Ganpat Bhujang Shidhanti Vs Hanamgouda Shidagauda Patil

First Appeal No. 398 of 1927

Court: Bombay High Court

Date of Decision: Oct. 13, 1932

Acts Referred:
Dekkhan Agriculturists Relief Act, 1879 â€" Section 12

Citation: AIR 1933 Bom 439 : (1933) 35 BOMLR 956 : (1933) ILR (Bom) 593 : 147 Ind. Cas. 919

Hon'ble Judges: Rangnekar, J; John Beaumont, J

Bench: Division Bench

Final Decision: Allowed

Judgement

John Beaumont, C.J.
This is an appeal from the decision of the Joint First Class Subordinate Judge of Belgaum. The plaintiffs sued to

obtain a declaration that the defendant was not entitled to redeem the suit property, and they also sued to recover possession of the property as

owners from the defendant, and for certain mesne profits. The plaintiffs" title arises under a document of November 25, 1908, which is a mortgage

by conditional sale. The learned Subordinate Judge held that the plaintiffs" title was barred by limitation, and he therefore digmissed the suit; but he

raised an issue as to whether the consideration for the document of November 25 was given, and he held that it was and on that issue he discussed

the evidence in some detail. The plaintiffs in this Court say that they will be satisfied by an order for possession, and they do not ask for any

declaration that the defendant is not entitled to redeem.

2. The first point to consider, therefore, is, whether the plaintiffs" suit is barred by limitation; and for the purposes of that issue the facts can be

shortly stated. The suit property originally belonged to a man called Shidagauda, who died sometime in 1897, and was succeeded by his widow.

In the year 1900 the widow gave a possessory mortgage on the said property to her brother Parappa. The defendant disputes that the document

was a mortgage, but he does not dispute that Parappa got possession of the property. In 1907 the widow adopted the present defendant, and she

died soon thereafter. On November 25, 1908, the defendant executed the mortgage by conditional sale, to which I have referred. That document

is Exhibit 45. It is made in favour of one Bhujang, who was the plaintiffs" father. It is expressed to be a deed of conditional sale, and the defendant

stated that he had sold to Bhujang for Rs. 2,000 the suit property. Then it provides as follows :-

If I repay you Rs. 2,000 (two thousand) borrowed from you on the next day after the expiry of the period of five years from today, you should

give (the land) to us by executing a sale deed in our favour.

3. Then it is stated that the property has been let to one Malappa for cultivation for Rs. 80 for one year, and then the document runs :-

And hence I have handed over to you the said Kabulayat (i.e. tenancy agreement)...According to the terms of the said Kabulayat you are

authorised to recover from him the said amount of rent. As soon as the period in the said Kabulayat expires, you should take the said land in your

possession. I have duly received the said amount of rupees two thousand in cash paid by you.

4. So that the document appears on the face of it to be a mortgage by conditional sale with immediate possession given to the purchaser or

mortgagee. In fact, however, possession was not given, because possession was still in the hands of Parappa under the mortgage of 1900. In the

year 1917 the defendant recovered possession of the property from Parappa. He denies that he paid anything, but whether he did so or not is, in

my view, immaterial. The plaintiffs started this suit on August 8, 1924, and the question is, whether time runs against them from November 25,

1908, the date of their mortgage, or from 1917, the date when the mortgagor recovered possession of the suit property from Parappa.

5. The question turns, in my opinion, on Article 135 of the Indian Limitation Act. That Article provides that a suit instituted in a Court not

established by Royal Charter by a mortgagee for possession of Immovable property mortgaged must be brought within twelve years, and then in

the third column the date from which the time runs is this : ""When the mortgagor"s right to possession determines."" That Article was in the same

terms under the Indian Limitation Act of 1877, but under the previous Act of 1871 the period ran from the time when the mortgagee was first

entitled to possession. Whether there is any difference between the provisions of the two Acts is not very clear. Prima facie it would seem that the

moment of time at which the mortgagee becomes entitled to possession is the same as the moment when the mortgagor"s right to possession

determines. However, we are only concerned with the present Act, IX of 1908. There is very little direct authority on this point, and one must deal

with it in the first place as a matter of construction. It seems to me that a provision that time is to commence to run when the mortgagor''s right to

possession determines presupposes that the mortgagor has a right to possession. If he has no right to possession, that right cannot determine. Mr.

