(1906) 03 CAL CK 0023

Calcutta High Court

Case No: None

Imam Ali		APPELLANT
	Vs	
Baij Nath Ram Sahu		RESPONDENT

Date of Decision: March 16, 1906

Acts Referred:

- Limitation Act, 1963 - Section 19, 22
- Transfer of Property Act, 1882 - Section 85

Citation: (1906) ILR (Cal) 613

Hon'ble Judges: Mookerjee, J; Francis W. Maclean, J

Bench: Division Bench

Judgement

Mookerjee, J.

The facts which have given rise to the litigation, out of which this appeal arises, so far as it is necessary to state them for the disposal of the questions of law raised before us, lie in a narrow compass and are practically undisputed. The plaintiffs seek to enforce a mortgage security executed in favour of the first plaintiff and his father by the first defendant, on the 5th September 1882. The date fixed for repayment in the bond was the 5th March 1883. Various payments appear to have been made from time to time and it is proved that the last of these payments was made on the 16th January 1891. The present suit was commenced on the 17th December 1902, and the mortgagees joined as defendants not only the mortgagor, but also eight other persons, who had subsequent to the date of the mortgage acquired an interest in the equity of redemption, either as purchasers or as puisne mortgagees. It is necessary to state that the mortgage comprised eight properties, out of which property No. 2 had passed into the hands of one Imam Ali, Nos. 1, 8, 4 and 5 into the hands of the 8th defendant, Tilukdhari, and property No. 8, into the hands of the 5th defendant, Abdul Rahim. Imam Ali was not one of the original defendants to the suit, by reason of which an objection was taken by one of the other defendants that all the necessary parties were not before the Court as required by Section 85 of the

Transfer of Property Act. The plaintiffs thereupon applied to the Court and on the 8th May 1903, Imam Ali was ordered to he added as a defendant. The claim was resisted on various grounds, out of which it is sufficient to specify three, namely, first, that the suit was barred by limitation as against the added defendant Imam Ali.; secondly, that as the mortgage debt was indivisible, the suit was barred in its entirety; and, thirdly, that if the claim was not barred either in whole or in part, the mortgagees were incompetent to proceed against the properties purchased by Tilukdhari, as they had been validly released from the claim under the mortgage. The Courts below have concurrently held that the suit is not barred by limitation. But while the learned Subordinate Judge held that the properties in the hands of Tilukdhari had not been validly released, the learned District Judge held that those properties were not liable to satisfy any portion of the mortgage debt. The defendants have appealed to this Court and on their behalf, the decision of the Court below has been challenged on three grounds, namely, first, that the suit is barred by limitation as against Imam Ali; secondly, that if the suit is dismissed as against Imam Ali, as barred by limitation, it is not maintainable as against the other defendants, and thirdly, that the properties in the hands of Tilukdhari are still liable for the mortgage debt.

2. In support of the first point taken on behalf of the appellants, it is argued that u/s 22 of the Indian Limitation Act, the suit as regards Imam Ali, must be deemed to have been instituted on the 8th May 1903, when he was made a party, and as this was more than 12 years after the date of the last payment (Section 20 and Article 132 of the Limitation Act), the suit is clearly barred by limitation. In answer to this contention, it is argued on behalf of the plaintiffs respondent''s---first, that as there was a valid acknowledgment of the debt by the mortgagor on the 21st October 1891, the suit is within time u/s 19 of the Limitation Act, and secondly, that inasmuch as the added defendant was made a party by the Court, no question of limitation arises. As regards the first branch of this contention, it appears, that in the conveyance, which the mortgagor executed to Tilukdhari on the 21st October 1891, in respect of five out of the eight properties comprised in the mortgage security, the following statement is to be found:

It is necessary for and incumbent upon me, the declarant, to pay the money due to Baij Nath Kara and Jagan Nath Ram under the bond dated the 5th September 1882, and whereas, without making a sale of the property, I have no other means of paying the said amount, I have absolutely sold (here is given a description of the property) to Tilukdhari Lall for Rs. 1,400, and having received the aforesaid consideration money from the vendee paid off the dues of the mahajans and got such of the properties as were mortgaged in their bond released by them from the liabilities of the said bond.

