we uphold the decision of the High Court and dismiss each of these appeals with costs. There will, however, be only one hearing fee.

Appeals dismissed.

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March 7

LAKSHMI ACHI AND OTHERS

v.

T.V.V. KAILASA THEVAR AND OTHERS

(S. K. DAS, A. K. SARKAR, M. HIDAYATULLAH and N. RAJAGOPALA AYYANGAR JJ.)

Debt Relief—Agriculturist—Scaling down of decree debt—Enabling statute coming into force pending appeal—Application made after appellate decree, if barred by res-judicata—Madras Agriculturists Relief Act, 1938 (Mad. 4 of 1938), as amended by Madras Act 23 of 1948, ss. 16 (iii), 19 (2).

The appellants had filed a suit on a mortgage against respondent No. 1 and others as defendants and had obtained a preliminary decree in it on May, 15, 1937 and a final decree on January 20, 1938. Appeals were filed against the preliminary Decree in the High Court of Madras. While the appeals were pending there, the Madras Agriculturists Relief Act, 1938 came into force. The defendants in this suit other than respondent No. 1 thereupon applied for relief under this Act. The applications succeeded and the High Court passed a new preliminary decree on March 25, 1942 after scaling down the amount recoverable in accordance with the Act.

The respondent No. 1 had neither contested the suit nor appeared in the appeals nor made any application under the Act for relief. The preliminary decree passed by the High Court, therefore, confirmed as against him the decree passed by the trial Court. Respondent No. 1 thereafter applied to the trial Court for relief under the Act but the application was dismissed on the ground that in view of the judgment of the High Court the application was not maintainable in the trial Court. Respondent No. 1 thereafter applied to the High

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Court for setting aside the exparte decree in so far as it deprived him of the right to relief under the Act but that application was also dismissed.

On January 25, 1949, Madras Act XXIII of 1948 was passed amending the Act of 1938 by adding a sub-s. (2) to s. 19. After this amendment s. 19 read, "(1) where before the commencement of this Act, a court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculturist ....apply the provisions of this Act to such decree and shall notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be. (2) The provisions of sub-section (1) shall also apply to cases where, after the commencement of this Act, a Court has passed a decree for the repayment of a debt payable at such commencement." Section 16 of the amending Act provided, "The amendments made by this Act shall apply to the following suits and proceedings, namely :— .....(iii) all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act.....". Respondent No. 1 again applied to the trial Court for relief under the Act in view of the amendment but this application was rejected. Respondent No. 1 then appealed to the High Court which granted relief under the Act. The appellants thereupon appealed to the Supreme Court.

Held, that the decree passed by the trial Court was superseded by the preliminary decree passed by the High Court on March 25, 1942. The final decree on the basis of this preliminary decree was passed by the District Judge on September 25, 1943, and this was the only operative decree in the case. Hence s. 19 (2) of the Act of 1938 read with s. 16 (iii) of the amending Act created a new right in favour of defendant No. 1.

Jowad Hussain v. *Gendan Singh*, A. I. R. (1926) P. C. 93, *Gajadhar Singh* v. *Kishan Jiwan Lal*, (1917) I. L. R. 39 All. 641, *The Collector of Customs Calcutta* v. *The East Indian Commercial Co. Ltd.* [1963] 2 S. C. R. 563, referred to.

In the Act the word "debt" includes a decretal debt.

Narayanan Chettiar v. *Ammamalai Chettiar*, [1959] Supp. 1 S. C. R. 237, followed.

Clause (iii) of s. 16 of the amending Act applies to this case because the final decree had not been satisfied in full before

the commencement of the amending Act and that created a fresh right in defendant No. 1 to the benefit of sub-s. (1) of s. 19.

Defendant No. 1 cannot be deprived of the new right given by the amending Act by reason of the dismissal of his earlier applications for reliefs under the Act which were made before the creation of the right.

CIVIL APPEALLATE JURISDICTION : Civil Appeal No. 617 of 1960.

Appeal by special leave from the judgment and order dated December 2, 1955 of the Madras High Court in C. M. A. No. 355 of 1951.

