

(1919) 10 BOM CK 0018

Bombay High Court

Case No: None

Krishnaji Sakharam
Deshpande

APPELLANT

Vs

Kashim
Mohiddinsaheb
Havaladar and Another

RESPONDENT

Date of Decision: Oct. 24, 1919

Acts Referred:

- Bombay Hereditary Offices Act, 1874 - Section 5
- Limitation Act, 1908 - Section 20(2)

Citation: 57 Ind. Cas. 76

Hon'ble Judges: Shah, J; Crump, J

Bench: Division Bench

Judgement

1. The facts which have given rise to this second appeal are these:

On the 6th of May 1893 the present defendant's father passed a possessory mortgage for Rs. 2,000 in favour of the plaintiffs' predecessor in title. The mortgage related to Vatan property. On the 8th of April 1901, the defendant's father died. The present defendant filed Suit No. 106 of 1913 to recover possession of the land and in the alternative for redemption of the mortgage. In April 1914, a decree was passed in favour of the plaintiffs in that suit awarding them possession with mesne profits for three years. The present suit was filed by the heirs of the mortgagee to recover Rs. 3,000 (Rs. 2,000 as principal and Rs. 1,000 as interest) on the 2nd of June 1914.

2. The trial Court held that the money claim was barred by limitation and dismissed the suit. In appeal the lower Appellate Court came to the conclusion that the possession was in fact taken from the plaintiffs in 1914, that under the covenant the cause of action arose at the date of dispossession, and that the claim was within time. In the result the plaintiffs' claim was allowed.

3. The defendant has appealed to this Court, and it is urged in support of the appeal that the plaintiffs' claim is time barred and that the point relied upon by the plaintiffs relating to the covenant in the deed is res judicata in virtue of the decision in Suit No. 106 of 1913.

4. In the view which we take of the point of limitation urged in this appeal, it is not necessary to express any opinion as to the point of res judicata raised on behalf of the defendant.

5. Apart from the effect of the covenant to which we shall presently refer, it is clear that under the document the money was payable in twelve years from the date of the document and that the suit, not having been filed within six years from the expiry of the twelve years mentioned in the deed, it is time barred. The covenant relied upon by the plaintiffs runs as follows:-- "if there be any dispute about the land on the part of the Bhaubands or of anybody else, I shall settle the same. If there be any hindrance to continuance of the land, I shall pay the said sum together with interest thereon at the rate of one per cent. per mensem out of my other estate and personally in the year in which the hindrance may arise." The lower Appellate Court has construed this covenant as meaning that the mortgagor undertook to pay the amount in the year in which the hindrance would arise, and as the hindrance arose when the possession was disturbed, the liability to pay under this covenant arose at the date of the hindrance. It seems to us, however, that on a proper construction of this covenant it really means that the mortgagor undertook personally to pay the amount if any hindrance was caused to the possession during his lifetime. The mortgaged property being Vatan land, the mortgage could have operation only during the life of the mortgagor. u/s 5 of the Bombay Hereditary Offices Act, it is not competent to a Vatandar, without the sanction of Government, to mortgage for a period beyond the term of his natural life any Vatan property to any person who is not a Vatandar of the same Vatan. It is not disputed now--and in fact it has been held in the suit of 1913--that this mortgage was operative only during the lifetime of the mortgagor according to law. It is clear from the reasoning in *Parshottam Veribhai v. Chhatra sangji Madhavsangji* 40 Ind. Cas. 1002 : 41 B. 546 : 19 Bom. L.R. 545 that the parties must be taken to have contracted with reference to the existing law. Reading the covenant in that light, the mortgagor must be taken to have agreed to pay the amount personally if any hindrance were caused during his lifetime. The covenant does not refer in terms to his heirs and successors. The mortgage as such came to an end on the death of the mortgagor, and the purpose of the covenant was fulfilled when no hindrance was in fact caused during the lifetime of the mortgagor. We are, therefore, of opinion that the date of the subsequent dispossession or the hindrance caused to the enjoyment of the property after the death of the mortgagor has nothing to do with the question of limitation, and that the time against the plaintiffs cannot be taken to commence to run from the date of such hindrance.

6. It is urged on behalf of the respondents that in any case the suit is saved u/s 20, Sub-section 2, of the Indian Limitation Act, which provides that "where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of Sub-section 1." It is clear that after the death of the mortgagor in the present case the possession of the original mortgagee was the possession of a trespasser claiming a limited interest in the property as a mortgagee, but not the possession of a mortgagee. Within twelve years from the death of the mortgagor the person entitled to the property put forward effectively a claim to this property against him, and, in our opinion, on the facts of this case, Sub-section 2 of Section 20 has no application. The plaintiffs' claim, therefore, is clearly time-barred.

7. The result, therefore, is that we allow the appeal, reverse the decree of the lower Appellate Court, and restore that of the trial Court with costs of this appeal and in the lower Appellate Court on the plaintiffs.

8. The cross-objections are dismissed with costs.