3. The question therefore arises, whether there is an acknowledgment by the mortgagor as required by Section 19 of the Limitation Act, so as to give the

mortgagees a new period of limitation computed from the time when the acknowledgment was signed. It is argued on behalf of the appellants that there was no valid acknowledgment, because there was no admission of liability to the mortgagees, nor was it communicated or addressed to them. In our opinion this contention is well founded and is supported by the decision of the Judicial Committee in Mylapore v. Yeo Kay IL.R.(1887) IndAp 168 : ILR Calc. 801. In this case Sir Barnes Peacock in delivering the judgment of their Lordships, observed as follows with regard to an admission contained in a conveyance, which was relied upon as an acknowledgment within the meaning of Section 19 of the Limitation Act:

It is contended that in that conveyance Mr. B admitted that he was liable in respect of the property. The only admission is that he was acting as agent for one of the executors in selling the estate. He was selling the estate for the purpose of getting paid out of the proceeds of the sale. He does not admit that he was liable to be turned out of possession, or that anyone had a right of possession as against him, nor does he make any admission at all to the plaintiff or to anyone through whom he claims. Under those circumstances the clause does not apply.

4. It is clear that this is an authority for the proposition that an admission contemplated by Section 19 is an admission of liability made to the plaintiff or to a person through whom the plaintiff claims. The learned vakil for the respondents suggested that their Lordships of the Judicial Committee overlooked the provisions of Explanation (1) to Section 19, which lays down that an acknowledgment may be sufficient though it is addressed to a person other than the person entitled to the property or right. We do not think that there is any foundation for this suggestion as three of the members of the Judicial Committee (Lord Hobhouse, Sir Barnes Peacock and Sir Richard Couch), who hoard this case, were Judges of considerable experience of Indian Courts and quite familiar with the provisions of Indian Codes. Apart from this circumstance, however, it is clear that the explanation relied upon is of no assistance to the Respondents. It does not say that an acknowledgment addressed to a person other than the person entitled to the property or right shall be sufficient; it only provides that it may be sufficient. On the other hand, the explanation appears to imply that an acknowledgment to be operative must be addressed to some person; see Mahalakshmi Bai v. Firm of Nageshwar I.L.R (1885) . 10 Bom. 71, where Sir Charles Sargent observed that Explanation (1) to Section 19 shows that the acknowledgment is contemplated as ''addressed'' to the creditor, and that it would not be sufficient, unless communicated to the creditor or to some one on his behalf. This view is not inconsistent with the decision of the Judicial Committee in Sukha Moni v. Ishan Chunder IL.R.(1898) IndAp 95 : ILR Cal. 844 and the earlier decision of this Court in Madhu Sudan v. Brnja Nath (1871) 6 B.L.R. 299. In the first of these cases the acknowledgment, which was held to be operative, was contained a petition presented to Court by the creditor and the debtor jointly; in the second case, the acknowledgment, which was held to be valid, was contained in a conveyance jointly executed by the creditor and the debtor; so that in each case the

admission was, if not addressed, communicated to the creditor. We may add that the explanation was added for the first time in the Act of 1871 and merely gave effect to what had been understood to be the law under the Act of 1859, under which it had been held, Dur Gapal v. Kashee Ram(1865) 3 W.R. 3 and Nijamnddin v. Mahanimad Ali (1869) 4 Mad. 385, that an acknowledgment of a debt might be sufficient though not addressed to the person entitled to sue. The view we take is based upon a construction of Section 19 and of the explanation attached to it, as interpreted by the Judicial Committee in the case of Mylapore v. Yeo Kay IL.R.(1887) IndAp 168. Substantially the same result would follow under the English law, where it appears to be settled that an acknowledgment to a stranger is inoperative under Statute 21 Jac. 1, C. 16, Stamford v. Smith (1892) 1 Q.B. 765; Rogers v. Quinn 26 L.R.Ir. 136 although under Stat. 3 and 4 Will 4, c. 42, Section 5, it has been held that an admission of a bond-debt contained in the answer of the executors of the obligor in a suit to which the obligee is not a party was sufficient to take the case out of the operation of the Statute, Moodie v. Brnnister (1859) 4 Drewry 432. We find it impossible to hold, therefore, that the recital in the conveyance of 1891, which was not addressed to any person, was never communicated to the creditors or anybody on their behalf and was not even relied upon by them in the Court of first instance, as an acknowledgment sufficient to take the case out of the Statute should, be treated as an acknowledgment within the meaning of Section 19.