Nilkant Atmaram has argued that the mortgagor had a right to possession in this sense that he had a right to recover possession from Parappa. But

it is not proved in this suit that Parappa was anything else than what he is expressed to be under the document, viz., a mortgagee, and if that is so,

the right of the mortgagor to recover possession was only a conditional right, a right to recover possession upon payment of what was due under

the mortgage, in other words, a right to redeem, and that right was not determined by execution of the mortgage in favour of Bhujang. In my

opinion, for the purposes of Article 135 the mortgagor must either have actual possession, or an unconditional right to recover possession from

somebody who has in fact got it, and unless and until he has that right, time does not start to run, In construing Acts of limitation the Courts must

always remember that the object of the legislature is to induce people to be active in the assertion of their rights, and to penalise those who sleep

upon their rights; and if it is possible to avoid giving a statute of limitation a meaning which has the effect of destroying a right to sue before that right

has effectively arisen, I think the Court should do so.

6. With regard to the authorities there is a case from Oudh, Gokul Prasad v. Sukru AIR [1924] Oudh 374 in which the learned Judicial

Commissioner held that in a case where possession is outstanding in a prior mortgagee at the date of a subsequent mortgage, time runs against the

subsequent mortgagee from the time of that mortgage, and not from the date when possession is recovered from the prior mortgagee. That view

has been dissented from in two cases by the High Court of Lahore, Budha v. Mul Raj (1918) 48 I.C. 916 and Indar Singh v. Basanta (1921) 63

I.C. 679 and in my judgment the view of the Lahore Court is the correct one. I think, therefore, that until the mortgagor recovered possession in

the year 1917, time did not begin to run against the plaintiffs under their mortgage of November 25, 1908. As soon as possession was recovered

from the prior mortgagee, then the mortgagor''s right to possession as between himself and the plaintiffs determined, but time did not begin to run

against the plaintiffs until 1917. I think, therefore, on the question of limitation the decision of the learned Judge was wrong.

7. Then the respondent by his cross-objections challenges the finding of the learned Subordinate Judge on the issue as to whether consideration

was given for the mortgage of November 25, 1908. The mortgage itself, to which I have referred, states that consideration had been paid before

the Sub-Registrar before whom the document was registered. The defendant does not dispute the execution of the document. The document

admits that Rs. 500 were received and Rs. ""1,500 were paid by the creditor in the presence of the Sub-Registrar, The defendant does not dispute

that the document was executed and that Rs. 1,500 were paid to him by Bhujang before the Sub-Registrar. But his story is that the payment of Rs.

1,500 before the Sub-Registrar was merely to induce the Sub-Registrar to believe that the transaction was a genuine one, that in point of fact no

money had passed from Bhujang to the defendant, that the document was executed because the defendant anticipated that he would have to

indulge in litigation in order to establish his title as the adopted son of the late owner of the suit property, that immediately after the execution of the

document the sum of Rs. 1,500 was repaid to Bhujang, and that a month or two after the date of the transaction the mortgage itself was handed

over by Bhujang to the defendant and was retained by him. Before dealing with the merits of this story I should observe that the defendant is an

agriculturist and therefore he falls within the Dekkhan Agriculturists'' Relief Act. Under the ordinary law, the defendant having admitted by this

mortgage that he had received Rs. 2,000, the burden would be upon him of showing that that admission was false and that in fact he did not

receive Rs. 2,000. But in the case of persons to whom the Dekkhan Agriculturists'' Relief Act applies, such general provisions of law do not apply,

and u/s 12 of the Act ""the Court, if the amount of the creditor''s claim is disputed, shall examine both the plaintiff and the defendant as witnesses,

unless, for reasons to be recorded by it in writing, it deems it unnecessary so to do, and shall inquire into the history and the merits of the case..."" It

is, therefore, argued by Mr. Nilkant Atmaram that the burden is not on the defendant, to prove that the admission was false, and he even suggests

that the burden is upon the plaintiffs to prove that Bhujang actually advanced the defendant the moneys. In my opinion under the Act the burden of

proof is upon no-body''s shoulders. The Court has to find out the facts, and I think the learned Judge has correctly appreciated the position,

because ho himself called the defendant and examined him as to the facts. Although the burden may not be upon the defendant to prove that the

admissions which he made in the mortgage are untrue, nevertheless the fact that he did admit receiving Rs. 2,000 is certainly evidence against him

oven in an inquiry under the Dekkhan Agriculturists'' Relief Act.

8. Mr. Nilkant Atmaram in support of the defendant''s story relies principally upon these facts : He says that at the date of the mortgage in 1908

the defendant was only eighteen years of age and disputes were going on as to the heirship of Shidagauda, that there was no adoption deed in

favour of the defendant, and the fact of his adoption was being disputed; furthermore, Bhujang did not procure any entry of this document to be

made in the Record of Rights. It is also stated that the document remained with the defendant. At any rate it was produced by the defendant, but

the learned Judge did not accept the evidence as to that, and held that it was in possession of a witness who passed it over to the defendant and

who had been managing the plaintiffs'' property. It is also stated that Bhujang made no inquiry as to the possession of this property and took no

