

CIVIL WRIT.

Before Mehar Singh, J.

NAWAB ZAHIR-UD-DIN AHMAD KHAN AND ANOTHER.—
Petitioners.

versus

THE APPELLATE OFFICER, ETC.—*Respondents.*

Civil Writ No. 113-D of 1956.

*Evacuee Interest (Separation) Act (LXIV of 1951)—
Section 9(1)—Statutory rate of interest—Non-evacuee,
whether can take advantage of—Procedure for separation
of interests under the Act.*

1958

April, 14th

*Held, that the non-evacuees are not entitled to the
benefit of the statutory rate of interest provided in sec-
tion 9(1) of the Evacuee Interest (Separation) Act, 1951.*

*Held, that under the Evacuee Interest (Separation)
Act the competent officer must first separate the interest*

of non-evacuee co-sharers from evacuee co-sharer. When that has been done, then he proceeds to separate the interest of non-evacuee mortgagee from the evacuee mortgagor in so far as the right and title of the evacuee mortgagor in the property is concerned. So in the end he is left with three separate interests: (1) of the non-evacuee co-sharer, (2) of the evacuee mortgagor co-sharer, and (3) of the non-evacuee mortgagee. As between the second and the third the rate of interest will apply according to section 9(1) of this Act and as between the first and the third the rate of interest will apply according to ordinary law which, subject to any statutory limitation, is the contractual rate between the parties. The fact that the competent officer is to separate the interests of these persons under the Act shows that the integrity of the mortgage is split up under the statutory provision in the Act.

Petition under Articles 226 and 227 of the Constitution of India, praying that a writ or order in nature of certiorari or mandamus or other appropriate writ be granted quashing the order of appellate officer, dated 12th July, 1956, and restoring the order of competent officer, dated the 5th August, 1956, or commanding the respondents to allow the claim of the petitioner with future interest at 5 per cent per annum and further praying that such other orders or relief be granted as this Court be pleased to deem fit and the costs of this petition be awarded.

TARA CHAND BRIJ MOHAN LAL, for Petitioners.

I. D. DUA and R. S. NARULA, for Respondent:

ORDER

Mehar Singh, J. The only question for consideration in this case is whether in the matter of statutory rate of interest a non-evacuee is entitled to the benefit of section 9 (1) of the Evacuee interest (Separation) Act (No. LXIV), 1951, when he is a co-mortgagor of composite property under that Act?

It is not necessary for the consideration of this question to go into any appreciable detail of the facts of the case and it will be sufficient to say,

for the purposes of this order, that the two petitioners, non-evacuees, and one Alla-ul-Din, an evacuee, are the mortgagors, and Jamna Devi, respondent No. 2, is the mortgagee of the property.

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In the beginning the purpose for which Act No. LXIV of 1951 was enacted is stated in that Act in these words:—

“An Act to make special provisions for the separation of the interests of the evacuees from those of other persons in property in which such other persons are also interested and for matters connected therewith.”

The Preamble recites:—

“Whereas it is expedient to make special provisions for the separation of the interests of evacuees from those of other persons in property in which such other persons are also interested and for matters connected therewith;”

It will be seen that the purpose for which the statute was enacted and its preamble leave no doubt at all that this Act is meant only for the separation of interests of evacuees from other persons who are obviously non-evacuees.

In section 2(d) of this Act is defined ‘composite property’ to mean “any property which, or any property in which an interest, has been declared to be evacuee property or has vested in the Custodian under the Administration of Evacuee Property Act, 1950 (XXXI of 1950), and—

- (1) in which the interest of the evacuee consists of an undivided share in the property held by him as a co-sharer or partner of any other person, not being an evacuee; or

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(ii) in which the interest of the evacuee is subject to mortgage in any form in favour of a person, not being an evacuee;"

