

## APPELLATE CIVIL.

Before *Mr. Justice Varadachariar and Mr. Justice  
Abdur Rahman.*

1938,  
October 20.

PERIANNA GOUNDAN (EIGHTH RESPONDENT—NINTH  
DEFENDANT), PETITIONER,

*v.*

SELLAPPA GOUNDAN AND SEVEN OTHERS (APPELLANT  
AND RESPONDENTS 1 TO 7—PLAINTIFF AND DEFEN-  
DANTS 2 TO 8), RESPONDENTS.\*

*Madras Agriculturists Relief Act (IV of 1938), sec. 3 (iii)—  
“Debt”—Liability for mortgage amount of purchaser of  
equity of redemption in portion of hypotheca—Relief  
under the Act—Right to, of heir-at-law, legal representative  
or assign of debtor—Mortgage of 1929—Purchaser in 1933  
of equity of redemption in portion of hypotheca—Relief under  
the Act—Right of purchaser to—Application by him for  
relief—Nature and extent of relief to be granted on—Sec. 8  
of the Act—Effect of.*

In a suit for the recovery of money due under a mortgage deed, dated 27th July 1929, the High Court on appeal held that the mortgagee (plaintiff) was entitled to a decree for almost the full amount due under the mortgage deed. The eighth defendant in the suit had in 1930 purchased the equity of redemption in a portion of the hypotheca in execution of a money decree against the mortgagor and he sold the same to the ninth defendant (eighth respondent in the appeal) on 11th August 1933. The plaintiff claimed to bring to sale the properties purchased by the ninth defendant as part of the mortgage security. The ninth defendant applied for relief under Madras Act IV of 1938. The ninth defendant was admittedly an agriculturist within the meaning of that Act and so also was the mortgagor.

*Held* : (i) The liability of the petitioner (ninth defendant) was a “debt” within the meaning of section 3 (iii) of the Act.

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\* Civil Miscellaneous Petition No. 4192 of 1938 in Appeal No. 152 of 1934.

It was not the intention of the Legislature to limit the relief under the Act to cases where a person was personally liable.

(ii) The right to claim relief under the Act was not confined to the person who actually contracted the debt but was available to his heir-at-law, legal representative or assign.

(iii) Though the petitioner purchased the property only in 1933, yet, as his liability arose out of the mortgage of 1929, the case fell under section 8 of the Act.

(iv) Relief under the Act was not limited to the extent of the proportion attributable to the property in the possession of the petitioner, the plaintiff being at liberty to recover his full claim against the properties in the hands of the mortgagor.

The relief under section 8 is not confined to the applicant. The applicant has only to move the Court and bring certain facts to its notice and the quantum of relief is indicated by section 8.

(v) The debt must therefore be scaled down in the manner indicated in section 8.

PETITION praying that in the circumstances stated therein the High Court will be pleased to scale down the debt forming the subject-matter of Original Suit No. 9 of 1934 on the file of the Court of the Subordinate Judge of Coimbatore (Appeal No. 152 of 1934 on the file of the High Court) under the provisions of the Madras Act IV of 1938.

*K. V. Ramachandra Ayyar* for petitioner.

*N. Somasundaram* for first respondent.

Respondents 2 to 6 and 8 were not represented.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This is an application filed by the ninth defendant in the Court below (eighth respondent here) for relief under Madras Act IV of 1938.

The suit out of which the appeal arose was instituted for the recovery of money due under a mortgage deed, dated 27th July 1929, executed by the first defendant in favour of the plaintiff. In execution of

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a money decree obtained against the mortgagor, the eighth defendant purchased the equity of redemption in a portion of the hypotheca in 1930 and he sold the same to the ninth defendant on 11th August 1933. The plaintiff claimed to bring to sale the properties purchased by the ninth defendant as part of the mortgage security. The ninth defendant in turn contended that the mortgage in favour of the plaintiff was nominal and not supported by consideration. The lower Court substantially upheld this contention of the ninth defendant and gave a decree in the plaintiff's favour for a small amount. On appeal by the plaintiff, we reversed the decree of the lower Court and held that the mortgage was true and fully supported by consideration and that the plaintiff was entitled to a decree for almost the full amount due under the mortgage deed. As the ninth defendant stated that he was applying for relief under Madras Act IV of 1938, we allowed the matter to lie over and the question has now been argued before us.