steps to get it in from Parappa. It is also pointed out that the plaintiff"s produced no books of account on their behalf to explain where this amount

of Rs. 2,000 came from, and that Bhujang was a person whose lands were already mortgaged and who was not a man likely to have Rs. 2,000 to

invest on a rather speculative security. There is no doubt a good deal of force in these criticisms, and I am not altogether sure that the whole truth

has been disclosed ; but on the other hand, it is very difficult to understand the defendant"s story, his story being that this mortgage was executed

not to secure any present advance, but to secure possible advances if he required money to fight the litigation, It is difficult to accept the story; why

should the mortgage be executed before the money was advanced ? The defendant, in order to support his story, called a witness, Exhibit 106, on

a point which was, I think, of vital consequence, his case being that Rs. 1,500 were admittedly paid by Bhujang before the Sub-Registrar. It was

necessary for the defendant to show where the money came from, and he called Exhibit 106 who said that he advanced the moneys to Bhujang

merely for the purpose of making a show before the Sub-Registrar. That evidence was disbelieved by the learned Judge. The learned Judge also

disbelieved another witness, Exhibit 88, who said that it was not he who had handed over the deed in question to the defendant. The learned Judge

took the view on the facts that it was probably this witness who would have the deed in his possession on behalf of the plaintiffs and their family.

Now the learned Judge having held that there is no explanation how this sum of Rs. 1,500 was procured if it did not belong to Bhujang, and having

disbelieved the defendant"s explanation as to how he got possession of the deed, and having moreover believed Exhibit 79 when he says that the

defendant admitted to him that he had received Rs. 500 in advance, it seems to me impossible for this Court to accept the defendant"s story and

reject the plaintiffs" story. The learned Judge has dealt with the evidence in detail, and I do not think any useful purpose would be served by my

dealing with it more elaborately, and after hearing the able argument of Mr. Nilkant Atmaram, I am of opinion that there is no ground on which, on

the question of fact, we can disagree with the finding of the learned trial Judge, assuming, as I do, that the burden of proof is neither on the plaintiffs

nor on the defendant, but that it is the duty of the Court to find out whether the money was advanced or not. In my opinion, we cannot disagree

with the finding of fact of the learned Subordinate Judge, but he being wrong in holding that the plaintiffs" suit is barred by limitation, the appeal

must be allowed.

Rangnekar, J.

9. The plaintiffs-appellants brought this suit for a declaration that the defendant was not entitled to redeem the suit property, for possession of the

property as owners, and for other reliefs. They rest their claim on a document Exhibit 45. The defendant contested the claim on the ground, among

others, that the transaction was not one of sale but was a mortgage by conditional sale, that it was a hollow transaction and he had received no

consideration for it, and that in any event the suit was barred by limitation. On the facts the learned Subordinate Judge held that the transaction was

a mortgage by conditional sale, that Bhujang, the father of the plaintiffs, had paid consideration for the document, and that it was not a hollow

transaction as contended by the defendant. But on the question of limitation he held in favour of the defendant, and dismissed the suit.

10. The plaintiffs appeal on the ground that the learned Judge was wrong in holding that the suit was barred by limitation. The defendant has filed

cross-objections to the finding of the learned Judge on the merits. The principal question, therefore, is, whether the learned Judge was right in

holding that the plaintiffs'' suit was barred under Article 135 of the Indian Limitation Act. As stated above, the learned Judge held that the

document, Exhibit 45, was a mortgage by conditional sale and that the relationship between the plaintiffs and the defendant was that of the

mortgagee and the mortgagor. In that opinion I entirely agree, and indeed it has not been disputed before us by the learned counsel on behalf of the

respondent.

11. At the outset I should like to deal with a point which Mr. Nilkant has taken in the course of his able arguments. He says that as the suit was

framed, it was a suit for foreclosure and therefore it was barred under Article 120 of the Indian Limitation Act, as the mortgage under Exhibit 45

was executed in 1908 and the suit was instituted in August 1924. As far as I can see, the point was not raised in the trial Court. Apart from that, it

is clear that the suit was framed in this particular manner as the plaintiffs believed and contended that the document in their favour was one of sale.

But assuming that the suit was one for foreclosure, and further assuming that it was barred when it was instituted, I am unable to see why it is not

open to a mortgagee claiming under a mortgage by conditional sale to maintain the claim for possession. I may in this connection refer to the

observations of the learned authors, Shepherd and Brown, in their Commentary on the Transfer of Property Act, at page 290 :-

...on the other hand, the fact that his right to foreclosure is barred does not prevent him from recovering the possession of which he has been

deprived (Amain v. Gurumurthi ILR (1892) Mad. 64

12. Mr. Kelkar for the appellants made his position clear and stated that he would be satisfied with a decree for possession and would not ask for

any declaration that the defendant is not entitled to redeem. In view of this and having regard to the conclusion to which we have come on the facts

of the case, I do not think that any useful purpose would be served by pursuing this point further, and speaking for myself, I do not think that this

was a foreclosure suit.