5. The second branch of the contention of the respondents is that as the Court acting on information brought to its notice added as defendant a party, whose presence was necessary for the disposal of the suit, no question of limitation arises. In support of this position reliance is placed upon the cases of Girish Chunder v. Dwarka Nath I.L.R (1897) Cal. 640 and Fakera Pasban v. Bibi Azimuunissa I.L.R.(1899) Cal. 540. In our opinion the cases relied upon are distinguishable, because the Court did not make the added defendant a party to the suit upon its own motion, but upon an application made by the plaintiff. We desire to add, however, that we are not prepared to accept the rule laid down in Girish Chunder v. Dwarkanath I.L.R.(1897) Cal. 640 and Fakera v. Bibi Azimnnissa I.L.R.(1899) Cal. 540, which, with all respect for the learned Judges, who decided those cases, appear to us to be based upon a misapprehension of the decision of this Court in Oriental Bank v. Charriol I.L.R.(1886) Cal. 612 and, if it were necessary for the purposes of the present case, we would have referred the matter to a Full Bench. We agree entirely in the observations of the learned Judges of the Bombay High Court in Guruvayya v. Dattaraya I.L.R.(1903) 28 Bom. 11 where Jenkins C. J., pointed out that the principle affirmed in the case of Oriental Bank v. Charriol I.L.R.(1886) Cal. 612 is that a Court in joining parties u/s 32 of the CPC is untrammelled by any question of limitation in respect of an application for such joinder, not that the joinder can be made in disregard of any question of limitation in respect of the suit itself as affected by such joinder. It would be a startling result, if the Court could of its own motion add a party defendant to a suit and thus deprive him of the benefit of the Statute of

Limitation, the provisions of which are expressly saved by the penultimate paragraph of Section 82 of the Civil Procedure Code. We must hold accordingly that so far as the added defendant Imam Ali is concerned the suit is barred by limitation.

6. The second ground urged on behalf of the appellants is that, if the suit is barred by limitation as against Imam Ali, it must fail in its entirety as the mortgage debt is joint and indivisible. We are unable to accept this contention as well founded. The present case is clearly distinguishable from the class of cases of which Ramsebuk v. Ram Lal I.L.R.(1881) Cal 815 and Ram Doyal v. Junmenjoy I.L.R.(1887) Cal. 791 may be taken as the type, where the Court felt itself compelled to dismiss an entire claim on the ground that a person, in whose absence no relief could possibly be given to the plaintiff, had been joined as a plaintiff or a defendant after the expiry of the period of limitation prescribed for the suit. In the case before us, all the properties comprised in the mortgage are liable for the satisfaction of the debt and after different persons have become interested in different fragments of the equity of redemption, the properties continue to be so liable; and all that the owner of any portion of the equity of redemption is legitimately entitled to ask is that not more than a rateable part of the mortgage debt should be thrown upon the property in his hands. This is manifestly just and the mortgagees cannot claim to throw the entire burden upon a portion of the mortgaged premises, because by reason of their own laches, they have lost their remedy as against the remainder. This principle has been recognised by this Court in the cases of Haari Kissen v. Viliat Hossein I.L.R.(1908) Cal. 755 and Surjiram v. Barhamdeo (1905) 2 C.L.J. 202. We must consequently hold that the plaintiffs ought to succeed in respect of a proportionate part of their claim.

7. The third ground taken on behalf of the appellants raises the question of the validity of the release set up by Tilukdhari in respect of the properties purchased by him in 1891. It is proved that on the 16th January 1891 the mortgagor borrowed Rs. 1,400 from Tilukdhari and paid the sum to the mortgagees. On the 11th June 1890, the mortgagees wrote to Tilukdhari agreeing to release five of the mortgaged properties from their claim. On the 21st October 1891 the mortgagor conveyed these properties to Tilukdhari and the deed of sale recited that the properties conveyed had been released from the liability under the bond. One of the mortgagees attested this conveyance. It is obvious that the release was inoperative in law, because, although a release may be effected by parol, if it is in writing, as it purports to be in this case, it ought to be registered u/s 17 of the Registration Act, where the amount of the claim to interest in Immovable property, which is extinguished by the release, is of the value of one hundred Rupees or upwards, Safadar Ali Khan v. Lachman Das I.L.R.(1879) All. 554, Basawa v. Kalkapa I.L.R.(1877) 2 Bom. 489, Bhyrub v. Kalee Chunder (1871) 16 W.R. 56 and Nanda Lal v. Gurditta (1901) 2 P.L.R. 615. It was; suggested by the learned vakil for the respondents, as was suggested in the Court below, that as one of the mortgagees attested the conveyance to Tilukdhari, he is estopped from setting up the invalidity of the