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There are other sub-clauses of section 2(d), but those are not material. The two sub-clauses referred to above of this clause (d) of section 2 of the Act show that in the case of co-sharers or partners, there is to be separation of interest in property between an evacuee and a non-evacuee. Again, in the case of a mortgage there is to be a separation of interest between a non-evacuee mortgagee and evacuee mortgagor. It may happen that these two sub-clauses may apply at one and the same time to a particular case and the present is a case of that type. Here the petitioners, non-evacuees, are co-owners of the property along with an evacuee named Alla-ul-Din, the three being joint mortgagors of the same. The petitioners are entitled to separation of their interest as non-evacuees from the evacuee and that will be based on the ground that they are co-sharers of the property with the evacuee. The mortgagee is entitled to have her interest separated from the evacuee mortgagor in so far as the mortgage concerns that mortgagor.

Section 7 of the Act deals with submission of claims and the details that are required to be stated in the claim and the time within which the claim is to be made. Section 8 of the Act provides for separation of the interest of an evacuee from the interest of the claimant in the property in question and then details are given in the section of what the order of the Competent Officer in making such separation is to contain. Then follows section 9 and its subsection (1), that is under consideration in this case, reads thus—

"Section 9(1) Notwithstanding anything to the contrary in any law or contract or

any decree or order of civil court or other authority, where the claim is made by a mortgagee, no mortgaged property of an evacuee shall, subject to the provisions of subsection (2), be liable for the payment of interest at a rate exceeding five per cent per annum simple on the principal money advanced or deemed to have been advanced."

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In the present case first the petitioners made an application under section 7 claiming separation of their interest in the property as co-sharers from Alla-ud-Din evacuee. After them the mortgagee came in claiming separation of her interest in so far as the mortgage was concerned from that of evacuee mortgagor Alla-ud-Din. It is in these circumstances that the petitioners, non-evacuees, claim benefit of the statutory rate of interest under section 9(1) of the Act. Section 10 provides for details now, on a claim by a co-sharer or a partner, the competent officer is to direct the separation of the interests of the persons concerned in the composite property. It also deals with the separation of the interest of non-evacuee mortgagee and evacuee mortgagor. Some reliance has been placed on section 11 of the Act on behalf of the petitioners but all that it provides is that in the case of composite property after separation of the interest of the non-evacuee, it is the interest of the evacuee that alone remains evacuee property, but that if the non-evacuee makes no claims as to his interest in the property then the whole vests in the Custodian. It has not been quite clear how this advances the case of the petitioners.

The learned counsel for the petitioners has urged that some kind of enquiry is necessary by the competent officer in splitting the mortgage consideration between the various mortgagors if he is to

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separate the interest of evacuee mortgagor from the non-evacuee mortgagors and that some how a dispute between such parties is to be settled. He is of the opinion that there is no provision in this Act for the settlement of such a dispute between co-owners or co-sharers. But it appears that section 12 of the Act makes a clear provision with regard to a situation to which the learned counsel is referring. That section says:—

“Section 12. Nothing in this Chapter shall prejudice any rights in respect of the property transferred or delivered, or payment made, to a claimant under the provisions of this Act which any other claimant or other person may be entitled by due process of law to enforce against the claimant to whom the property is delivered or transferred or the payment is made.”

This provides for the disputes between the claimants themselves and between the claimants and other persons.

The learned counsel for the petitioners contends that the general principle is that a mortgage security is indivisible, and that being so, in deciding what rate of interest is to be charged under a mortgage under section 9(1) of the Act, the competent officer cannot possibly split the mortgage consideration and then say that the statutory rate of interest will apply to an evacuee and the contractual rate of interest will apply to a non-evacuee. But the rule that a mortgage security is indivisible, is obviously subject to the contract between the parties, the conduct of the parties and any law applying to such a transaction. It has been shown that under Act No. LXIV of 1951 in a case as the present the competent officer must first separate

