

## APPELLATE CIVIL

*Before Mehar Singh, C. J. and H. R. Sodhi, J.*

KUNDAN AND OTHERS,—Appellants

*versus.*

UNION OF INDIA AND ANOTHER,—Respondents

**Regular Second Appeal No. 1196 of 1967**

September 19, 1968

*Evacuee Interest (Separation) Act (LXIV of 1951)—Ss. 2(d) and 9(2)—Non-evacuee mortgaging land with another non-evacuee—Mortgagor transferring the equity of redemption to an evacuee—S. 9(2)—Whether applicable—Mortgage—Whether stands extinguished—Corporeal ownership—Meaning of—Mortgage—Whether becomes an owner.*

*Held*, that there is nothing in the language of section 2(d) and 9(2) of Evacuee Interest (Separation) Act to warrant that in order to attract the provisions of section 9(2), the mortgage should have been executed by the evacuee himself. A mortgage is by the owner of the property who only transfers some of his interests in the said property for the purpose of securing the payment of money to be advanced by way of loan, an existing or future debt, or the performance of an engagement may give rise to a pecuniary liability, but this does not mean that the mortgagor ceases to be owner simply because he has transferred some of his rights in the specific immovable property put under a particular charge. He has always the right to redeem which in English law is called the equity of redemption. The right to redeem implies that he is still the owner who has parted with only some of his rights. It, therefore, makes no difference that the original mortgage is by a non-evacuee. As soon as the evacuee purchases the land from a non-evacuee mortgagor or what may be called the equity of redemption, he becomes the owner of the land itself which would be deemed to have been mortgaged by him (evacuee) within the meaning of section 9(2) of the Act. The mortgage thus stands extinguished on the expiry of twenty years which must be computed from the date of the original mortgage.

(Paras 5 and 6)

*Held*, that a corporeal ownership is the right to the entirety of the lawful uses of a corporeal thing. This vast compass of rights can be reduced or limited to any extent by creating the rights of others in the corpus. There may be cases where the right of ownership of the property may be practically eaten up by the permanent rights of lessees, mortgagees and other encumbrancers, but all the same he continues to be an owner. A mortgagee cannot be said to have become the owner of the property simply because of having a charge on that property

and all that he has, is a particular type of a right over that property. When a mortgagor transfers the equity of redemption, he transfers the property itself and the transferee gets the same rights as an owner which the mortgagor had. The mortgagee acquires only a right in the property of the mortgagor which is a right in *re aliena*. (Para 5)

*Case referred by the Hon'ble Mr. Justice D. K. Mahajan, on 21st December, 1967 to a larger Bench for decision of the important question of law involved in the case. The case was finally decided by a Division Bench consisting of Hon'ble the Chief Justice Mr. Mehar Singh and the Hon'ble Mr. Justice H. R. Sodhi on 19th September, 1968.*

*Second Appeal from the decree of the Court of Shri Sarup Chand Goyal, 1st Additional District Judge, Karnal, dated the 10th day of October, 1967 affirming that of Shri Rajinder Paul Gaiind, Sub-Judge, 1st Class, Karnal, dated the 10th October, 1966, dismissing the plaintiff's suit.*

J. N. KAUSHAL, SENIOR ADVOCATE AND ASHOK BHAN, ADVOCATE WITH HIM, for the Appellants.

RAJ KUMAR, ADVOCATE, for ADVOCATE-GENERAL (HARYANA), for the Respondents.

### JUDGMENT

SODHI, J.—This regular Second Appeal came up for hearing before D. K. Mahajan, J., on December 21, 1967, when the learned Judge considered that the points involved in the case were of considerable importance and the entire case should, therefore, be decided by a Division Bench. It is in these circumstances that the appeal is before us.

(2) The facts are not in dispute. One Mata Bakhsh, was was a Hindu, originally owned the suit land measuring 131 Kanals, 13 Marlas situate in village Saraula, tehsil Kaithal, district Karnal. He mortgaged this land by two mortgage-deeds in the years 1897 and 1898 for a sum of Rs. 290 in favour of Shadi and Jati Ram, predecessors-in-interest of the plaintiffs-appellants. The possession of land in pursuance of the terms of the mortgage was delivered to the mortgagees who are in possession of the same since then. Mutations of the mortgages were sanctioned and Mata Bakhsh later gifted the equity of redemption of the said land in favour of Parsa, son of Satha

Kundan, etc. v. Union of India, etc. (Sodhi, J.)