A. V. Viswanatha Sastri, R. Ganapathi Iyer and *G. Gopalakrishnan* for the appellants.

M. K. Ramamurthi, D. P. Singh, R. K. Garg and *S. C. Agarwala,* for respondent No. 1.

1963. March 7. The Judgment of the Court was delivered by

S. K. DAS J.—This is an appeal by special leave from the judgment and order of the Madras High Court dated December 2, 1955 by which the said Court set aside the order of the learned District Judge of East Tanjore dated August 30, 1950 passed on an application made by the 1st respondent herein, under s. 19 of the Madras Agriculturists Relief Act (Act IV of 1938), hereinafter called the principal Act, as amended by the Madras Agriculturists Relief (Amendment) Act of 1948 (Act XXIII of 1948). By the said order the learned District Judge dismissed the application as unsustainable in law. The High Court set aside that order on the ground that the respondent's application for the scaling down of the decree passed against him should not have been dismissed *in limine* and the learned District Judge should have gone into the question whether the respondent was an agriculturist

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entitled to the benefit of the principal Act as amended in 1948.

The material facts are not very much in controversy, but this is one of those cases in which a long history must be stated for the appreciation of a very short point involved in the case. The short point involved is, whether the application made by the 1st respondent herein to the District Judge of East Tanjore in O. S. No. 30 of 1934 on December 6, 1950 was unsustainable in law.

We may now state the long history. The appellants before us are the representatives of the original plaintiffs who as mortgagees instituted a suit (being O. S. No. 30 of 1934) in the court of the District Judge, East Tanjore for the enforcement of a mortgage against respondent No. 1, who was defendant No. 1 in the suit, and six other persons. The mortgage bond upon which the suit was brought was executed by defendant No. 1 for himself and his minor undivided brother, defendant No. 2, and also as authorised agent on behalf of defendants 3 to 7, who were interested in a joint family business. The suit was contested by all the defendants, except defendant No. 1 against whom it proceeded *ex parte*. A preliminary decree was passed on May 15, 1937 by which a sum of Rs. 1,08,098/- was directed to be paid by defendant No. 1 and defendants 3 to 7, in default of which the plaintiffs were declared entitled to apply for a final decree for sale of the mortgaged property and the suit was dismissed as against defendant No. 2. Against this decree, two appeals were taken to the Madras High Court, one by defendants 3 to 7 (being Appeal No. 48 of 1938) who contended that the mortgage was not binding on them or on their shares in the joint family property; and the other by the plaintiffs (being Appeal No. 248 of 1938), who challenged the propriety of the judgment of the trial Judge in so far as it dismissed their claim

against defendant No. 2. During the pendency of these appeals the principal Act came into force and applications were made by defendants 2 to 7 to the High Court praying that in the event of a decree being passed against them, the decretal debt might be scaled down in accordance with the provisions of the principal Act. Defendant No. 1 who did not appeal at any stage of the proceedings did not make any such application. The High Court forwarded these applications to the lower court for enquiry and asked for a finding on the question whether the applicants were agriculturists and if so, to what extent the decretal dues should be scaled down. The District Judge made the necessary enqu ry and submitted a finding that the applicants were agriculturists and that the debt, if scaled down would amount to Rs. 49, 255/- with interest thereon at six percent per annum from October 1, 1937 exclusive of costs. On receipt of this finding the appeals were set down for final hearing and by their judgment dated March 25, 1942 the learned Judges of the Madras High Court accepted the finding of the court below and held that defendants 2 to 7 were entitled to have the debt scaled down, but as no application had been made on behalf of defendant No. 1 he was held entitled to no relief under the principal Act. A decree was drawn up in accordance with this judgment. The amount due by defendants 2 to 7 was stated to be Rs. 49,255/- with interest thereon at six per cent per annum, while so for as defendant No. 1 was concerned the decree of the trial Judge was affirmed subject to a slight modification regarding the rate of interest. Defendant No. 1 thereupon filed an application in the court of the District Judge, East Tanjore, claiming relief under the principal Act alleging that he too was an agriculturist and hence entitled to the benefits of the Act. This application was dismissed on February 25, 1943 on the ground that as a decree had already been passed by the High Court definitely negativing his claim to any relief under the

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principal Act, such application was not entertainable by the lower court. The next step taken by defendant No. 1 was to file an application in the High Court itself praying for setting aside the *ex parte* decree which excluded him from the benefits of the principal Act. This application was rejected by the High Court on December 13, 1943. As no payment was made in accordance with the preliminary decree passed by the High Court, a final decree in terms of the same was passed by the District Judge on September 25, 1943. Proceedings for execution of this final decree were started on August 16, 1944 when an execution petition was filed in the court of the District Judge, East Tanjore. Some of the mortgaged properties were sold and purchased by the decree-holders for a total sum of Rs. 12,005/- and part satisfaction of the decree was entered for that amount. In the course of these proceedings certain terms of settlement were offered by the judgment-debtors. The estate of the decree-holders was then in the hands of the receivers, and it appears that the receivers agreed, with the sanction of the court to receive Rs. 24,000/- only from or on behalf of defendant No. 2 and release him and his share of the mortgaged property from the decretal charge. Likewise the receivers agreed to receive Rs. 48,000/- from defendants 3 to 7 and to release them and their properties from the decretal debt. With regard to defendant No. 1 also the receivers agreed to accept Rs. 37,500/- and it was agreed that if one Yacob Nadar paid the amount on behalf of defendant No. 1 on consideration of the decree against defendant No. 1 being assigned to him, the receivers would accept the same. No such payment was however made on behalf of defendant No. 1. But a sum of Rs. 24,000/- was paid on behalf of defendant No. 2 and his properties were exonerated from the decree. Defendants 3 to 7 also paid a sum of Rs. 48,000/- and odd in two instalments in discharge of their decretal debt. The three amounts paid by defendants

