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August, 23

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Harries

DHARAM SINGH (PLAINTIFF) *v.* BISHAN SARUP (DEFENDANT)*

U. P. Agriculturists' Relief Act (Local Act XXVII of 1934), sections 30, 33—Suit by debtor for account—Reduction of interest thereupon—"Loan"—"Interest"—Usufructuary mortgage in lieu of previous hypothecation bond, without any fresh advance—No fresh "loan"—Only "loan" was that on the previous bond—Interest on the previous bond can be reduced.

A usufructuary mortgage was executed in August, 1933, in lieu of the balance then due on a previous hypothecation bond of 1926, no fresh advance being made by the mortgagee. The mortgagee was to appropriate the income in lieu of interest and accordingly no rate of interest was prescribed in the mortgage deed. Afterwards the mortgagor filed a suit for account under section 33(1) of the U. P. Agriculturists' Relief Act, and the question arose of the application of sub-section (2) and reduction of interest according to section 30:

Held that, having regard to the definitions of "loan" and "interest" in the U. P. Agriculturists' Relief Act, the usufructuary mortgage, which was executed merely in lieu of the previous hypothecation bond without any fresh advance, could not be deemed to be a "loan". It could not be regarded as a fresh advance in kind by the mortgagee to the mortgagor; the use of the words "actually lent" in the definition of the word "interest" suggested that any such fiction of law should not be imported into the definition of "loan" and that what the court had to see was the actual amount advanced or lent and not what by some fiction might be imagined to have been indirectly advanced in the way of wiping out the previous liability. The "loan" in this case was therefore that of the hypothecation bond of 1926, and it was the interest on this "loan" which, as directed by section 33(2), was to be reduced according to section 30(1) from 1st January, 1930. It was accordingly open to the court to find that the amount of the principal plus interest (reduced) up to August, 1933, was only so much and not the amount mentioned in the mortgage deed, and then to declare that the same amount was still due because

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nothing had been paid towards it and no interest had accrued thereon.

Held, also, that as section 33(1) of the U. P. Agriculturists' Relief Act applied to cases of indebtedness under any engagement, written or oral, there was no reason why it should not be applicable to a usufructuary mortgage.

Dr. *N. C. Vaish,* for the applicant.

Mr. *B. Mukerji,* for the opposite party.

SULAIMAN, C.J., and HARRIES, J.:—In this case there had been previous dealings between the parties, and there were in existence two hypothecation bonds of 1926 and 1927, part of the amounts due on which was paid off. On the 13th and 14th of August, 1933, the present applicant Dharam Singh executed a fresh mortgage deed in lieu of the amounts due under the previous bonds in favour of the defendant Bishan Sarup admitting that Rs.4,300 in all were due from him and mortgaging with possession the same properties which had been previously hypothecated. It has been admitted that no fresh advance was made by the mortgagee and no additional cash was paid. Under the terms of the usufructuary mortgage deed the mortgagee was entitled to appropriate income in lieu of the interest due to him and accordingly no rate of interest was prescribed under the usufructuary mortgage deed.

The present applicant filed a suit in the court of the Munsif of Ghaziabad under section 33(1) of the Agriculturists' Relief Act for an account of money payable by him and for granting him a declaration to that effect. The trial court applied the provisions of section 33(2) and reduced the interest under the Usurious Loans Act of 1918, which is not in dispute before us, and also reduced the interest further under section 30 of the Act from the 1st of January, 1930, till the date of the mortgage deed. On appeal the lower appellate court while upholding the reduction of interest under the Usurious Loans Act has held that the debtor is not entitled to a further reduction under chapter IV,

section 30. The lower appellate court has held: "In my opinion there is no such sanction or justification. Schedule III provides for a 'loan taken before this Act'. This in my opinion must be the bond of 1933. The schedule rates will not govern the interest rates of the prior transactions."

When the applicant sued under section 33(1) of the Act he was certainly entitled to ask for an account of money lent or advanced to him by the defendant or due by him to the defendant, as well as of money paid by him to the defendant. When the suit is filed under sub-section (1), then the provisions of sub-section (2) apply and the court is bound to follow the provisions of chapter IV of the Act and the provisions of the Usurious Loans Act of 1918. The provisions of chapter IV which were applicable to this case are contained in section 30 of the Act. Under that section "Notwithstanding anything in any contract to the contrary no debtor shall be liable to pay *interest* on a *loan* taken before this Act comes into force at a rate higher than that specified in schedule III for the period from January 1, 1930, till such date as may be notified." The contention urged on behalf of the respondent is that when the mortgage deed was renewed and a usufructuary mortgage deed was executed, then although there was no fresh advance of money, it was a new transaction of loan and the previous transaction must be deemed to have been completely wiped out, with the result that no reduction can be ordered prior to August, 1933. It is urged that the renewal of the mortgage deed was itself a new loan or an advance in kind and would, if there had been a rate of interest specified, be treated as the starting point for the interest. Now both the words "loan" and "interest" which occur in section 30(1) are defined in section 2, and we must therefore understand from those words in the sub-section the meanings which have been given to them by their definitions. "Loan" means an advance to an agriculturist whether of money or in kind, and

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shall include any transaction which is in substance a loan; while "interest" includes the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specifically by way of interest or in the form of service or otherwise. Having regard to these definitions, there cannot be the least possible doubt that the amount actually advanced, that is to say the principal amount, is what is defined as "loan", and anything paid over and above that is "interest", no matter what form or shape it may take. This point was considered at some length by a Full Bench of this Court in *Raghubir Singh* v. *Mul Chand* (1), where the view expressed in an Oudh case was dissented from.

