(1966) 02 KL CK 0026

High Court Of Kerala

Case No: S.A. No. 377 of 1962

Padmanabhan Pankajakshan	APPELLANT
Vs	
Ayyappan Narayanan	RESPONDENT

Date of Decision: Feb. 9, 1966

Acts Referred:

- Limitation Act, 1963 - Section 20

Citation: (1966) KLJ 559

Hon'ble Judges: M. Madhavan Nair, J

Bench: Single Bench

Advocate: G. Viswanatha Iyer and S. John, for the Appellant; P. Subramoniam Potti, P.V. Neelakanta Pillai and S.A. Nagendran, for the Respondent

Judgement

M. Madhavan Nair, J.

Second Appeal by 1st defendant. The appellant, in conjunction with his wife, had mortgaged the suit property with possession to the respondent on April 29, 1952. While in possession of the property the respondent was prosecuted by a stranger for wrongful entry into the property and convicted on March 12, 1958. Averring that he had lost possession of the property, the respondent instituted this suit on August 7, 1958, for the mortgage money. The appellant contended that the respondent had not lost possession of the property and therefore a cause of action for money had not arisen and alternatively that the suit was barred by limitation. The courts below concurred to find the respondent to have lost possession of the property and to decree the suit. Hence this second appeal.

2. It is contended here that there is no covenant to repay in the mortgage deed and that even if one is deemed to be implied that can be enforced only on a reconveyance of the property and also that the suit is barred by limitation.

3. The suit mortgage (Ext. P. 1) is styled an Otti. Otti, in Travancore, is an anomalous mortgage in which a personal covenant to repay is implied. The respondent says he

lost possession of the property in 1956 and the appellant says the respondent is still in possession of the property. As it is common case that the respondent had been in possession of the property till 1956 it may safely be assumed to be true. If that be so, the period of limitation being admittedly 6 years, the suit is saved by sub-section 2 of Section 20, Limitation Act, from bar of limitation. Section 20 reads:

20. (1) Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy, or by his duly authorised agent, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of a payment of interest made before the last day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

(2) Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-section (1).

Explanation--Debt includes money payable under a decree or order of Court.

4. It is contended that even in regard to sub-section 2, an acknowledgement in writing is necessary to save limitation. Rustomji on Limitation (6th Edition, page 243) observes:

S. 20(2).....applies whenever mortgaged land is, in fact, in the possession of the mortgagee. When the receipt of produce or rent is regarded as payment, the requirements of the proviso (as to handwriting etc.) may not be observed. The object of Sub-section (2) is to dispense with actual payment and it is not controlled by the other provisions of Sub-section (I). A suit by the mortgagee for sale is, for purpose of S. 20, a suit to recover a debt, and there for the mortgagee is entitled to rely on the receipt of produce of the mortgaged land for enlarging limitation.

The question arose before the Bombay High Court in Manikchand Bharmappa and Another Vs. Rachappa Virsangappa and Others, when Chagla C. J., with concurrence of Gajendragadkar J. as he was then, held:

Sub-section (2) makes the receipt of rent or produce by the mortgagee a payment for the purpose of sub-section (1) including the purpose of the proviso. In other words, if rent is received by the mortgagee, then in the eye of the law the conditions of sub-section (1) and the proviso are satisfied. The receipt of the rent is just as good as if the mortgagor had made the payment and the payment appeared in his writing or in the writing of the person who actually made the payment. Any other interpretation would make sub-section (2) entirely nugatory.

I am in respectful agreement with the above dicta. On the admitted facts in this case, a fresh period of limitation starts in 1956, and this suit, having been instituted

within 3 years thereof, has to be found well within time.

5. As the mortgage is an Otti--the name as well as the operative parts of the deed expressly says so--by the customary law of Travancore recognised in precedents, a personal covenant to repay is implied in the encumbrance. In Bhagavathi Narayani v. Valli Amma Kaliyamma (14 T. L. R. 218) the suit was for money under an otti of 1043. It is observed therein:

The District Judge takes the view that the plaintiff being a usufructuary mortgagee, who has received the interest on the sums due from the profits of the mortgaged property, cannot sue for the principal, unless the mortgage instrument contains a covenant for repayment by the mortgagor, and there being no such covenant in the deed Ext. A the claim is not maintainable.....We have, as far as our experience goes which covers many years, never heard that the holder of an otti cannot sue for the recovery of the principal in the absence of a clause in the mortgage deed that the mortgagor would repay it. The right of a mortgagee without a term to recover the principal at any time after mortgage has hitherto been always recognised by the courts here..... The term Otti in Ext. A implies that it was a mortgage to which all the incidents of an Otti apply and no special covenant for repayment by the mortgagor was necessary. In fact no such covenant is ever inserted in a Malabar mortgage. We therefore, hold that according to the customary law of the land the plaintiff is entitled to recover his money.....

Even if the stipulation in the deed that the mortgagor would be personally liable if the property is lost to the mortgagee he construed to imply a negation of the implied personal covenant, the contemplated contingency has, on the concurrent findings of the courts below, taken place. But, when the mortgage purported to transfer possession, the mortgagee claiming return of the mortgage money is bound to execute a reconveyance of the property if the mortgagor demands so.

In the result, the decree of the court below is affirmed subject to the condition that--counsel for the respondent asserted that the security on the property has been abandoned--if the appellant serves a written demand for a reconveyance of the property to be executed by the respondent--plaintiff at the cost of the appellant, the respondent must do so within a fortnight thereof. The respondent is entitled to his costs here.