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Before Mr. Justice Iqbal Ahmad and Mr. Justice Bajpai

FAIYAZ AHMAD AND ANOTHER (DEFENDANTS) *v.* JAMAL
UDDIN (PLAINTIFF)*

U. P. Agriculturists' Relief Act (Local Act XXVII of 1934), section 2(2), third proviso—Non-agriculturist "joining" with an agriculturist in a transaction of loan—Transfer by agriculturist mortgagor of part of the mortgaged property to a non-agriculturist—Does not come under the proviso—U. P. Agriculturists' Relief Act, sections 30, 33—Suit under section 33 maintainable by such transferor—Transferee also entitled to benefit of reduction of interest.

Where an agriculturist mortgagor transfers part of the mortgaged property to a non-agriculturist, who thereupon becomes jointly liable with the mortgagor for repayment of the loan to the mortgagee, the case is not one of a non-agriculturist "joining" with an agriculturist in a transaction of loan, within the meaning of the third proviso to section 2(2) of the U. P. Agriculturists' Relief Act, and the mortgagor is not debarred from bringing a suit under section 33 of the Act. Further, as even a non-agriculturist transferee from an agriculturist mortgagor is entitled to reduction of interest under section 30 of the Act, the maintainability of the suit under section 33 by the mortgagor would not be conferring indirectly a benefit on the non-agriculturist transferee to which he was not himself directly entitled.

Mr. *Gopal Behari*, for the appellants.

The respondent was not represented.

IQBAL AHMAD and BAJPAI, JJ.:—This appeal, though filed as an appeal against a decree, is really an appeal against an order of remand passed by the District Judge of Agra in a suit filed by Jamaluddin plaintiff respondent under section 33 of the U. P. Agriculturists' Relief Act (Act XXVII of 1934).

The facts that led to the suit are as follows.

In the year 1934 Jamaluddin executed two simple mortgage deeds in favour of the defendants appellants mortgaging three items of properties. After the execution of the mortgage deeds Jamaluddin transferred

*Second Appeal No. 94 of 1938, from a decree of F. N. Crofts, District Judge of Agra, dated the 29th of September, 1937, reversing a decree of V. Bhargava, Civil Judge of Agra, dated the 11th of May, 1937.

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two items of the mortgaged properties to Hameed Bano, his mother-in-law, and Hameed Bano undertook the liability to pay the amount due on the basis of the two mortgages. Hameed Bano was and is admittedly a non-agriculturist.

Jamaluddin then filed the suit under section 33 of the Act for account. He impleaded only the mortgagees as defendants to the suit and did not implead Hameed Bano. The mortgagees defendants contested the suit on two grounds. Firstly they maintained that Jamaluddin was not an agriculturist either on the date of the execution of the mortgage deeds or on the date of the institution of the suit, and secondly they contended that even if he was an agriculturist on the date of the execution of the mortgage deeds he ceased to be an agriculturist when he transferred some of the items of the mortgaged property to Hameed Bano and the latter undertook the liability to pay the loan. This latter contention of the defendants was based on the third proviso to section 2(2) of the Act which provides that "If a non-agriculturist joins with an agriculturist in any transaction of loan, save for the purpose of adding his name as security, the agriculturist shall not be considered as such for the purpose of that transaction." Both the courts below overruled the first contention of the defendants and held that Jamaluddin was an agriculturist both on the date of the execution of the mortgage deeds and on the date of the suit.

The court of first instance, however, accepted the second contention of the defendants and held that because of the transfer in favour of Hameed Bano, Jamaluddin ceased to be an agriculturist and was, therefore, not entitled to file the suit. In this view of the matter that court dismissed Jamaluddin's suit.

Jamaluddin filed an appeal in the lower appellate court, and the question whether the appeal lay to that court does not appear to have been raised in that court. The learned District Judge entertained the appeal and,

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holding that the proviso referred to above had no application to the case, reversed the decision of the court of first instance and remanded the case to that court to grant appropriate relief to Jamaluddin. It is against this order of remand that the present appeal has been filed.

Jamaluddin, though served with notice of the appeal, has not appeared. The question whether the appeal to the District Judge was competent and whether the present appeal against the order of the District Judge can be entertained by this Court is not free from difficulty. But in the view that we take it is unnecessary to decide this question.

