab Relief of Indebtedness Act, the amount received by a creditor in excess of the amount due to him under s. 3(2)(e) of the Usurious Loans Act is liable to be deducted from twice the amount actually advanced. [220 E]

(5) Section 30 uses the expression "sum found by the court to have been 'actually advanced.'" Such amount is not the amount found by the court to be the amount due on taking account. Therefore, the amount declared by the court as the amount due cannot be deemed to be the amount actually advanced, and under s. 30, the court cannot declare any amount due under the mortgage which is in excess of twice the amount actually advanced less any amount received in excess of the amount due to the creditor under s. 3(2)(e) the Usurious Loans Act. [220 H]

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 10 and 11 of 1966.

Appeals from the judgment and decree dated May 23, 1961 of the Punjab High Court in Regular First Appeals Nos. 184 of 1954 and 6 of 1955.

C. B. Agarwala and *A. D. Mathur*, for the appellant (in both the appeals).

K. L. Gosain, *N. N. Goswami* and *P. C. Khanna*, for respondents Nos. 1 to 4 (in C.A. No. 10 of 1966) and respondents Nos. 1 to 6 (in S.A. No. 11 of 1966).

B. Datta, for respondent No. 18 (in C.A. No. 10 of 1966) and respondent No. 24 (in C.A. No. 11 of 1966).

The Judgment of the Court was delivered by

Shah, J.—On July 20, 1896, Ladhia—grandfather of the respondents—borrowed Rs. 5,000 from Ramji Dass and as security for repayment thereof mortgaged with possession certain agricultural lands and a house. The mortgage amount was to carry interest at the rate of 12 annas per cent. per mensem, and in default of payment of interest due at the end of the year interest was chargeable at 1% per mensem. On May 17, 1897, Ladhia executed in favour of Ramji Dass another mortgage deed on the same properties for Rs. 800. Interest under that mortgage was payable at the rate of 2% per mensem. Ladhia executed a third mortgage deed in favour of Ramji Dass on May 21, 1897, for Rs. 600. It included the properties in the two earlier mortgages and 1/12th share in other lands and two houses. The properties mortgaged in favour of Ramji Dass were subject to a previous mortgage in favour of one Shugan Chand. Ramji Dass redeemed that mortgage on payment of Rs. 650.

Lekh Ram son of Ladhia filed a suit for redemption of the three mortgages. On August 21, 1915, a preliminary mortgage decree was passed in the suit by the Subordinate Judge, Hissar, declaring that Rs. 62,293/11/9 were due on the mortgages. The High Court of Punjab confirmed the decree on November 24, 1919. But no payment was made under that decree, nor was the decree made final.

A Division Bench of the High Court then held that under the principle of s. 30 of the Punjab Relief of Indebtedness Act, the mortgagee's representatives were entitled to receive Rs. 14,100, being double the amount due as mortgage debt, and Rs. 1,420, being double the amount of improvements made by the mortgagee, and the total amount received by the mortgagee as income from the properties was Rs. 45,022, and deducting therefrom Rs. 35,810 being the amount received in excess, the balance of Rs. 9,212 remained. A decree for redemption on payment of Rs. 6,308 (Rs. 15,520 less Rs. 9,212) was accordingly passed. Against the decree passed by the High Court, these appeals have been preferred by the representatives of the mortgagee with certificate granted by the High Court.

Three questions are raised in these appeals :

(1) That s. 30 of the Punjab Relief of Indebtedness Act, 1934 has no application, because—

(a) there is no debt due; and

(b) that a legal representative of the original mortgagor cannot obtain the benefit of s. 30;

(2) That the judgment of the Division Bench is inconsistent with the finding on the second question recorded by the Full Bench; and

(3) That the amount declared as due under the preliminary decree in the earlier suit was for the purposes of s. 30 of the Punjab Relief of Indebtedness Act the "amount actually advanced".

