
Dashrath Motiram Shet Wani Vs Gajanan Keshav Phadnis

Second Appeal No. 27 of 1941

Court: Bombay High Court

Date of Decision: Nov. 18, 1942

Acts Referred:

Limitation Act, 1908 " Section 20, 21(3)(b)

Citation: AIR 1943 Bom 381 : (1943) 45 BOMLR 740

Hon'ble Judges: Macklin, J; Broomfield, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Broomfield, J.

This second appeal raises questions of limitation under Sections 19 and 20 of the Indian Limitation Act.

2. The appellant brought a suit to recover Rs. 2,900 on a simple mortgage executed on May 22, 1924, by defendant No. 1 for herself and as the

guardian of defendant No. 2, who was a minor. Defendant No. 2 is the son of the brother of defendant No. 1's deceased husband. It was

provided by the mortgage bond that the sum advanced was to be repaid on or before February 23, 1925. The suit was filed on July 29, 1937, and

was prima facie out of time. But it was stated in the plaint that limitation was saved for the following reasons :-(1) on, July 29, 1925, a sum of Rs.

900 was paid on behalf of the mortgagors by one Pandharinath who had purchased some other property from the defendants. At this time

defendant No. 1 gave instructions that the money was to be appropriated as to Rs. 365 and odd in payment of interest and as to the balance in

payment of principal. So that reliance was placed on Section 20 of the Indian Limitation Act. (2) The sale-deed in favour of Pandharinath, which

was dated July 28, 1925, contained an acknowledgment by defendant No. 1 of her liability under the mortgage and Section 19 of the Indian

Limitation Act was therefore relied upon. (3) A further acknowledgment of liability was made before the Sub-Registrar when the sale-deed was

registered on July 29, 1925.

3. The question of limitation was raised as a preliminary issue. The trial Court held that defendant No. 1 was a duly authorised agent of defendant

No. 2, but that there had in fact been no acknowledgment and no payment of interest as such. The suit was therefore dismissed both against

defendant No. 1 and defendant No. 2.

4. On appeal the Assistant Judge held in favour of the plaintiff that there had been an acknowledgment of the mortgage by defendant No. 1 and

also that there had been a payment of interest as such. He accordingly allowed the appeal as against defendant No. 1, but he held that the claim as

against defendant No. 2 was barred, because defendant No. 1 was not a duly authorised agent but only a de facto guardian and therefore her

acknowledgment of the payment of interest by her did not save limitation against defendant No. 2. It was also contended on behalf of the plaintiff in

the appeal that the payment of interest by a co-mortgagor would save limitation apart from the question whether defendant No. 1 was the duly

authorised agent of defendant No. 2. But the Assistant Judge overruled this contention by reason of Section 21(2) of the Indian Limitation Act. In

this appeal we are concerned with the question whether the suit is in time as against defendant No. 2.

5. Mr. Gajendragadkar, who appears for the appellant plaintiff, has conceded, as he was bound to do, that defendant No. 1, the paternal aunt of

defendant No. 2, was not his guardian under Hindu law. The points he has argued are as follows : (1) He contends that a de facto guardian may be

a lawful guardian for the purposes of Sections 19 and 20 and that therefore defendant No. 1 could make a valid acknowledgment and could also

save limitation by paying interest as such. (2) It is also contended that any payment by a co-mortgagor such as to attract the operation of Section

20 is effective not only against the person making the payment but also against the co-mortgagor, (3) Lastly it was argued that this should be

treated as a case of a mortgage made by the members of an undivided Hindu family so as to invoke the operation of Section 21 (3)(b) of the

Indian Limitation Act.

6. Sections 19, 20 and 21, so far as they are material for our purposes, are as follows :-

19. (1) Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of

liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by

some person through whom he derives title of liability, a fresh period of limitation shall be computed from the time when the acknowledgment was

so signed.

Explanation II.-For the purposes of this section, "signed" means signed either personally or by an agent duly authorised in this behalf.

20. (1) Where interest on a debt or legacy, is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or

legacy, or by his agent duly authorised in this behalf,...a fresh period of limitation shall be computed from the time when the payment was made.

21. (1) The expression "agent duly authorised in this behalf," in sections 19 and 20, shall, in the case of a person under disability, include his lawful

guardian, committee or manager, or an agent duly authorised by such guardian, committee or manager to sign the acknowledgment or make the

payment.