It has not been denied by the plaintiff that the ninth defendant is an agriculturist within the meaning of the Act nor has it been denied that the mortgagor is an agriculturist. The only ground on which the petitioner's right to relief under the Act is challenged is that the liability of the petitioner is not a "debt" within the meaning of section 3 (iii) of the Act. The learned Counsel for the plaintiff contends that this definition should be understood as limited to cases where a person is *personally* liable. We are unable to read the definition in this limited sense. There are no words in the definition clause justifying any such restriction; the clause speaks of "any liability" and the word "due" does not necessarily imply that it *must* be recoverable by imprisonment of the debtor.

The inappropriateness of restricting it in the sense contended for will be realized when it is remembered that even by the time this Act was contemplated, imprisonment for debt had, to a great extent, been abolished by Act XXI of 1936. It could not therefore have been the intention of the Legislature to limit the relief under the Act to cases where a person was personally liable. Its avowed purpose was to enable agriculturists to retain their property and prevent such property passing into the hands of creditors or execution purchasers.

Again, according to the contention of the plaintiff's learned Counsel, it will only be the person who actually contracts the debt that will be entitled to claim relief under the Act and not his heir-at-law or legal representative because the latter will ordinarily be under no personal liability. Similarly, in the case of joint families, relief under the Act will have to be limited only to the actual borrower or to those special cases in which other members of the family might on some special grounds have become personally liable. But the provisions of the Act relating to joint families clearly indicate that even members who are under no personal liability are entitled to invoke the protection of the Act for the preservation of the property of the family. It was next pointed out that while clause (v) which defines "creditor" takes care to include his heirs, legal representatives and assigns, there is no corresponding definition in the case of a "debtor". This omission is obviously due to the fact that the reference to liability in clause (iii) is wide enough to cover every person who is in any manner liable, either because he is personally liable or because he is liable on account of the possession of property. There was no necessity to refer to any heir, legal representative

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or assign except in cases in which such person was liable within the meaning of clause (iii).

It was next contended that the liability of the petitioner was not one falling within section 8 of the Act, because he purchased the property only in 1933 and his liability was not therefore one subsisting prior to 1st October 1932. This proceeds upon a misapprehension of the nature of the petitioner's liability. His liability is traceable to the original mortgage and his purchase was not the basis of any new liability. The liability that is now sought to be enforced is the liability arising out of the mortgage of 1929. The case therefore falls under section 8.

It was finally contended that relief under the Act should be limited to the extent of the proportion attributable to the property in the possession of the petitioner and that the plaintiff must be at liberty to recover his full claim against the properties in the hands of the mortgagors. We do not think we can accede to this contention either. The relief under section 8 is not confined to the applicant. The applicant has only to move the Court and bring certain facts to its notice and the quantum of relief is indicated by section 8. Difficult questions may arise where some of the persons liable are agriculturists and some are not. One such case has been specifically dealt with in section 14 of the Act. The principle to be applied in cases not so specifically dealt with need not be discussed in the present case because it has not been suggested that the other persons liable here are not agriculturists.

We accordingly hold that the debt must be scaled down in the manner indicated in section 8. It is agreed that on this basis the amount due to the plaintiff will be Rs. 3,300 on 1st October 1937. To this

will be added interest at six and one-fourth per cent per annum as per the directions in our judgment. The plaintiff will also be entitled to his costs as directed in the judgment in the main appeal. The appropriate figures calculated on the above basis will be inserted in the decree to be passed in the appeal.

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APPELLATE CIVIL.

*Before Mr. Justice Varadachariar and Mr. Justice  
Pandrang Row.*

NILAKANTA PRABHU (PETITIONER—PLAINTIFF),  
APPELLANT,

1938,  
September 22.

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v.

APPU NAIKA AND THREE OTHERS (RESPONDENTS 2 TO 5—  
DEFENDANTS 2 TO 5), RESPONDENTS.\*

*Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 6—  
Personal remedy against mortgagor—Omission to consider,  
or to provide for it in preliminary decree—If operates as  
res judicata as regards application under O. XXXIV, r. 6.*

Though the practice in mortgage suits is to consider even at the preliminary stage the question whether the personal remedy against the mortgagor is barred or not, the omission to consider it or the omission to provide for it in the preliminary decree will not operate as *res judicata*, because the proper stage for dealing with the question of personal liability arises only after the mortgaged property has been sold and the proceeds are found insufficient to satisfy the plaintiff's claim.

APPEAL against the order of the Court of the Subordinate Judge of South Kanara, dated 3rd July 1933 and

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\* Appeal No. 182 of 1934.