It is urged that s. 30 of the Punjab Relief of Indebtedness Act, 1934, had no application, for the three mortgages being usufructuary mortgages there is no debt due by the mortgagor, nor can the mortgagee enforce recovery of any debt under the covenants of the mortgagees. The first mortgage Ext. P-1 dated July 20, 1896 recited that the mortgagor Ladhia had mortgaged with possession the properties set out therein for Rs. 5,000. The mortgage deed contained the following, amongst other, covenants :

"First :—Interest on the mortgage money has been fixed at Re. -/12/- per cent. per mensem.

Third :—I will be entitled to get from the mortgagee the income accruing from the mortgaged property after deduction of the Government revenues therefrom.

Fourth :—I will pay back the principal mortgage money within a period of six years. In case of default

A Some time in 1951 the representatives of Ladhia applied under the Punjab Restitution of Mortgaged Lands Act, 1938, to the Special Collector and obtained an order for restoration of the agricultural lands. Thereafter the mortgages remained outstanding only on non-agricultural properties. The representatives of Ladhia then instituted an action in the Court of the Senior Sub-

B ordinate Judge, Hissar, for redemption of the non-agricultural properties, and claimed an account under s. 30 of the Punjab Relief of Indebtedness Act, 1934, and also of Usurious Loans Act, 1918, as amended by the East Punjab Amendment Act 4 of 1948. The representatives of the mortgagee contended, *inter alia*, that the suit was barred because no payment was made pursuant to the

C preliminary decree in the earlier suit, that in any event it was declared that the amount due in 1919 under the three mortgages was Rs. 62,293/11/9, and that decision operated as *res judicata*, and that account under s. 30 of the Punjab Relief of Indebtedness Act should be taken on that footing.

D The Trial Court held that the mortgage dues were Rs. 7,050; that the mortgagee had received Rs. 48,571 as income during the time he and his representatives remained in possession of the mortgaged properties; that the preliminary decree in the earlier suit declaring that Rs. 62,293/11/9 were due operated as *res judicata*; and that the present action not being one for recovery of a loan, the rule of *Damdapat* incorporated in s. 30 of the Punjab

E Relief of Indebtedness Act, 1934 had no application; but s. 2 of the Usurious Loans Act, 1918, as amended by the East Punjab Act 4 of 1948 applied. The Court held that the mortgagee was entitled, besides Rs. 62,293/11/9 to Rs. 17,855/4/3 as interest on the three mortgages and after giving credit for Rs. 48,571 received as income, the balance due was Rs. 31,578. The Trial Court

F accordingly passed a decree for redemption of the properties in suit on payment of Rs. 31,578.

In the appeal filed by the parties to the High Court of Punjab, two questions were referred to a Full Bench :—

G “1. Whether it is open to the legal representatives of a debtor to invoke the help of s. 30 of the Punjab Relief of Indebtedness Act in a suit for possession by redemption ?

H 2. Whether the provisions contained in s. 3 of the Usurious Loans Act, 1918, as amended in the Punjab, would govern a suit for redemption of mortgage executed before the commencement of the Act ?”

The Full Bench answered the first question in the affirmative, and the second in the negative.

A of payment of the whole or a part of it the mortgaged property shall be considered as foreclosed in favour of the mortgagee,

B Fifth :—I will pay the interest year after year. In case of default I will pay interest on the amount of interest also at the rate of Re. 1/- per cent. per mensem. The mortgagee shall also be competent to file a separate suit regarding the amount of interest in Civil Court and recover the same from me through it. I shall not have any objection thereto.

C Seventh :—Till the principal mortgage money and the interest are not paid off in full, temporary or permanent transfer of the mortgaged property by me to any body else shall be considered illegal and invalid.

D The mortgage deed Ext. P-2 dated May 17, 1897, for Rs. 800 contained similar covenants. It also recited that an amount of Rs. 5,000 was borrowed under a deed dated July 20, 1896, and the mortgagor agreed to repay the sum within six years with interest at the rate of Re. -/12/- per cent. per mensem. By the sixth clause it was provided :

E "In case of default, viz., in default of payment of the mortgage-money and interest along with the previous mortgage money amounting to Rs. 5,000/- (on the basis of the mortgage-deed) dated the 20th of July, 1896, agreed to be paid back within a period of six years, the surplus rights in the mortgaged property shall be considered as foreclosed and shall be the absolute property of the mortgagee."

