
Umesh Chandra Mondal Vs Hemanga Chandra Maity

None

Court: Calcutta High Court

Date of Decision: May 13, 1932

Acts Referred:

Limitation Act, 1877 " Article 146(2)#Limitation Act, 1963 " Section 19, 20#Transfer of Property Act, 1882 " Section 81

Citation: AIR 1933 Cal 325

Judgement

1. The plaintiffs in the suit out of which this appeal has arisen prayed for a decree for sale of properties mortgaged by defendant 1 in the suit. The

mortgage was executed in favour of Srinath Maity on 14th Chaitra 1314 A.S. and all the plaintiffs are interested in the same as members of a

Hindu joint family. The properties mortgaged consisted of several plots of land, and we are only concerned with plots 6, 7 and 8 mentioned in the

plaint. The plaintiffs' claim in suit was resisted by the defendants. The mortgagor, defendant 1, raised all possible defences available to him,

including the satisfaction of the mortgage debt. It may be mentioned that all the pleas raised by defendant 1 have been overruled by the Courts

below, and the appeal before us does not relate to the case sought to be made out by defendant 1. Defendants 4 to 9, 11 and 12, appellants in this

Court, contested the suit as persons claiming through one Baidyanath Mondal, the purchaser of plots 6, 7 and 8 from defendant 1 and his brother

Chaitanya Charan Sow, by two different kabalas executed on 10th Agrahayan and 14th Agrahayan 1316 B.S. It was alleged that after the

purchase by Baidyanath, there was recognition of the transfer by the plaintiff's, who were cosharer landlords in respect of the properties

purchased from defendant 1 and his brother. A question of estoppel was raised by the defendants so far as this part of the case was concerned.

The defendants pleaded limitation, and contended that the suit instituted after the expiry of twelve years from the date fixed for payment of the

mortgage money was barred by time.

2. A question of marshalling also appears to have been attempted to be raised by the defendants. The position sought to be taken up by them in

this part of the case was this: that their predecessor-in-interest was a bona fide purchaser of a portion of the mortgaged properties without notice

of the plaintiff's mortgage, and they were therefore entitled to the benefit of the doctrine of marshalling, and that at any rate the properties 6, 7 and

8 of which they were purchasers should be sold, if necessary, after the other mortgaged properties had been sold. Another aspect of the case for

defendants 4 to 9, 11 and 12 arising out of events that happened in the course of the suit, and during its pendency in the trial Court, requires notice.

One of the defendants No. 10 died on 10th August 1927. The two brothers of that defendant already on the record were substituted in his place

as the legal representatives of the deceased defendant; but the mother of defendant 10 was not brought on the record. On this state of facts it was

sought to be made out that the suit should have been dismissed on the ground of non-joinder of necessary party.

3. The trial Court totally negated the defence of the contesting defendants in the suit, and passed a mortgage decree in favour of the plaintiff's in

usual terms, directing the sale of the mortgaged properties in default of payment of the mortgage debt in terms of the decree. On appeal by

defendants 4 to 9, 11 and 12 the learned Additional District Judge modified the decision and decree passed by the trial Court on the ground that

the suit had abated so far as the mother of the deceased defendant 10 was concerned, and reduced the amount of the mortgage debt recoverable

by the plaintiffs in the suit by the amount of Rs. 65. Defendants 4 to 9, 11 and 12 have appealed to this Court, and cross-objections have been

preferred by the plaintiffs in regard to the reduction of the mortgage debt recoverable by them by Rs. 65 as mentioned above. (The question of

estoppel was held against the defendants on facts and the judgment proceeded). The plea of limitation raised by the defendants rested, as indicated

above upon the fact that payments made towards the satisfaction of mortgage debt after the purchase of Baidyanath Mondal in 1316, could not be

of any avail to the plaintiff's, seeing that the suit was instituted more than 12 years after the date fixed for repayment of the mortgage money.