(2) Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written

acknowledgment signed or of a payment made by, or the agent of, any other or others of them...

(3) For the purposes of the said sections-

(b) where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the

duly authorised agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family.

7. As regards the first contention the only point is whether the expression ""agent duly authorised "" in Sections 19 and 20 includes a de facto

guardian, and the patent obstacle in the way of this contention is the: first clause of Section 21 which says that the expression "" agent duly

authorised"" in these sections includes a person's lawful guardian. The expression "" de facto guardian"" means and implies a person who is not a legal

or lawful guardian but merely in fact performs the functions of a guardian. Prima facie then it would be impossible to say that a de facto guardian

comes within the scope of these provisions.

8. Nor is there any authority in favour of the view for which Mr. Gajendragadkar contends. Under Mahomedan law a de facto guardian has no

power to deal with the property of a minor. There has been some conflict of authority as to whether the position is not the same under Hindu law.

It has however been recently held by this High Court in *Tulsidas v. Vaghela Raisingji* ILR (1932) 57 Bom. 40 that under Hindu law a de facto

guardian of a minor can validly sell the property of the minor to a third person for legal necessity. It was so held by Patkar and Barlee JJ.,

Beaumont C.J. dissenting. But it was certainly not held in that case that a de facto guardian is a lawful guardian. For the purposes of Sections 19

and 20 of the Indian Limitation Act what is required is a lawful guardian and not merely a person who under certain circumstances may have

power to alienate, the property of a minor.

9. Mr. Gajendragadkar was in the somewhat unfortunate position of having to cite a large number of authorities nearly all of which were against

him. He drew our attention to a Full Bench Madras case *Chennappa v. Onkarappa* [1940] Mad. 358. The principal question there was whether

the paternal grandmother of a Hindu minor being his nearest living relation is his lawful guardian under Hindu law. The question whether a de facto

guardian can be the lawful guardian of the minor within the meaning of Section 21 of the Indian Limitation Act arose incidentally, but that was very

summarily disposed of. Leach C.J. merely said (p. 362) : ""section 21(1) states that the expression "agent duly authorised in this behalf" includes the

person's lawful guardian. The fact that Neelamma was the de facto guardian of the minor would not help the appellant."" He went on to refer to a

previous decision to the same effect in *Nagayya v. Narasayya* [1939] Mad. 65. In the course of his judgment in the latter case *Madhavan Nair J.*

said (p. 69) :

We were referred to a series of cases by the learned Counsel for the petitioner to show that alienations made by de facto guardians under the

Hindu law were held valid if they were for the benefit of the minor. None of those cases has any bearing, on the question. We are not concerned

with the question whether an alienation should be binding or not.

That is sufficient to dispose of the first point.

10. For his second point Mr. Gajendragadkar relies principally on the language of Section 20 and he argues that the words "" person liable to pay

must include one of two persons jointly liable to pay, and if one of such persons pays, then the suit is in time against all. This is no doubt a possible

view. It has been held in *Lakshmi Naidu v. Gunnamma* ILR (1934) Mad. 418 that Section 20 of the Indian Limitation Act does not contemplate

that, when there is a plurality of persons liable in respect of a debt, all of them should join in making a part payment, and a part payment by one of

the persons liable Can avail not merely against the person making the same but also against other "persons" liable in respect of the debt. There are

observations to the same effect in *Badri Das v. Pasupati Banarji* ILR (1932) Pat. 93. But in this connection the difficulty which the appellant has to

get over arises from Clause (2) of Section 21 which expressly provides that nothing in Sections 19 and 20 renders one of several joint contractors,

partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of,

any other or others of them. All that Mr. Gajendragadkar is able to say about this provision is that co-mortgagors are not mentioned, and he

argues that if joint contractors include co-mortgagors it would also include co-mortgagees and on that view the addition of the word "" mortgagees

would have been superfluous. But there is no getting away from the fact that a mortgage is a contract, and apart from authority we think it

sufficiently clear that the words ""joint contractors "" must be taken to include co-mortgagors. It is therefore for the appellant to produce authority for

the other view.