The mortgaged property transferred to Hameed Bano is undoubtedly liable to sale for satisfaction of the mortgage debt and Hameed Bano is therefore in the position of a debtor so far as the defendants are concerned. In other words, both Jamaluddin and Hameed Bano are in the position of mortgagors and therefore in the position of joint debtors under the two mortgage bonds, and their liability under those bonds is co-extensive at least so far as the mortgaged properties are concerned. The question, however, remains whether the mere fact of the transfer of some of the items of mortgaged properties and of the liability undertaken by Hameed Bano to satisfy the debts due on the basis of the mortgage deeds attracted the provisions of the proviso quoted above. That proviso can apply only when a non-agriculturist joins with an agriculturist in any transaction of loan. The transactions of loans in the present case were evidenced by the two mortgage deeds as the loans were incurred by executing those deeds. Hameed Bano did not "join" in the execution of those deeds and, therefore, it cannot be said that Hameed Bano joined with Jamaluddin in the transactions of loans evidenced by the two deeds.

It is to be remembered that the Agriculturists' Relief Act was passed with the avowed object to make provi-

sion for the relief of agriculturists and the proviso referred to above is in the nature of an exception to the definition of "agriculturist" contained in the Act. The proviso must, therefore, be strictly construed and a liberal interpretation should not be put on the same so as to deprive a person who is otherwise an agriculturist from seeking the benefit conferred by the Act.

There is yet another reason for holding that the suit by Jamaluddin was maintainable. Even a non-agriculturist transferee from an agriculturist mortgagor is entitled to reduction in the rate of stipulated interest in accordance with the provisions of section 30 of the Act. Such a transferee is entitled to file an application under section 30 for reduction in the amount of interest, provided the loan was originally taken by an agriculturist: See *Misri Lal v. Alexander Gardner* (1) and *Bireshwar Das Bapuli v. Uma Kant Panday* (2).

In the present case if the defendants had put their mortgages into suit Hameed Bano would have been entitled to claim reduction in the stipulated rate of interest in accordance with the provisions of the Act. In a suit under section 33 in the framing of accounts all that the court does is to compute interest according to the directions contained in the Act. Hameed Bano, though a non-agriculturist, is not, therefore, disentitled to the benefit conferred by the Act in the matter of interest. By giving relief to Jamaluddin under section 33 no indirect benefit to which Hameed Bano may not be entitled would be conferred on her. There is, therefore, no reason to hold that Jamaluddin was not entitled to file the suit. It follows that the decision of the court of first instance was erroneous and the view taken by the learned District Judge is correct.

Even if an appeal does not lie in this Court, this Court in the exercise of its revisional jurisdiction is competent to revise the decision of the court of first instance. The court of first instance had undoubtedly jurisdiction to entertain the suit filed by Jamaluddin

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(1) [1936] A.L.J. 1250.

(2) I.L.R. [1937] All. 514.

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and to grant the relief prayed for by him. By refusing to exercise this jurisdiction the court failed to exercise jurisdiction vested in it and therefore this Court can set aside the decision of the court of first instance and pass the same order that the learned District Judge has done. By dismissing the present appeal we shall be upholding the order of the District Judge which was the appropriate order in the case. We accordingly dismiss this appeal, but as the respondent is not represented we make no order as to costs.

Before Justice Sir Edward Bennet and Mr. Justice Verma

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LACHHMANDAS CHHIDDULAL (DECREE-HOLDER) v. BABU LAL (SURETY)*

Civil Procedure Code, section 55(4)—Realisation of security from surety—Liability arises only when judgment-debtor neither applies for adjudication nor appears—Discretion of court.

Under section 55(4) of the Civil Procedure Code the decree-holder is not entitled to proceed against the surety unless there has been failure on the part of the judgment-debtor in both the respects, namely in applying for adjudication as an insolvent and in appearance. Where the judgment-debtor had complied with one of these conditions, by applying for adjudication as an insolvent, the decree-holder was not entitled to ask the court to realise the security.

The court has a discretion in making or refusing an order in favour of the decree-holder under section 55(4) of the Civil Procedure Code.

Mr. S. B. L. Gaur, for the appellant.

Mr. J. Swarup, for the respondent.

BENNET and VERMA, JJ.:—This is an appeal by the decree-holder and arises out of proceedings for the execution of a decree which is one for money. The judgment-debtor was arrested and was brought before the court on the 6th of February, 1933, when he made an application under section 55 of the Code of Civil

*Second Appeal No. 1947 of 1937, from a decree of V. Bhargava, Civil Judge of Agra, dated the 30th of August, 1937, confirming a decree of H. P. Asthana, Munsif of Fatehabad, dated the 21st of December, 1936.