Reliance was placed on *Newbould v. Smith* (1886) 33 Ch D 127, in support of this position. That case no doubt is an authority for the proposition

that payment of interest by the mortgagor who remained liable, *ex contractu* to pay the debt, though he had previously assigned the mortgaged

property to a third person was in a suit to enforce the mortgage security, held to be insufficient to keep alive the mortgagee's claim against the

assignee and the mortgaged property. "The decision in *Newbould v. Smith* (1886) 33 Ch D 127 is in conflict with the view expressed on the

subject by the Privy Council in *Lewin v. Wilson* (1886) 11 AC 639, and the correctness of the decision was questioned before the House of

Lords [see Newbould v. Smith (1889) 14 AC 423 at pp. 426 and 428]; but their Lordships did not express any opinion on the decision one way

or the other. So far as this Court is concerned Newbould v. Smith (1886) 33 Ch D 127 has not been followed, and Lewin v. Wilson (1886) 11

AC 639 was given the preference in a suit for possession under Article 146, Sch. 2, Lim. Act, 1877, Domi Lal v. Roshan Dobey (1907) 33 Cal

1278. The Limitation Act has to be followed by Courts in India in considering the rules of limitation applicable to a case; and whereas in a case like

the one before us, there is sufficient guidance given by the provisions contained in Sections 19 and 20, Lim. Act, there would be no justification in

our borrowing rules of limitation from decisions by Courts in England, based upon a statute altogether different in language from the statutory

provisions contained in Sections 19 and 20, Lim. Act. Furthermore, in the case before us, the purchaser defendants were transferees from the

mortgagor in respect of a portion only of the mortgaged property, consisting of several items; and in such a case, there can be no doubt that the

rule laid down by the House of Lords in Chinnery v. Evans (1864) 11 HLC 115, namely, that where estates A, B and C are included in one

mortgage, and the owner of A pays interest, the mortgagee's remedy against B and C is preserved, is the rule that must be applied.

4. The mortgagor, in the case before us, had in him the title to 9 bighas 10 cottahs of land after the sale to Baidyanath Mondal, the predecessor-in-

interest of defendants 4 to 9, 11 and 12 in 1316, of the plots 6, 7 and 8 out of the several items of the mortgaged properties; and as such there is

no substance in the contention advanced by the defendants that payments by the mortgagor towards the satisfaction of the mortgage debt after

1316, could not keep the mortgagees right alive, so far as the enforcement of the mortgage security was concerned. It may be mentioned that the

decision of this Court in the case of Surjiram Marwari v. Berhamdeo Persad (1905) 1 CLJ 337, which has been cited before us in support of the

appellants' contention on the question of limitation does not appear to throw any light on the point arising for consideration in the present case, in

view of the facts and circumstances mentioned above. In that case Mookerjee, J., based his views as expressed at pp. 344 to 346 on the decision

in Bolding v. Lane (1863) 1 Deg J & S 122 and quoted from Lord Westbury's judgment which contained amongst other things, observations like

these: The mortgagor or his representatives who have no interest whatever in the lands, should not be enabled to charge the estate anew with any

amount of arrears of interest against second and subsequent mortgagees, and that a departure from such a course would involve consequences

inconsistent with natural justice. The learned Judge Mookerjee, J., also referred to Chinnery v. Evans (1864) 11 HLC 115 in dealing with the facts

of the particular case before him. It is difficult to make out how the decision in Surjiram Marwari's case (1905) 1 CLJ 337 or any of the

observations made by Mookerjee, J., in that case could support the appellants' position so far as the question of limitation was concerned, in view

of the fact that the mortgagor defendant 1, in the suit, had an interest left in him in a portion of the mortgaged properties, when payments were

made by him towards the satisfaction of the mortgage debt in 1322, 1327, 1329 and 1332, well within 12 years before the institution of the suit out

of which the appeal has arisen. The contentions raised on behalf of the appellants bearing upon the question of limitation must, in our judgment, be

overruled.

5. It has been urged on behalf of the appellants that the suit brought by the plaintiffs had abated as a whole, on the failure on the part of the

plaintiffs to bring all the heirs of defendant 10 on the record within the time allowed by law. With reference to the question of abatement thus

raised, mention has already been made of the fact that two of the brothers of that defendant 10 were substituted by the plaintiff's in proper time; no

objection as to non-representation or want of complete representation of the interest of defendant 10, was raised when the other defendants had

notice of the application for substitution made by the plaintiffs in the suit. The order for substitution was duly made by the trial Court, on 3rd

September 1927. The fact that defendant 1 had a mother living, came out at that stage of the suit when witnesses were being examined by the

defendants, after examination of the witnesses for the plaintiffs in Court. One of the witnesses for the defendants stated in his deposition that

defendant 10 who has died, had his mother living at the time of his death. The point made by the defendants-appellants comes to this. There was

no complete representation of the interest of defendant 10 in the suit after that defendant's demise. There was a fatal defect on account of

nonjoinder of a necessary party in the mortgage suit, and the suit must therefore fail. So far as non-joinder of parties is concerned, the suit could

not be defeated in its entirety on that ground.