F Exhibit P-3 dated May 21, 1897, also referred to the two earlier mortgages. By the first clause it recited that the mortgage Money shall be paid back alongwith the mortgage money due under the two earlier deeds of mortgage. The second clause referred to the interest payable on the mortgage money at the rate of Rs. 2/- per cent. per mensem. The sixth clause recited that till the entire mortgage money and interest are not paid off, the mortgagor will not transfer by sale, mortgage or gift the mortgaged property to any body else. The seventh clause provides that the money paid by the mortgagor shall first be credited towards the interest on the two earlier mortgages and the balance shall be accounted towards the principal. By the eighth clause it was provided that the mortgagor will pay interest on the mortgage money upto the date of redemption of the mortgaged property.

Under the covenants in each of the deeds of mortgage, there is a stipulated rate of interest payable by the mortgagor on the

L6SupCI/70—15

mortgage money and the amount recovered from the income is to be first applied towards the interest and the balance towards the principal. The mortgagee is also entitled to recover by suit interest accruing due. The mortgages are clearly anomalous mortgages.

Section 7 of the Punjab Relief of Indebtedness Act, 1934, defines a 'debt' as inclusive of "all liabilities of a debtor in cash or in kind, secured or unsecured, payable under a decree or order of a civil court or otherwise, whether mature or not," The definition of the expression 'debt' therefore includes all liabilities of a debtor, in cash or in kind, secured or unsecured. The liability of a mortgagor to pay the money due under the mortgage and to pay interest accruing due is clearly a debt, even if it be assumed that the mortgagee had no right to enforce the mortgage by sale of the property and had a right only to foreclose the mortgages. Under the terms of the mortgage deeds, if the mortgagor pays the amount due, the mortgagee is bound to release the mortgaged property. It cannot be said that under the three mortgages there was no debt due by the mortgagor. Nor do we agree with counsel for the mortgagee that the benefit of s. 30 of the Punjab Relief of Indebtedness Act is available only to the original mortgagor and not to his representatives. Section 30 of the Punjab Relief of Indebtedness Act by the first sub-section provides :

"In any suit brought after the commencement of this Act in respect of a debt as defined in section 7, advanced before the commencement of this Act no court shall pass or execute a decree or give effect to an award in respect of such debt for a larger sum than twice the amount of the sum found by the Court to have been actually advanced, less any amount already received by a creditor in excess of the amount due to him under clause (e) of sub-s. (2) of section 3 of the Usurious Loans Act, 1918."

A suit to redeem property on payment of the amount due on the mortgage is a suit in respect of a debt; and the Court is by s. 30 of the Act debarred from passing a decree for a sum larger than twice the amount of the sum found by the Court to have been actually advanced. The section imposes a restriction, in certain conditions, upon the power of the Court. It is the nature of the suit which decides the Court's jurisdiction : the section makes no reference to the status of the party claiming relief except in so far as the definition of debt involves such reference. On the plain words of the section there is no warrant for the view that the jurisdiction of the Court is attracted only when the person who incurred the obligation to pay the debt personally is a party to the suit and not when his legal representative is a party. An

- A obligation to pay a debt is not extinguished on the death of the debtor. The obligation is enforceable against the estate of the debtor in the hands of his legal representatives; and when it is so sought to be enforced, in the absence of an express provision or clear intendment to the contrary, the representatives may set up the defence which the original debtor could if he had been sued
- B have set up. The representatives of the mortgagor were therefore rightly held entitled to the benefit of s. 30 of the Punjab Relief of Indebtedness Act, 1934.