Jat in the year, 1914, the mutation in respect of which was sanctioned on June 4, 1915. On February 10, 1928, Parsa sold his equity of redemption to one Khawaja, a Mohammedan, for Rs. 1,300 per registered deed and a mutation of sale was also sanctioned on May 28, 1928. Khawaja vendee was then entered in the revenue records as a mortgagor and the plaintiffs as mortgagees with possession. There then came the partition of the country in the year 1947 when Khawaja migrated to Pakistan. The plaintiffs continued in possession of the land as mortgagees and the entries in the revenue records also continued to the same effect showing the plaintiffs as mortgagees and Khawaja as mortgagor. In the year 1965, the Punjab Government through the Tehsildar (Sales) started auction proceedings in respect of the suit land treating it as an evacuee property free from any encumbrances. The plaintiffs were probably feeling that they had become owners of the land, since it was not redeemed by the mortgagor within the period of sixty years. They filed the present suit on November 19, 1965, after serving notice under section 80 of the Code of Civil Procedure, for a declaration that they had become absolute owners of the land in dispute by lapse of the period of sixty years and the property could not, therefore, be sold by the Custodian as an evacuee property. The Union of India and the Custodian of Evacuee Property, Jullundur, were impleaded as defendants, who contested the suit on the ground that the property was an evacuee property and the mortgage stood extinguished under section 9(2) of the Evacuee Interest (Separation) Act, 1951, hereinafter called the Act, and that it vested in the Union of India free from all encumbrances. On the pleadings of the parties, the following issues were framed--

- (1) Whether the plaintiff has become the owner of the property in dispute due to lapse of time ?
- (2) Whether the civil Court has got jurisdiction to try this suit ?
- (3) Whether the defendant is entitled to special costs ?
- (4) Relief.

The trial Court held under issue No. 1 that the mortgage in favour of the plaintiffs had been extinguished on the coming into force of the Act in the year 1951, in view of the provisions of section 9(2)

contained therein, and that the plaintiffs had no title in the land. Issue No. 2, which related to the jurisdiction of the civil Court, was not pressed by the defendants. Issue No. 3 was decided against the defendants. As a result of the finding on issue No. 1, the suit was dismissed.

(3) The plaintiffs preferred an appeal. The District Judge, Karnal, affirmed the findings of the trial Court though with a more elaborate discussion of the relevant law and dismissed the appeal. Hence the present appeal by the plaintiffs.

(4) It is contended before us by Mr. J. N. Kaushal, learned counsel for the appellants, that section 9(2) of the Act does not apply to the circumstances of the instant case. The contention is that this provision is intended to apply only to those cases where the original mortgage was by a Muslim evacuee and that in the present case, the mortgage was by Mata Bakhsh, who was admittedly a Hindu. According to the learned counsel the mere fact that equity of redemption has been transferred by the original mortgagor in favour of a Muslim does not convert it into a mortgage by a Muslim. It is submitted that since sixty years, the prescribed period of redemption, had expired, the plaintiffs-appellants became owners by lapse of time and the Custodian had no jurisdiction to interfere with their ownership. At this stage the provisions of section 9(2) may be reproduced here with advantage—

“9. (2) Where a mortgagee has taken possession on any terms whatsoever of any agricultural land and is entitled to receive profits accruing from the land and to appropriate the same, every such mortgage shall be deemed to have taken effect as a complete usufructuary mortgage and shall be deemed to have been extinguished on the expiry of the periods mentioned in the mortgage deed or twenty years, whichever is less, from the date of the execution of the mortgage deed and if the aforesaid period has not expired and the mortgage debt has not been extinguished, the competent officer shall determine the mortgage debt due having regard to the proportion which the unexpired portion of that period bears to the total of that period.”

In order to support the contention that section 9(2) of the Act does not apply and the mortgage cannot be deemed to have been extinguished on the expiry of the period of twenty years from the date of

the execution of the mortgage debt, the learned counsel also relies on the definition of the 'composite property' as given in section 2 (d) of the Act, the relevant portion whereof is in the following terms—

"2 In this Act, unless the context otherwise requires—

\* \* \* \* \*

(d) 'composite property' means 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—

\* \* \* \* \*

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

\* \* \* \* \*

The argument of the learned counsel is that a mortgage debt with regard to which the competent officer can have jurisdiction must be one incurred by the evacuee himself. 'Mortgage debt' has been defined under section 2(f) of the Act in the following terms—