13. On the question of limitation, the learned First Class Subordinate Judge held that Article 135 applied to the facts of the case and time began to

run against the mortgagee from the date of the execution of the mortgage deed, that is, from November 1908. The question is whether this view is

correct. Article 135 gives a right to a mortgagee to sue for possession within twelve years, and the period of twelve years runs from the time the

mortgagor''s right to possession determines. Previous to the present Act we had the same Article in the Act of 1877. The Article 135 in these two

Acts corresponds with the Article 135 in the Act of 1871, but in that Act limitation runs from the time ""when the mortgagee is first entitled to

possession."" In my opinion the change in the wording of the Article in the Act of 1877 and of the present Act has not made any change in the time

from which limitation is to run, and, as in the earlier Act, so in the present Act, the terminus a quo is in effect the same. I say so, because when the

mortgagee first becomes entitled to possession, the right of the mortgagor to possession ceases and must cease, and he can be ejected, and while

the mortgagor has a right to possession the mortgagee is not entitled to possession. In my opinion, Article 135 distinctly contemplates that

possession must be with the mortgagor before the Article would apply and before time would begin to run under the Article. Mr. Nilkant relies on

a decision of the Oudh Court in Gokul Prasad v. Sukru AIR [1924] Oudh 374 With all respect to the learned Judicial Commissioner who decided

that case I am unable to agree with his opinion. The learned Judicial Commissioner relied upon a previous decision of the same Court to the same

effect. That earlier decision was dissented from by Mr. Justice Shadi Lall, as he then was, in Budha v. Mul Raj (1918) 48 I.C. 916 and his

judgment was followed by a Division Bench in a later case, Indar Singh v. Basanta (1921) 63 I.C. 679 consisting of Sir Shadi Lal, Chief Justice,

and Mr. Justice Moti Sagar. I respectfully agree in the view taken by the Lahore High Court. In my opinion, a puisne mortgagee is not bound to file

a suit for possession within twelve years from the date of the mortgage if the property is not in the possession of the mortgagor but in the

possession of a third party or a prior mortgagee.

14. In this case the facts are that although the mortgage deed Exhibit 45 stated that the mortgagee was to recover possession from the tenant

holding the land, it is common ground that the recital is false and that in fact the land was not in the possession of the mortgagor nor of any one

holding under him, but that it was in the possession of Parappa to whom the land was mortgaged with possession by the adoptive mother of the

defendant. The defendant obtained possession from Parappa in 1917 and the suit filed in August 1924 would, I think, be in time. I think, therefore,

the view of the learned Judge that the suit is barred is erroneous, and the appeal must be allowed.

15. On the cross-objections I desire to say very little. Mr. Nilkant has argued that having regard to the fact that the defendant is an agriculturist the

onus was really on the plaintiffs to establish the factum of consideration. I do not think that Section 12 of the Dekkhan Agriculturists'' Relief Act on

which he relies lays down any such proposition. I think the correct procedure in such cases is as laid down in Maloji Santaji v. Vithu Hari ILR

(1880) Bom. 520 u/s 12 of the Dekkhan Agriculturists'' Relief Act the question is not so much of the onus, but it is the duty of the Court to hear

both the plaintiff and the defendant if the defendant happens to be an agriculturist and to satisfy itself that the transaction is free from any of the

defects mentioned in that section. This the Court has done, and merely because there are certain circumstances which Mr. Nilkant has rightly

stressed as supporting his case, speaking for myself, I am not prepared to interfere on a question which essentially was a question of fact to be

determined by the Judge of first instance.

16. We held the plaintiffs entitled to possession, but we think, under the circumstances of this case, we ought to exercise the powers given to us by

Section 15C of the Dekkhan Agriculturists'' Relief Act and give the defendant an opportunity of paying the mortgage debt by instalments. We

think, following the decision of the Privy Council in (1880) ILR 1 245 (Privy Council) the plaintiffs are not entitled to interest before the decree.

17. The final order, therefore, will be : The appeal is allowed with costs and the defendant to pay the plaintiffs the amount due on the mortgage,

which is admitted to be Rs. 2,000, with interest at the rate of six per cent, per annum from the date of the decree by annual instalments of Rs. 500

principal together with interest up to date. The first instalment to be paid on June 1, 1933, and the subsequent instalments to be paid on June 1 of

each succeeding year. In default of payment of any one instalment, the plaintiffs will have liberty to apply to the Court u/s 15C(2) for an immediate

order for possession. Costs of this appeal to be added to the mortgage debt. Cross-objections dismissed with costs.