- C Each of the three mortgages created a debt due by the mortgagor within the meaning of s. 7 of the Punjab Relief of Indebtedness Act, 1934, and a suit filed by the representatives of the mortgagor for redemption of the mortgages was a suit in respect of a debt within the meaning of that section. A suit for redemption of a mortgage executed before the commencement of the Usurious Loans Act, 1918, was however not a suit to which the Act applied, and on that account the mortgagor could not claim the benefit of that Act. Section 2(3) of the Usurious Loans Act
- D defines "suit to which this Act applies" as meaning any suit—

- "(a) for the recovery of a loan made whether before or after the commencement of this Act; or
- (b) for the enforcement of any security taken or any agreement whether by way of settlement of account or otherwise made, after the commencement of this Act, in respect of any loan made either before or after the commencement of this Act; or
- E (c) for the redemption of any security given after the commencement of this Act in respect of any loan made either before or after the commencement of this Act."
- F

- Evidently cls. (a) and (b) of s. 2(3) have no application to a suit for redemption by the mortgagor, and cl. (c) also will not apply because the security was given before the commencement of the Act. Clause (c) only applies in those cases of redemption
- G of securities given after the commencement of the Act in respect of any loan made either before or after the commencement of the Act. The mortgagor's representatives were, therefore, not entitled to claim the benefit of the Usurious Loans Act, 1918.

- H The mortgagor's representatives were still entitled to the benefit of the Punjab Relief of Indebtedness Act. By s. 30(1) of that Act in a suit filed in respect of a debt, the Court is enjoined not to pass a decree for a sum larger than twice the amount found by the Court to have been actually advanced, less any amount

already received by a creditor in excess of the amount due to him under cl. (e) of sub-s. (2) of s. 3 of the Usurious Loans Act, 1918. A

Clause (e) of sub-s. (2) of s. 3 of the Usurious Loans Act was incorporated in that Act by s. 5 of the Punjab Relief of Indebtedness Act. The clause reads : B

“The Court shall deem interest to be excessive if it exceeds seven and a half per centum per annum simple interest or is more than two per centum over the Bank rate, whichever is higher at the time of taking the loan, in the case of secured loans, or twelve and a half per centum per annum simple interest in the case of unsecured loans : C

Provided”

There is nothing in s. 30 of the Punjab Relief of Indebtedness Act which restricts the benefit of deduction of amounts in excess of the amount due under cl. (e) of sub-s. (2) of s. 3 to those suits only to which the Usurious Loans Act applies. The application of s. 30 of the Punjab Relief of Indebtedness Act does not depend upon the suit being one to which the Usurious Loans Act applies. Even if the suit is not within the definition in s. 2(3) of the Usurious Loans Act, by virtue of the express provisions of s. 30 of the Punjab Relief of Indebtedness Act the amount received by a creditor in excess of the amount due to him under cl. (e) of sub-s. (2) of s. 3 of the Usurious Loans Act is liable to be deducted from twice the amount actually advanced. The High Court was, therefore, right in directing that the amount received in excess of the amount due under cl. (e) of sub-s. (2) of s. 3 of the Usurious Loans Act was liable to be deducted from twice the amount actually advanced. D
E
F

Counsel for the mortgagee's representatives contended that the decision of the Civil Court in the earlier suit for redemption which declared an amount of Rs. 62,293/11/9 due under the mortgages must be deemed to be the amount actually advanced by the mortgagee. But the decree in the earlier suit merely declared the amount due at the date when the decree was passed : it did not adjudicate that the amount declared was the amount actually advanced under the three mortgages. The amount advanced under a mortgage is not the amount found due on taking account of the mortgage. Section 30 uses the expression “sum found by the Court to have been actually advanced”. If apart from the terms of the Punjab Relief of Indebtedness Act, the mortgagor was seeking an account of the mortgage dues, the previous adjudication may be binding. But the provisions of s. 30 of the Punjab Relief of Indebtedness Act places an embargo upon the Court G
H

- A** declaring any amount due under the mortgage which is in excess of twice the amount actually advanced less any amount received in excess of the amount due to the creditor under cl. (e) of sub-s. (2) of s. 3 of the Usurious Loans Act. The Court, therefore, could not pass an order directing payment of an amount larger than the amount which may be declared due under s. 30 of the
- B** Punjab Relief of Indebtedness Act.

The appeals fail and are dismissed with costs. One hearing fee.

R.K.P.S.

Appeals dismissed.