2 to 7 totalled Rs. 72,610-12-0. On March 6, 1947 defendant No. 1 deposited in court a sum of Rs. 3215/- and put in a petition under s.47 and Order XXI r. 2 C. P. C. praying that the amount deposited by him together with the payments already made by defendants 2 to 7 completely wiped off the amount due under the decree as scaled down by the High Court in favour of defendants 2 to 7; defendant No. 1 prayed that as the decree was one and indivisible, full satisfaction of the decree should be recorded exonerating the mortgaged property and also defendant No. 1 himself from any further liability in respect of the decretal debt. The position taken up by defendant No. 1 in substance was that the mortgage debt was one and indivisible and even though different amounts were mentioned as payable by two groups of defendants in the decree, the decree-holders were bound under the terms of the decree to release the entire mortgaged property even on payment of the amount directed to be paid by defendants 2 to 7. This contention of defendant No. 1 was negatived by the District Judge, but was accepted by the High Court on appeal which allowed the application of defendant No. 1 and directed that the court below should enter full satisfaction of the mortgage decree. The decree-holders then came up to this court in appeal (C. A. No. 32/1950) and the judgment of this court is reported in *V. Ramaswami Ayyangar and others* v. *T. N. V. Kailasa Thavar* (1). This court held that though the general law undoubtedly is that a mortgaged decree is one and indivisible, exceptions to the rule are admitted in special circumstances where the integrity of the mortgage has been disrupted at the instance of the mortgagee himself. This court further held that there was nothing wrong in law in scaling down a mortgage decree in favour of one of the judgment-debtors while as regards the others the decree was kept intact; the principal Act was a special statute which aimed at giving relief not to debtors in general

(1) [1951] S. C. R. 292.

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but only to a specified class of debtors, namely, those who are agriculturists as defined by the Act and to this extent it trenched upon the general law. The result of the decision of this court was that the decree stood unscaled as against the 1st defendant. When the appeal in the Supreme Court was pending, the amending Act of 1948 was enacted and it came into force on January 25, 1949. We shall presently read the provisions of this amending Act. On the strength of these provisions defendant No. 1 made an application again to scale down the decretal debt. This was application No. 79 of 1950. It was this application which the learned District Judge held to be unsustainable in law. On appeal, the High Court held that the application was sustainable and an enquiry should be made whether defendant No. 1 is an agriculturist within the meaning of the principal Act. The present appeal is directed against this order of the High Court.

Now before we proceed to consider the questions which arise in this appeal it is necessary to set out the relevant provisions of the principal Act and the amending Act of 1948 of which defendant No. 1 (respondent No.1 herein) claims the benefit. We must first read s. 19 of the principal Act. That section is in these terms :

> "19. (1) Where before the commencement of this Act, a court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree holder, apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be :

Provided that all payments made or amounts recovered, whether before or after the commencement of this Act, in respect of any such decree shall first be applied in payment of all costs as originally decreed to the creditor.

(2) The provisions of sub-section (1) shall also apply to cases where, after the commencement of this Act, a Court has passed a decree for the repayment of a debt payable at such commencement."

It is worthy of note that s. 19 as it originally stood in the principal Act was re-numbered as sub-s. (1) of s. 19 and sub-s. (2) was added by s. 10 of the amending Act of 1948. We may also set out here s. 16 amending Act of 1948. That section is in these terms :

"16. The amendments made by this Act shall apply to the following suits and proceedings namely :—

(i) all suits and proceedings instituted after the commencement of this Act ;

(ii) all suits and proceedings instituted before the commencement of this Act, in which no decree or order has been passed, or in which the decree or order passed has not become final, before, such commencement ;

(iii) all suits and proceedings in which the decree or order passed has not been executed or satisfied in full before the commencement of this Act :

Provided that no creditor shall be required to refund any sum which has

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been paid to or realised by him, before the commencement of this Act."