the interest of non-evacuee co-sharers from evacuee co-sharer. When that has been done, then he proceeds to separate the interest of non-evacuee mortgagee from the evacuee mortgagor in so far as the right and title of the evacuee mortgagor in the property is concerned. So in the end he is left with three separate interests: (1) of the non-evacuee co-sharer, (2) of the evacuee mortgagor co-sharer, and (3) of the non-evacuee mortgagee. As between the second and the third the rate of interest will apply according to section 9(1) of this Act and as between the first and the third the rate of interest will apply according to ordinary law which, subject to any statutory limitation, is the contractual rate between the parties. The fact that the competent officer is to separate the interests of these persons under the Act shows that the integrity of the mortgage is split up under the statutory provision in the Act. The petitioners, therefore, cannot base their argument on the general principle that the integrity of a mortgage cannot be split up.

It is then said that the definitions of the terms 'evacuee interest', 'mortgage debt', and 'principal money', respectively in clauses (e), (f), and (h) of section 2 of the Act go to show (a) that if the legislature intended that the benefit of section 9(1) was to go only to an evacuee it would not have used the words 'mortgaged property of an evacuee' in that subsection, but would have used the expression 'evacuee interest' as defined in the Act, (b) that the expression 'mortgage debt' in the Act would then have referred only to a part of such debt which concerned an evacuee only, and (c) that the expression 'principal money' would not have referred to the whole of the consideration for the mortgage. It appears to me that the argument founded on these definitions is not quite sound. The legislature in section 9 (1) has said

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that that subsection concerns 'mortgaged property of an evacuee'. This is as clear and as strong an expression to show that the subsection relates to nothing else but to property that has been mortgaged by an evacuee and no more. The legislature was dealing separately with the question of mortgage and it appears to me that the use of the expression 'evacuee interest' in the subsection would probably have led to many complications. In so far as the other two expressions 'mortgage debt' and 'principal money' are concerned, the legislature could not do anything but refer to the debt as a whole and the principal money of the mortgage as a whole, for without such reference the interest or share of the evacuee would not have been ascertainable and consequently separable. The legislature could not possibly assume, without enquiry, that the share of the evacuee existed separately in a composite property and also the quantum of the share existed separately. These definitions do not advance the case of the petitioners at all.

Leaving aside any other consideration the use of the words 'mortgaged property of an evacuee' themselves can only be interpreted in one way and that is that this section refers to an evacuee and in no case to a non-evacuee. Reference has been made to the preamble of the Act and the purpose for which it was enacted and that also makes it clear that the Act is not meant to afford any advantage or benefits to a non-evacuee.

In this case the competent officer, following a previous decision of the appellate officer, came to the conclusion that the non-evacuees, the petitioners, were entitled to the benefit of section 9(1) of the Act, but on appeal the appellant officer set aside that order and found that non-evacuees are

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not entitled to the benefit of that subsection. I have shown that the decision of the appellate officer is correct and sound.

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In this case there is another consideration on which this petition should really be summarily dismissed. Before the competent officer a statement was made by the learned counsel appearing on behalf of the petitioners that the petitioners agreed to abide by the decision of the competent officer or the appellate officer with regard to the question of interest and to pay the same whether it was decided to be the statutory rate or the contractual rate. An attempt has been made on the part of the petitioners to go back on that statement and on two considerations that have been urged. The first consideration is that no such statement in this light ~~was made and that the statement was made only for the purpose of ascertaining the actual amount due from the parties and that the petitioners were willing to pay the amount to save the property from being sold.~~ But it is not quite easy to understand this because without going into the question of interest the amount due could not be ascertained and without some payment of the amount due the property could not be saved from sale. The other ground urged is that the statement was only made if the decisions of the competent officer and the appellate officer were concurrent but there is no such condition in the statement. In my opinion this statement of the learned counsel for the petitioners disentitles them to come to this Court for any relief in a writ petition, even if otherwise there was substance in the case, but I have shown that there is, on merits also, no case on the side of the petitioners.

The petition is dismissed with costs, counsel's fee being Rs. 60 for each respondent.

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