

**(1953) 07 BOM CK 0015**

**Bombay High Court**

**Case No:** Second Appeal No. 870 of 1951

Sidramaya Nilkanthayaswami  
Wantmurimath

APPELLANT

Vs

Danava Shidramappa Deshnur  
and Others

RESPONDENT

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Date of Decision: July 30, 1953

Acts Referred:

- Limitation Act, 1908 - Article 132
- Transfer of Property Act, 1882 - Section 68, 68(1), 98

Citation: AIR 1954 Bom 407 : (1954) 56 BOMLR 407 : (1954) ILR (Bom) 717

Hon'ble Judges: Gajendragadkar, J; Chainani, J

Bench: Division Bench

Advocate: G.R. Madhavi and H.B. Datar, for the Appellant; N.M. Hungund, for the Respondent

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### **Judgement**

Gajendragadkar, J.

This appeal has been referred to a Division Bench by Mr. Justice Shah for the reason that it raises an important question of limitation. The question is whether the plaintiffs' right to recover the mortgage amount from the successor-in-title of the mortgagor is barred under Art. 132, Limitation Act. This point has been answered against the plaintiffs by the Courts below relying upon the judgment of Mr. Justice Lokur in -- "Dnyanoba Gangaram v. Dattoba Balappa AIR 1947 Bom 152 (A). When this appeal was argued before Mr. Justice Shah, it was urged before Him that the judgment of Mr. Justice Lokur should be reconsidered in view of the fact that it was apparently inconsistent with the decision of the Privy Council in -- AIR 1932 207 (Privy Council) . That is why Mr. Justice Shah has sent this matter to a Division Bench for disposal.

2. The facts on which the point of limitation arises can be very briefly stated at the outset. The property in suit originally belonged to one Shidra-mappa, who died on 31-12-1915. After his death the title to this property vested in Balappa, who was then a minor. Gurushiddawa, who was acting as the "de facto" guardian of Balappa and as such was managing his properties, executed the mortgage in suit on 12-10-1927, for Rs. 800. The amount for which the mortgage was executed represented a past debt due by Shidramappa in respect of the sari business which he was carrying on during his lifetime. The mortgage deed purported to be a possessory mortgage. It also contained a specific covenant to repay the mortgage amount within five years.

In the present suit which was instituted by the plaintiffs on 30-8-1948, it was alleged that- the mortgagee had allowed the mortgagor to remain in possession as his tenant, that the tenancy continued until 12-10-1933, and so it was claimed that the present suit for possession of the mortgaged property was in time. In the alternative a claim to recover the mortgage amount was made. The defendants resisted both the claims on several grounds. It was urged by them that the mortgage was not for a legal necessity, nor for the benefit of the minor Balappa, that the lease alleged by the mortgagee had never been executed and that in fact the mortgagee had never obtained possession, that the claim for possession as well as the claim to recover the mortgage amount were barred by limitation.

It has been held by both the Courts below that though the mortgage was for the benefit of the minor Balappa, the mortgagee's claim to recover possession was barred by limitation because the case of tenancy set up by him had not been proved. Both the Courts have also held that the mortgagee's claim to recover the mortgage amount was also barred under Article 132, Limitation Act. In the present appeal Mr. Datar for the appellants does not challenge the conclusion of the Courts below that the plaintiffs' suit for possession of the mortgaged properties is barred by time. He, however, contends that the Courts below were wrong in holding that the plaintiffs' claim to recover the mortgage amount was barred by time under Article 132, Limitation Act. That is how the only question which arises for decision in this appeal is whether the Courts below were right in dismissing the plaintiffs' claim to recover the mortgage amount on the ground that it is barred by time.

3. In dealing with this question of limitation we have to bear in mind the fact that the mortgagee was entitled to obtain possession from the mortgagor and possession in fact had not been delivered to him. The contention of the defendants is that as soon as the mortgagee found that the mortgagor was committing a default in delivering possession of the mortgaged property to him, it was his right and his obligation to sue for the mortgage amount. This contention is raised on the strength of the provisions of Section 68(1)(d), Transfer of Property Act. Section 68 provides for the right of the mortgagee to sue for the mortgage money in certain cases. Section 68(1)(d) deals with the case where the mortgagee is entitled to possession of the mortgaged property but the mortgagor fails to deliver the same

to him, and it provides that in such a case the mortgagee has a right to sue for the mortgage money. The argument is that as soon as the provisions of Section 68(1)(d) come into play, the mortgagee's right to sue for the mortgage money becomes his obligation and in that sense the amount due under the mortgage becomes immediately due. If this contention is right, limitation will start against the mortgagee in respect of his claim to recover the mortgage amount from the time that Section 68(1)(d) comes into play.