6. It is well settled now, so far as this Court is concerned, that non-compliance with the provisions of Order 34, Rule 1, Civil P.C., was not fatal to

a suit for enforcing a mortgage and that the provisions of Order 1, Rule 9 were applicable to a mortgage suit: see *Kherodamoyi Dasi Vs. Habib*

Shaha, and the cases referred to there. The decision of the Patna High Court in *Girwar Narayan v. Mt. Makbunnessa* (1916) 1 Pat LJ 468, on

which reliance has been placed on behalf of the appellants cannot be accepted, in so far as it goes against the decisions of this Court, on the

question under consideration. Furthermore, the case before the Patna High Court related to the non-joinder of the mortgagee as a plaintiff in a

mortgage suit, and cannot be accepted as laying down the rule that Order 1, Rule 9 was controlled by Order 34, Rule 1. Civil P.C., even in the

case of subsequent purchasers in the position of defendants-appellants before us. So far as non-representation of the complete interest of

defendant 10 was concerned, the question has to be decided on the basis of the facts of the case before us. The question of representation of the

interest of defendant 10 in the suit, could not be allowed to be raised after the legal representative of the deceased defendant had been substituted

by the Court under Order 22, Rr. 4 and 5. Civil P.C., on notice to all the parties concerned. Failure to object to the substitution of defendants 8

and 9 in the place of defendant 10 at the earliest opportunity precluded the defendants-appellants to reopen the question of representation of the

interest of defendant 10 in the suit: see *Meenatchi Achi v. Anantha Narayana Ayyar* (1903) 26 Mad 224; and *Balabai v. Ganes Shankar* (1903)

27 Bom 162. The mere fact that there was a mother living at the time of the death of defendant 10 elicited during the examination of a witness in

Court, long after the order for substitution of the legal representatives of that defendant had been made, would not, in our judgment, enable the

defendants-appellants to succeed on the question of abatement of the mortgage suit as a whole; or for the matter of that in respect of the interest of

defendant 10 with interest, if any, of the mother of defendant. In the above view of the case we have no hesitation in coming to the conclusion that

no question of abatement in any shape, could arise in the case before us; and that the plaintiffs were entitled to a decree for the entire amount due

on the mortgage bond, on the basis of which the plaintiffs had instituted their suit.

7. The question of marshalling attempted to be raised by the defendants-appellants; cannot properly be gone into in the case before us, where the

rights of subsequent purchasers in the position of those defendants are concerned in view of the definite provisions contained in Section 81, T.P.

Act. So far as the point pressed before us that the Court should direct the sale of mortgaged properties other than those conveyed to the

defendants-appellants in the first instance, for the satisfaction of the mortgage debt was concerned, we need only observe that we are unable to

find any such equity in favour of the appellants which might enable them to get a relief of that description. The question of paramount title as raised

by the defendants-appellants, has been expressly left open by the Courts below. In our judgment the Courts below have, in accordance with the

trend of judicial decisions, rightly-held that the title of Chaitanya Charan Sow, the brother of defendant 1, as pleaded by the contesting defendants,

could not be decided in the present case; and as mentioned by the learned Additional District Judge in the Court of appeal below, the rule of res

judicata will not operate against the appellants in any way, if they desire to agitate that question of title hereafter in any Court of justice.

8. The learned advocate for the plaintiffs-respondents has urged before us, that according to a stipulation contained in the mortgage bond, on the

basis of which the suit out of which the appeal has arisen, was instituted, the right of alienation in any form was expressly prohibited, so far as the

mortgagor was concerned and as such the purchasers (defendants 4 to 12) were not necessary parties at all, that the mortgagees were entitled to a

decree against the properties in the hands of the purchasers by virtue of unauthorized transfers. The point raised in this behalf was not considered in

any form, by the Courts below; and we are not prepared to go into the matter in second appeal. Furthermore, it is not at all necessary for us, to

decide the, question raised for the first time before us in view of the conclusions we have arrived at in favour of the plaintiffs-respondents, on other

points arising for determination in this appeal. In the result the appeal is dismissed and the cross-objections preferred by the plaintiffs-respondents

are allowed. The decree of the Court of appeal below so far as it modified the decrees of the trial Court is set aside, and the decree of the trial

Court is restored. The plaintiffs-respondents are entitled to their costs in this Court and the costs in the Court of appeal below. We make no

separate order as to costs in the cross-objections.