Now if there had been a mere promissory note and before the expiry of the period of limitation it were simply renewed, it would be difficult to hold that the renewal of the promissory note in order to save limitation would amount to a fresh advance in kind by the creditor. The same result would follow if a simple mortgage deed were executed in renewal of an earlier mortgage deed without any fresh advance of money. The renewal would be by way of offering additional security and for the purpose of extending limitation; but it can hardly be regarded as a fresh advance of a loan in cash or in kind. In the present case the new transaction was one of a possessory mortgage under which possession was taken by the mortgagee and the income was to be set off against interest, but admittedly there was no fresh advance of any money to the mortgagor. We find it difficult to hold that this transaction can be regarded as a fresh advance in kind by the mortgagee to the mortgagor. The use of the words "actually lent" in the definition of the word "interest" suggests that any such fiction of law should not be imported into the definition, and what the court has to see is the actual amount advanced or lent and not what by some fiction might be imagined to have been indirectly advanced.

(1) I.L.R. [1937] All. 805.

It is urged before us that the parties having entered into a fesh contract, they must be deemed to have closed the previous transaction, and therefore the new contract should not be re-opened. It cannot, however, be doubted that a loan was in existence between January 1, 1930, and August, 1933, and it was carrying some interest. The applicant wants an account of the principal and interest which was due, and a reduction of interest during that period. It is impossible to say that there was no loan at all. We further find that in section 30(2) the court is bound to re-open even a decree which has been passed *inter partes* settling the account between them and creating a new judgment-debt. Under that sub-section, if a decree has already been passed on the basis of a loan and remains unsatisfied in whole or in part, the court which passed the decree shall on the application of the judgment-debtor amend it by reducing in accordance with the provisions of sub-section (1) the amount decreed on account of interest. If this is to be done in the case of a decree, it would follow that there should be no bar to such a re-opening in the case of a renewal of a previous mortgage deed. Such re-opening was expressly allowed in the Usurious Loans Act, but a decree could not be re-opened under that Act. The additional feature of this new Act is that even the amount adjudged by a court under a decree has to be re-opened. The applicant is entitled under section 30(1) to have the interest reduced for the period from January 1, 1930, till August, 1933, when the new mortgage deed was executed. It has been urged before us that if the definition of the word "loan" were to be taken in its literal sense as defined in section 2(10)(*a*), then the result would be that interest would continue to run on the original loan, even though part of it has been paid off. We think that such a result is impossible. The original loan, of course, would be the loan which had been actually advanced; but if a part of it has been paid it would cease to be outstanding and would no

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longer be an existing loan. In the Full Bench case referred to above, care was taken to point out that interest would run on the balance outstanding, which is only too obvious.

Another argument is that the account has to be declared by the court on the date when it comes to pass the decree and therefore the applicant should not be allowed to ask the court to declare what the amount due in August, 1933, was. It seems to us that the court cannot declare the amount due up to date unless it goes into the account. It is open to the court to find that the amount of principal plus interest due up to August, 1933, was only so much and not the amount mentioned in the mortgage deed, and then to declare that the same amount is still due because nothing has been paid towards it and no interest has accrued. We see no reason for accepting the contention urged on behalf of the respondent that section 33(1) should not be applied to a mortgagor who has executed a usufructuary mortgage deed. That section applies to every agriculturist debtor who is entitled to sue for an account under a written engagement. It matters little whether the written engagement amounts to a mere promissory note, a simple bond, a simple mortgage deed, or a usufructuary mortgage deed, or for the matter of that a mortgage by way of conditional sale.

Another point raised is that in view of the provisions of section 25 of the Act, no suit can be brought under section 33. We do not think that there is any force in this contention. The reliefs which are claimed under section 33, namely for account and for the reduction of interest under section 30, did not amount to any relief specified in chapter III at all. If the argument that section 30 does not apply to mortgages at all were sound, the result would be that schedule III which is referred to in that section and which lays down rates for secured loans would become meaningless.

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In our opinion, the view taken by the trial court was correct. We accordingly allow this revision, and modifying the decree of the lower appellate court restore that of the court of first instance. The applicant will have his costs from the respondent, but only on the scale of Rs.500 throughout.

APPELLATE CIVIL

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August. 27

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Harries

ABDUL LATIF KHAN (JUDGMENT-DEBTOR) *v.* SIKANDAR BEGAM (DECREE-HOLDER)*

Civil Procedure Code, section 51 ; *order XL, rule* 1—*Appointment of receiver in execution of decree for money—Wakf property—Mutwalli to perform certain religious duties and entitled to a balance remaining after the expenses—Receiver of such property can not be appointed—Discretion of court.*

In execution of a decree for money a receiver was sought to be appointed of certain wakf property in the possession of the judgment-debtor as mutwalli thereof; under the terms of the deed of wakf the mutwalli was to perform certain religious duties, which could not be performed by any other person until such other person was appointed mutwalli; the mutwalli was only entitled to a certain amount which remained over after the expenses; he had no proprietary interest in the property itself:

Held, that the court could not appoint a receiver to take possession of such property; and, in any case, the court would not exercise its discretionary power under order XL, rule 1 to appoint a receiver, as it would not be "just and convenient" to appoint a receiver of such property.

Mr. *Mushtaq Ahmad,* for the appellant.

Mr. *Shiva Prasad Sinha,* for the respondent.

SULAIMAN, C.J., and HARRIES J.:—This is an appeal by a judgment-debtor arising out of execution proceedings. A simple money decree was passed against the appellant, and in execution of that decree certain properties were sought to be attached. The judgment-debtor objected that the property was wakf property and

*First Appeal No. 197 of 1935, from a decree of M. M. Seth, Civil Judge of Budaun, dated the 19th of January, 1935.