11. Now it was held at one time in a number of cases that payment by a co-mortgagor was sufficient to salve limitation against the other co-

mortgagor or co-mortgagors (see for instance AIR 1926 Cal. 155; Ibrahim and Another Vs. Jagdish Prasad and Ghasi Khan Vs. Thakur Kishori

Ramanji Maharaj and Others, . But in the first two of these no reference whatever was made to Section 21(2) and in the last of the cases, although

this provision was referred to, the reason why it was not given effect to is very far from clear. The Allahabad High Court has overruled one of

these cases and taken the opposite view in Muhammad Taqi Khan v. Raja Ram [1937] All. 272 and Ram Kumar Pandey v. Hira Lal [1939] All.

258. These Were both cases of co-mortgagors. Mr. Gajendragadkar has pointed out that in Muhammad Taqi Khan v. Raja Ram a full bench

decision of the Madras High Court, Narayana Ayyar v. Venkataramana Ayyar ILR (1902) Mad. 220 was referred to as being an authority for the

proposition that joint contractors include co-mortgagors, and he says that that point was not really decided by the Madras Full Bench. However

that may be, it is perfectly plain that the Allahabad High Court now takes this view and holds that by reason of Section 21(2) an acknowledgment

or payment by a co-mortgagor is not effective for the purposes of Sections 19 and 20.

12. There is a Calcutta case in which the same view has been taken of the effect of Section 21(2), Jogeschandra Shaha v. Maneendranarayan

Chakrabarti I.L.R.(1932) Cal. 1128 but the Court was actually concerned there with a simple money bond and not a mortgage. There is also a

Madras case Thayammal v. Mutukumaraswami Chettiar ILR (1929) Mad. 119. After a very full discussion of English and Indian cases the

conclusion was thus stated (p. 126) : "" Whatever may be the law as to executors. it is impossible to say that of two joint contractors-which term

has been held to include two mortgagors in this Court-one contractor is bound by the payments of the other."" So that, as the authorities stand now,

they are practically unanimous against the view contended for by the appellant, and since the same view is suggested in our opinion by the language

of the provisions themselves, we have no hesitation in saying that the argument is unsound.

13. The only other point is that these transactions should be treated as a mortgage made by the members of an undivided Hindu family, in which

case u/s 21(3)(b) an acknowledgment or payment made by the manager of the family for the time being would be deemed to have been made on

behalf of the whole family. The short answer to that contention is that this was not a joint family transaction. The mortgage begins by setting out the

names of the parties and proceeds : ""I give this simple mortgage in writing as follows :-Money borrowed for the purpose of the marriage of the

daughter"". Then details of the consideration are given and the document goes on : "" We will go on paying interest thereon. I agree to pay the same

in the month of Magh 1846.... As a security for the said sum lands at Pimpalgaon which are of our ancestral ownership and which are in our

possession and enjoyment have been mortgaged to you."" Later on there is a recital : "" This simple mortgage is binding on our estate and on our

lives. I have given this mortgage deed of my own free will and pleasure.

14. As was stated at the beginning, defendant No. 2 was a minor and the mortgage was really effected by defendant No. 1. Mr. Gajendragadkar

says that the language of the deed suggests that defendant No. 1 herself had an interest in the property. Assuming that to be so, it was not made

clear that the property was the property of a joint family or that the liability was being incurred on behalf of the joint family as such. Moreover what

we have to look at is the substance of the transaction. Whatever defendant No. 1 may have purported to do, she had in fact no interest in the

property. She, was merely disposing or purported to dispose of the interest of the minor defendant No. 2 who was the sole surviving co-parcener.

15. The only authority referred to in connection with this part of the case was Lakshmi Naidu v. Gunnamma ILR (1934) Mad. 418. The facts in

that case are set out in the head-note. C was the managing member of a joint Hindu family composed of himself and his brother B.A. mortgage

was executed by C and B. Later on, a part payment was made towards the mortgage by C alone and the endorsement relating thereto was signed

only by him. A suit was filed by the mortgagee impleading C and B and several others. The question for determination, inter alia, was whether the

part payment by C was available to save limitation as against B also. The Court held that it was so available on the principle of implied agency,

since it could be inferred from the circumstances of the case that the part payment was made by him as the managing member on behalf of the

other members also. The facts therefore were entirely different, and in our case, where we have a mortgage effected by a de facto guardian

purporting to act on behalf of her minor nephew but without any legal authority to do so, it is impossible to say that the circumstances justify any

inference that she was acting as his agent so as to save limitation.

16. In our opinion the decision of the learned Assistant Judge was correct, and we dismiss the appeal, with costs to be paid to defendant No. 2

respondent No. 2.