release. It is well settled, however, that mere attestation of a deed does not necessarily import an assent to all the recitals contained therein, Chunder Butt v. Bhagwat Narain (1898) 3 C.W.N. 207 and no foundation was laid in the Court of first instance upon which any question of estoppel could be decided. But even if the mortgagees were estopped by their conduct from questioning the validity of the alleged release, they could not affect the rights-of the persons interested in the equity of redemption without their consent.

8. It appears to be clear that a mortgagee cannot release from his claim a portion of the properties comprised in his security so as to prejudice the rights of others, who might have already acquired an interest in the unreleased portion. As pointed out by this Court in the cases of Surjiram v. Barhamdeo (1905) 1 C.L.J. 337 and Surjiram v. Barhamdeo (1905) 2 C.L.J. 202, it is not open to a mortgagee to throw the burden of the entire debt upon a portion only of the mortgaged property and release the remainder. We are not prepared to adopt the contrary view suggested in the cases of Jai Gabind v. Jasram (1898) 18 All W.N. 120 and Sheo Prasail v. Beliari Lal I.L.R.(1902) All. 79 which might lead to hardship and injustice in many cases; a mortgagee, who has a security upon two or more properties, which he knows belong to different persons, cannot release his lien upon one so as to increase the burden upon the others without the privity and consent of the persons affected. The purchasers of the properties not released are entitled to insist that not more than a proportionate share of the mortgage debt shall he levied upon the properties in their hands. We must hold, therefore, that as the properties in the hands of Tilukdhari have not been validly released, they are liable to be sold in execution of the decree to be made in this suit, but as the purchase-money paid by him appears to have been applied towards the satisfaction of the mortgage debt we shall direct, as was done by the Court of first Instance, that the properties purchased by him are not to be sold till the other properties (excluding the one purchased by Imam Ali against whom the suit will be dismissed as barred by limitation) have been sold.

9. It was suggested by the learned vakil for the respondents that no question of apportionment arises in this case as the plaintiffs have claimed only a small fraction of what is due to them under the bond. We are unable to accept this contention as sound. If the plaintiffs had claimed a larger amount, they might have been met by other defences, for instance a question might have been raised as to the validity of the claim for interest; and in any event, the appeal from the decree of the Subordinate Judge would have lain not to the District Judge, but to this Court. We must consequently proceed upon the assumption that the amount claimed by the plaintiffs was the amount recoverable by them upon the bond at the date of the suit.

10. The result therefore is, that this appeal must be allowed and the decree of the Court below discharged. As against the added defendant Imam Ali, the suit will stand dismissed with costs in all the Courts. As regards the other defendants, the case will be remitted to the learned District Judge. He will take an account of what is

due upon the mortgage upon the footing that the amount claimed in the plaint was due on the bond at the date of the institution of the suit. He will then determine what proportion of this sum is properly chargeable upon the properties comprised in the mortgage security other than property No. 2 Enayet Chak claimed by Imam Ali; the amount to be abated will bear the same proportion to the amount found due on the mortgage as the value of the property No. 2 bore at the time of the execution of the mortgage to the value of the whole of the parcels comprised in the security.

11. A decree will be made in favour of the plaintiffs u/s 88 of the Transfer of Property Act for the amount thus found due and the decree will direct that properties other than those claimed by Tilukdhari, namely Nos. 6, 7 and 8, shall be sold first and if the decretal amount is not satisfied by the sale of such properties, the plaintiffs will be entitled to proceed against properties Nos. 1, 3, 4 and 5.

12. The plaintiffs will be entitled to the costs of this litigation, including the costs of this appeal as against the defendants other than Imam Ali.

Francis W. Maclean, K.C.I.E., C.J.

13. I am of the same opinion.