Mohini Mohan Misra and Others Vs Srimati Sarat Sundari Debi and Another

None

Court: Calcutta High Court

Date of Decision: Nov. 18, 1924

Acts Referred:
Limitation Act, 1963 â€" Article 148, 19

Citation: AIR 1925 Cal 862

Hon'ble Judges: Walmsley, J; B.B. Ghose, J

Bench: Full Bench

Judgement

Walmsley, J.
The plaintiffs prefer this appeal. They say that they are the successors-in-interest of one Nanda Lal Surma Roy, who in

March 1830 received a sum of Rs. 11,000-0-0 from Kali Prosad Sarma Roy and in consideration therefor executed in his favour a deed of

conveyance in regard to the properties in suit. On the same day Kali Prosad executed an Ekrarnama in favour of Nanda Lal by which the latter

was given the right to repay the money. Two other documents bearing on the transaction were also executed on the same day.

2. In 1859 Nanda Lal''s successor brought a suit on the documents he wanted to recover possession of the land on the footing that the principal

had been paid off out of the usufruct, and that there was a large sum due to him from Kali Prosad. The first Court decreed the suit finding that the

principal had been satisfied and that Rs. 24,000-0-0 were due to the plaintiff. The defendant appealed to this Court: he failed on his main

argument, that the transaction contained in the documents did not amount to a mortgage, but he succeeded in the second branch, that is in regard

to the mode in which the account was to be made up. The result of this Court''s directions as to the manner of making up the account was a finding

that a large sum was still due to the defendant, and in consequence the suit was dismissed. The plaintiffs'' appeal to the Judicial Committee was

unsuccessful.

3. In the present suit the plaintiffs have given a long account, beginning with the sum due from them as ascertained in the suit of 1859 after the

appeal to this Court. This account shows a debt growing steadily until the year 1873, then it shows a substantial increase in the usufruct, which

gradually reduces the debit balance until in 1900, the position has changed, with the result that at the date on which the suit was instituted there is a

sum of lakh and a quarter due to the mortgagor.

4. Numerous objections were raised by the defendants, but it is not necessary to deal with any except the plea of limitation. The learned Judge has

held that the suit is barred by limitation and that is the question which has been argued before us.

5. The date of the documents mentioned was March 22, 1830. This suit was filed on February 13, 1918, or nearly eighty-eight years later.

6. The argument on behalf of the appellants is that the learned Judge is wrong in his decision as to the point of time from which the period of sixty

years, under Article 148 of the Limitation Act, will run, and that in any event a fresh-starting point was provided by the acknowledgment contained

in defendant"s written statement in the suit of 1859.

7. It was decided in the suit of 1859 that the transaction between the parties did amount to a mortgage. The decision however did not go beyond

that. That is to say it did not determine when the option of redeeming could be enforced. The documents are rather vague on this point, but I think

that the obscurity is in regard to a matter which does not help the plaintiffs. There are expressions which seem to suggest that repayment of the

principal might be made before the period of ten years expired, and not only on the expiry of the period. I cannot however find in them any clause

to warrant the view that the option might be exercised at any indeterminate point of time after the expiry of the ten years period. In my view

therefore the contract made by the parties entitled the mortgagee on the one hand to sue in 1840 for foreclosure and the mortgagor on the other

hand to sue for redemption. That being so, the point of time from which limitation began to run must be March 22, 1840 and if that is so the suit is

hopelessly barred by limitation.

8. The suggestion that the mortgage was of an usufructuary one and that time began to run from the year 1900 according to plaintiff"s account of

such other point of time as may be determined by an account taken under the orders of the Court is met by reference to the terms of the

agreement. There was no stipulation that usufruct should be set against principal and interest. On the contrary the mortgagee insisted on cash

payment of principal and interest, and agreed to repay usufruct and interest only on receipt of such payment in cash. A stipulation of that kind

cannot be reconciled with the view that he agreed to have principal and interest automatically wiped out by growing profits. In my opinion therefore

the learned Judge was right in holding that the provisions of Article 148 bar the suit.

9. The plea of acknowledgment is rather a desparate one and there are three overwhelming objections to it. The first is that the plaintiffs have not

proved that any acknowledgment was made; the second is that they have not proved that the person who is said to have made the

acknowledgment was competent to make it: and the third is that the acknowledgment said to have been made does not amount to such an

acknowledgment as is described in Section 19 of the Limitation Act.