"2. (f) 'mortgage debt' means any liability in respect of a property due under any form of mortgage (including any usufructuary mortgage or mortgage by conditional sale) whether such liability is payable presently or in future, or under any decree or order of a Court or otherwise, or whether ascertained or not, which—

(i) in any case where it is incurred by an evacuee, is secured by the mortgage of the interest of the evacuee in the property in favour of a person, not being an evacuee ;

(ii) in any case where it is incurred by a person not being an evacuee, is secured by the mortgage of the interest of such person in the property in favour of an evacuee;

but does not include any such liability of an evacuee arising out of any transaction entered into after the 14th day of August, 1947 unless such transaction has been confirmed by the Custodian under the Administration of Evacuee Property Act, 1950 (XXXI of 1950); .....

The learned counsel submits that the interest of the Muslim evacuee in the mortgaged land was only a right to redeem commonly describes as equity of redemption and it was an interest separate from ownership of the land. The contention is that the interest of the Muslim evacuee is only an equity of redemption and if that interest namely equity of redemption were subjected to a mortgage, then alone could the property be a composite property within the meaning of the Act. This contention proceeds on the hypothesis that an equity of redemption was a distinct type of property acquired by the transferee and that he had no interest in the land which could be said to be under a mortgage with the plaintiffs appellants. This argument though quite ingenious is wholly fallacious and without merit.

(5) There is nothing in the language of sections 2(d) and 9(2) of the Act to warrant that the mortgage should have been executed by the evacuee himself. A mortgage is by the owner of the property who only transfers some of his interests in the said property for the purpose of securing the payment of money to be advanced by way of loan, an existing or future debt or the performance of an engagement may give rise to a pecuniary liability, but this does not mean that the mortgagor ceases to be owner simply because he has transferred some of his rights in the specific immovable property put under a particular charge. He has always the right to redeem which in English law is called the equity of redemption. The right to redeem implies that he is still the owner who has parted with only some of his rights and not that, as contended by Mr. Kaushal, he has acquired a new kind of property or interest distinct from the ownership of the land. It may be that he sometimes even delivers possession of the land depriving himself of one of the important benefits of ownership. A corporeal ownership is that right to the entirety of the lawful uses of a corporeal thing. This vast compass of rights can be reduced or limited to any extent by creating the rights of others in the corpus. There may be cases where the right of ownership of the property may be practically eaten up by the permanent rights of lessees, mortgagees and other encumbrancers, but all the same he continues to be an owner. A mortgagee cannot be said to have become the owner of the property simply because of having a charge on that property and all that he has is a particular type of a right over that property. When a mortgagor transfers the equity of redemption, he transfers the property itself and the transferee gets the same rights as an owner which the mortgagor had. The mortgagee acquires only a right in the property of the mortgagor which is a right in *re aliena*.

(6) In the instant case, it makes no difference that the original mortgage was by a Hindu. As soon as the Muslim evacuee Khawaja purchased the land from the mortgagor or what may be said to be an equity of redemption, he became the owner of the suit land itself which would be deemed to have been mortgaged by him (the Muslim evacuee) within the meaning of section 9(2) of the Act. This mortgage thus stood extinguished on the expiry of twenty years which must be computed from the date of the original mortgages which were effected in the years 1897 and 1898. Even if the period of twenty years is to be taken from the date of transfer, still more than twenty years had elapsed when the suit was filed as the transfer of equity of redemption in favour of Khawaja took place in the year 1928. The liability for the payment of mortgage debt was transferred in favour of the Muslim evacuee in the year 1928 and by virtue of this transfer Khawaja will be deemed to have incurred the debt secured by the mortgage and such a debt will also be a mortgage debt within the meaning of section 2(f) of the Act. As already observed, Khawaja became the owner of the property by purchasing the equity of redemption and had an interest in the land which stood mortgaged with the plaintiffs-appellants.

(7) The next contention of Mr. Kaushal is that the procedure as envisaged in sections 6, 7 and 8 of the Act was not followed in the matter of separation of the evacuee interest and in the absence thereof, the Custodian of Evacuee Property had no power to put the property to auction and take forcible possession thereof. This argument again loses sight of the provisions of section 9 of the Act, according to which the mortgage stood extinguished on the expiry of twenty years and the Custodian of the Evacuee Property automatically became the owner of the property. It is open to the Custodian of the Evacuee Property to take possession of such property by evicting the plaintiffs in accordance with law.

(8) For the foregoing reasons, there is no merit in the appeal which stands dismissed with costs.

MEHAR SINGH C.J.—I agree.