Respondent No. 1 claimed that he was entitled to the benefit of sub-s. (2) of s. 19 read with cl. (iii) of s. 16 of the amending Act of 1948. The learned District Judge nagatived this claim on the following three grounds :

(i) He held that in O. S. No. 30/1934 the preliminary decree was originally passed on May 15, 1937 and the final decree on January 28, 1938 and both these dates were anterior to the coming into force of the principal Act. The principal Act, it may be stated here, came into force on March 22, 1938. Therefore sub-s. (2) of s. 19 did not apply to the present case.

(ii) Secondly, he held that sub-s. (2) of s. 19 applied to those cases only where there was a debt payable on the date of the commencement of the principal Act; in the present case, however, there was no debt payable on the date of the commencement of the principal Act, the debt having ripened into a decree; therefore sub-s. (2) of s. 19 was not applicable.

(iii) Thirdly, he held that the claim of defendent No. 1 to have the decree against him scaled down having been decided against him by the District Judge in I. A. No. 104 of 1942 on February 25, 1943 and the same claim having been negatived by the High Court in subsequent proceedings, it was not open to defendant No. 1 to make a fresh claim under sub-s. (1) of s. 19 because though sub-s. (1) of s. 19 used the expression "notwithstanding anything contained in the Code of Civil Procedure", that expression related to the provision of the

Code in the matter of amendment of decrees and entering of satisfaction of decree but did not include the principle of *res judicata*, a principle which is more general and comprehensive in character than what is laid down in s. 11 of the Code.

The High Court apparently proceeded on the footing that the present case was one in which a decree had been passed after the commencement of the principal Act and therefore sub-s. (2) of s. 19, added by the amending Act of 1948, applied. The High Court said that no serious attempt was made before it on behalf of the decree-holders to support the view of the learned District Judge that the debt in the present case was not a debt within the meaning of the principal Act because it had ripened into a decree prior to the commencement of the principal Act. The High Court then referred to s. 16 of the amending Act and held that defendant No. 1 was entitled to the benefit of sub-s. (2) of s. 19 read with cl. (iii) of s. 16 of the amending Act, 1948 and the circumstance that the claim of defendant No. 1 to the benefits of the principal Act prior to its amendment in 1948 had been negatived by the District Judge and the High Court did not deprive him of the new right which the amending Act had given him provided he was able to prove that he was an agriculturist within the meaning of the Principal Act.

Learned counsel on behalf of the appellants has argued before us that the view expressed by the High Court is not correct. He has contended that the present case does not come under sub-s. (2) of s. 19 because this was a case in which a decree was passed for the repayment of a debt before the commencement of the principal Act, namely, before March 22, 1938. He has pointed out that so far as defendant No. 1 is concerned, a preliminary decree was passed against him on May 15, 1937 and a final decree on January

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28, 1938. He has also referred us to the decree passed in the High Court on March 25, 1942. In cl. (6) of that decree it was stated that so for as defendant No. 1 was concerned the direction made by the learned District Judge in the decree passed on May 15, 1937 would stand confirmed. Therefore, the argument before us is that the only provision of which defendant No. 1 was entitled to claim benefit is s. 19 as it stood before its amendment in 1948 which applied to cases where a decree was passed before the commencement of the principal Act and in as much as the claim of defendant No. 1 under that provision had been negatived both by the District judge and the High Court on previous applications made by defendant No. 1, it was not open to him to make fresh claim under the same provision. Learned counsel has also submitted that the provisions of the amending Act, 1948 have no application in the present case and therefore no new right has been given to defendant No. 1.

The crucial point for decision in connection with the arguments stated above is whether the decree in the present case is a decree passed before the commencement of the principal Act or after its commencement. It is indeed true that the District Judge passed a preliminary decree on May 15, 1937 and a final decree on January 28, 1938. These decrees, however, were superseded by the preliminary decree which the High Court passed on March 25, 1942. As this court pointed out in *Ramaswami Ayyangar's* case (supra), a preliminary decree was drawn up in accordance with the judgment of the High Court by which the amount due from defendants 2 to 7 was scaled down while so far as defendant No. 1 was concerned, the decree of the trial Judge was affirmed subject to a slight modification regarding the rate of interest. The decree passed on March 25, 1942 was a preliminary decree in as much as it directed that in default of the payment of the amounts directed

to be paid by the decree, the mortgaged properties would be sold. When no payments were made as directed by the preliminary decree of the High Court a final decree in terms of the same was passed by the District Judge himself on September 25, 1943. This was the decree which was put in execution. It is well settled that where an appeal has been preferred against a preliminary decree the time for applying for final decree runs from the date of the appellate decree; see *Jowad Hussain* v. *Gendan Singh* (1). In that decision the Privy Council quoted with approval the following observations of Benerjee, J. made in *Gajadhar Singh* v. *Kishan Jiwan Lal* (2).