10. As to the first objection, I think that the plaintiffs have been unfortunate: the records have been destroyed, and nothing but a copy could be

produced, but they have put in not -a copy of the original document, but a copy of a copy of a translation of the original. I quite understand that it

would be extremely difficult after sixty years to secure the evidence which would make such a paper admissible as secondary evidence, but the law

is clear and the defendants are entitled to demand that such a paper shall not be admitted as proof of what the defendants said in the 1859 suit.

11. The second objection is this, that the defendant in that suit was a widow named Kripamoyi: this lady had a daughter Shyama Sundari who

made a Hebanama in 1873 in favour of the father of the present defendants. On this branch of the case, the plaintiffs seem to be on the horns of a

dilemma: if Kripamoyi had nothing but a Hindu widow"s interest, an acknowledgment by her would not be operative against the reversioners: If on

the ether hand she had more than a widow"s interest and the property came to the defendants by gift from her daughter and the learned pleader for

the appellant said that he made that assertion then the defendants are not successors-in-interest of Kali Prosad but hold under a title which is not

affected by the transaction contained in the documents.

12. The third objection is simpler, but no less convincing. Assuming that Kripamoyi made the statements which she is said to have made, they do

not amount to an acknowledgment of liability: she only admitted certain facts, namely, the execution of documents and so forth, and after that

admission she went on to repudiate liability, not to acknowledge it. For these reasons I agree with the learned Judge that the plaintiffs have failed to

show that acknowledgment lifts the bar of limitation.

13. The result is that I confirm the decision of the lower Court to the effect that the suit is barred by limitation.

14. The appeal is therefore dismissed with costs.

B.B. Ghose, J.

15. This is an appeal by the plaintiffs against the decree of the Additional Subordinate Judge of Rajshahi dismissing their suit for redemption of a

mortgage. The facts are not disputed before us. One Nanda Lal Sarma Boy predecessor-in-interest of the plaintiffs executed a deed which was in

form a kobala in favour of Kali Prosad Sarma Roy with regard to the properties in suit on the 22nd March 1830, Three other contemporaneous

deeds were executed, an Ekramama by the transferee Kali Prosad, another Ekramama by Nanda Lal and a third document by Kali Prosad which

appears to be a counterpart of Nanda Lal''s agreement, By his Ekrarnama (Exhibit, 7-b) Kali Prosad agreed that if the vendor paid to him in cash

the principal with interest in one lump after the expiry of ten years ending on the 30th Cheyt 1246 B.S. he would execute a deed of sale in favour

of the vendor. There is no question now that the transaction constituted a mortgage and the parties will henceforth be described as mortgagor and

mortgagee. The mortgagee entered into possession and has been in possession ever since. After the death of the original patties the representatives

of the mortgagor brought a suit in 1859 against the widow of the mortgagee Kripamoyi for redemption alleging that the mortgage debt had been

paid off out of usufruct and claiming a large sum of money from the defendant as overpayments. He was successful in the first Court but the

principle of accounting adopted by that Court was reversed by the High Court on appeal by the defendant, and the decision of the High Court was

affirmed by the Privy Council on further appeal by the plaintiff. The judgment of the Privy Council is reported in 14 . I. A. 443. In the meantime

accounts being taken as directed by the High Court a large sum of money was found due to the mortgagee and according to the practice then

prevailing the suit was dismissed on the 2nd April 1864 no order for redemption having been made by payment of the mortgage money by the

mortgagor. Nothing farther happened till the present suit was brought in February, 1918 by the plaintiffs. The plaintiffs allege in their plaint that

Nanda Lal was at liberty to repay the principal with interest after the expiry of ten years from the date of the mortgage, but base their claim on the

ground that they believe that the mortgage debt has been fully paid of from the usufruct in or about 1307 B.S. corresponding to 1900 A. D. and

they make the usual prayers for redemption claiming over a lac of Rupees from the mortgagee as overpayments. A large number of issues wore

raised in the trial Court. All the material issues were found in favour of the plaintiffs except the question of limitation on which the Subordinate

Judge dismissed the suit and the only question argued before us was whether the suit was barred by limitation or not. The Subordinate Judge held

that Article 148 of the Limitation Act (IX of 1908), applied to the case and the right of the plaintiffs to redeem accrued more than 60 years before

suit and it is, therefore, barred. It is not contested that the present Limitation Act is applicable, but it is contended by the appellants that the

mortgage was a pure usufructuary one and the rule laid down is Section 62 (a) of the Transfer of Property Act is applicable to it, and as the

mortgagee was paid off within 60 years of the suit is not barred. A good deal of argument addressed to us was on the question as to whether the

mortgage was a usufructuary mortgage or a mortgage by conditional sale. In the view I take it is immaterial by what name the mortgage may be

called. It seems that such mortgages used to be termed By bil wafa or Kutkabala usufructuary, before the Transfer of Property Act

(Macpherson"s Law of Mortgage, 7th Ed. P. 21). I think that the position of the mortgagee was that of a mortgagee by a conditional sale in

possession. The transaction being prior to the passing of the Transfer of [Property Act, that Act does not apply in terms. But the rules laid down in

Section 62 of the Act might be applied in a "proper case as the general law In force before the Act was passed. The real question is whether the

mortgagee was authorised to pay himself the mortgage money from the rents and profits and was entitled to remain in possession of the property till

be was so paid off. There was no such agreement in the document constituting the mortgage. The stipulation in this case was, as already stated,

that, the mortgagor would be entitled to redeem after the expiry of 10 years and would obtain a reconveyance on payment of the principal and

interest. Further, the Ekrarnama of the mortgagor (Exhibit 6 a) and the counter-part executed by the mortgagee (Exhibit 8a) amongst other things

provided that the profits remaining at the end of every year after deducting the revenue and collection charges etc., should be paid to the mortgagor

by the mortgagee with interest at 12 annas per cent. whenever the mortgagor would pay off the principal amount with interest in full. The mortgagor

was entitled to redeem the mortgage certainly ah the expiry of 10 years from the date of the transaction i.e., in April 1840 A. D. It is unnecessary

to discuss the question whether he could redeem before that date under the other terms in the deeds as the suit has been brought more than 60

years after 1840. It is, however, contended by the learned vakil for the appellant that the Privy Council held in the previous litigation for

redemption upon a construction of the documents that the mortgagee was authorized to pay himself the mortgage money out of the usufruct.

Reliance is placed on a passage in the judgment of their Lordships reported in 14 M.I.A. 451 which runs thus ""...the parties intended that the

interest might be set off, from time to time against the rents and profits and that the mortgagee was only to account to the mortgagor for any rents

and profits and interest on the same which he may have received over and above the interest due to him upon the debt."" It appears that far from

laying down that the mortgagee was entitled to pay himself the mortgage money their Lordships held that he was to account for the surplus

received in excess of his interest and to pay interest on that account. If Section 62 of the Transfer of Property Act were applied than the case

would coma under the provision of Section 62 (b) of the Act and I am of opinion that limitation commenced to run against the mortgagor from the

date, when he was entitled to recover possession on payment of the mortgage money in 1840 at the latest. The present suit having been brought

more than 60 years after that date is barred.

16. It was also contended by the appellants that there being no personal obligation to pay the mortgage money, limitation does not run from the

expiry of the term. If this were accepted there would be no limitation in the case of a suit to redeem a mortgage by conditional sale, where there is

generally no personal obligation on the mortgagor to pay. This, however, cannot he correct. The lasts contention for the appellants was that there

was an acknowledgment of the right of the mortgagor by Kripamoyi in her written statement in the suit of 1859 and so a fresh period of limitation

should be computed from that date. This was not pleaded in the plaint and although the document was not proved according to law, a copy of a

copy of a translation which was on the record, was placed before us. I do not find that the right of the mortgagor was acknowledged in it

anywhere. Apart from this the defendants would not be bound by any acknowledgment by Kripamoyi as they claim through the last male owner,

and not through her, Soni Lal v. Kanhaiyalal [1913] 85 All. 227. An attempts was made to establish that the defendants derived title under a Heba

from Shyama Suadari, daughter of Kripamoyi. If the plaintiffs had made such a case in the plaint they would very likely have been met with other

difficulties as Shyama Sundari, if she had any title could never have derived it from the mortgagee. The grounds urged by the appellants having

failed, the appeal must be dismissed with costs.