> "It seems to me that this rule—the rule regulating application for final decree in mortgage actions—contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the making of a final decree is the existence of a preliminary decree which has become conclusive between the parties. When an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the cause."

The principle that the appellate order is the operative order after the appeal is disposed of, which is the basis of the rule that the decree of the lower court merges in the decree of the appellate court, has been approved by this court in *The Collector of Customs, Calcutta* v. *The East India Commercial Co., Ltd.*, (3). We are therefore of the view that the operative decree in the present case was the preliminary decree made by the High Court on March 25, 1942 which was made final on September 25, 1943. That being the position, the present is a case to which sub-s. (2) of s. 19 is attracted as also the provisions of s. 16 of the amending Act of 1948. Sub-s. (2) of s. 19 read with cl. (iii) of s. 16 entitles defendant No. 1 (respondent No. 1 herein) to claim the benefit of the principal Act, even though his earlier applications prior to

(1) A.I.R. 1926 P.C. 93. (2) (1917) I.L.R. 39 All. 641.
(3) [1963] 2 S. C. R. 563.

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the amending Act of 1948 were rejected. Sub-s. (2) of s. 19 read with s. 16 creates a new right in favour of respondent No. 1 and that right cannot be defeated on the principle of *res judicata*. The true scope and effect of s. 16 was considered by this court in *Narayanan Chettiar* v. *Annamalai Chettiar* (1). Referring to cl. (iii) of s. 16 this court said :

> "Clause (iii), it seems clear to us, applies to suits and proceedings in which the decree or order passed had become final, but had not been executed or satisfied in full before January 25, 1949 : this means that though a final decree or order for repayment of the debt had been passed before January 25, 1949, yet an agriculturist debtor can claim relief under the Act provided the decree has not been executed or satisfied in full before the aforesaid date. It should be remembered in this connection that the word 'debt' in the Act has a very comprehensive connotation. It means any liability in cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a civil or revenue court or otherwise etc. It is, therefore, clear that the word 'debt' includes a decretal debt."

In the case before us cl. (iii) of s. 16 clearly applies because the final decree which was passed on September 25, 1943 had not been satisfied in full before the commencement of the amending Act, 1948, that is, before January 25, 1949. Therefore, by reason of cl. (iii) s. 16 of the amending Act of 1948 respondent No. 1 was entitled to the benefit of sub-s. (2) of s. 19, and he cannot be deprived of that benefit because prior to the new right given to him by the amending Act of 1948 his applications for getting relief under the principle Act had been rejected.

(1) [1959] Supp. 1 S.C.R. 237.

We have, therefore, come to the conclusion that the view expressed by the High Court is the correct view and respondent No. 1 is entitled to the benefit of sub-s. (2) of s. 19 read with cl. (iii) of s. 16 of the amending Act of 1948, provided he establishes that he is an agriculturist within the meaning of the principal Act. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

FIRM SETH RADHA KISHAN (DECEASED) REPRESENTED BY HARI KISHAN AND OTHERS

v.

THE ADMINISTRATOR, MUNICIPAL COMMITTEE, LUDHIANA

(K. SUBBA RAO, RAGHUBAR DAYAL and J. R. MUDHOLKAR, JJ.)

Terminal Tax—Municipality—Collection of—Remedies by way of appeal provided in the Act—Express or implied exclusion of Civil courts—Punjab Municipal Act, 1911 (Punj. III of 1911), ss. 61, 78, 84, 86—Punjab Government Notification No. 26443 dated July, 21, 1932—Items 68, 69 of the Schedule—Code of Civil Procedure, 1908 (Act 5 of 1908), s. 90.

The appellant is a firm carrying on business within the octroi limits of Ludhiana Municipality. On the *Sambhar* salt imported by it into the limits of the Municipality terminal tax was imposed and the appellant made payment of the said tax. Under item 68 of the Schedule to the relevant Government Notification the Municipality is entitled to impose a certain rate of tax on common salt and under item 69 it is entitled to impose a higher rate of tax in respect of salt of all kinds other than common salt. In the present case the higher rate was imposed. The appellant filed a suit against the respondent in the civil court, Ludhina, for the refund of the amount paid by him.