Article 132 allows twelve years" period to the mortgagee to enforce payment of money charged upon immovable property and it lays down that this period of twelve years begins to run when the money sued for becomes due. If it is held that by virtue of the provisions of Section 68(1)(d) the money due under the suit mortgage immediately "becomes due", then limitation would start as soon as Section 68(1)(d) comes into operation, and the present suit is clearly beyond twelve years thereafter. On the other hand, the plaintiffs' contention is that Section 68(1)(d) primarily deals with cases of possessory mortgages which do not contain a personal covenant to pay, and the effect of Section 68(1)(d) in such cases is to clothe the mortgagee with the right to sue for the mortgage money in case the mortgagor commits a default in delivering possession of the mortgaged property to the mortgagee. It may be conceded that in the case of such a mortgage where there is no personal covenant to pay, the mortgagee would have to sue within 12 years from the time that his cause of action u/s 68(1)(d) accrues to him. In other words, if in the mortgage bond with which we are concerned there had not been a specific personal covenant to pay, the suit filed by the mortgagee obviously beyond 12 years from the failure of the mortgagor to deliver possession to the mortgagee would have to be held to be barred by limitation.

4. But the question which falls to be considered in the present case is whether the same result would follow in spite of the fact that the mortgage deed contains a personal covenant to pay and, the period stipulated for the payment under this covenant is five years. If it is held that this personal covenant governs the relations between the parties, then the cause of action to the mortgagee to enforce this covenant would accrue five years after the date of the mortgage and his present suit to recover the mortgage amount would be in time. Can it be said that the effect of the provisions of Section 68(1)(d) is to reduce the longer period of limitation which would be available to the mortgagee by virtue of the specific terms of the contract of mortgage? We would like to add that it has been conceded before us that the provisions of Section 68 apply to the suit mortgage; it is, therefore, on that basis that we propose to deal with the point of limitation raised before us.

5. There can be no doubt that the provisions of Section 68, T. P. Act are intended for the benefit of the mortgagee, and, as I have just indicated, in the case of ordinary usufructuary mortgages this section confers upon the mortgagee the right, which he normally does not possess, to sue for the mortgage money in case the

mortgagor commits a default in delivering possession of the mortgaged property. If we were to accept the view which has succeeded in the Courts below, it would really mean that by his own default the mortgagor succeeds in depriving the mortgagee of the larger period of limitation available to him by virtue of the specific terms of the contract. If the mortgagor had acted fairly and had carried out the terms of the contract, the mortgagee would have remained in possession and would have been entitled to sue for the mortgage amount within 12 years after the expiration of five years as mentioned in the contract. He commits a default in delivering possession of the mortgaged property and he insists that the necessary consequence of his default is that the mortgagee must sue for the mortgage amount straightaway despite the period of five years which is expressly mentioned in the contract itself.

In our opinion, the effect of the provisions of Section 68(1)(d) is to confer upon the mortgagee the right to sue for the mortgage amount. If there is no personal covenant to pay in the mortgage bond, this right would have to be exercised by him within the prescribed period of twelve years from the date of the mortgagor's default. But if there is a personal covenant to pay in the mortgage bond, the terms of that covenant would not be adversely affected or restricted by the provisions of Section 68(1)(d). In such a case, the statutory right conferred upon the mortgagee u/s 68(1)(d) as well as the contractual right given to him by the specific terms of the contract are both intended for his benefit. If the mortgagee elects to exercise his statutory right, then he would be entitled to recover the mortgage amount on the footing that by virtue of the default of the mortgagor the amount has become due if, on the other hand, he does not elect to exercise this statutory right but stands by his contractual right, he would be entitled to sue for the mortgage amount within 12 years after the expiration of the period stipulated in the contract.

We are not disposed to take the view that even without the election by the mortgagee the default committed by the mortgagor necessarily and automatically makes the mortgage amount due within the meaning of Section 68, T. P. Act. If this view were to be accepted, it would lead to the most unreasonable result that the mortgagor can safely nullify the terms of the contract and compel the mortgagee to sue for the mortgage amount by committing a default in the discharge of his own obligations. The contract between the parties shows that the mortgagee advanced the amount of Rs. 800 to the mortgagor on the security of the mort-gaged property and he gave the mortgagor the right to pay this amount five years after the date of the mortgage. The mortgagor, therefore, could not have offered to pay the mortgage amount and to redeem the mortgage before the period of five years was over. In other words, the mortgagee was entitled to the possession of the security for five years and the mortgagor was not at liberty to redeem the mortgage during this period. The fact that the mortgagor commits a default in delivering possession of the mortgaged property cannot, we think, be held to lead to his benefit by compelling the mortgagee to sue for the mort-gage amount within twelve years after his default.

If the words of Section 68(1)(d) are construed to mean that as soon as the statutory right conferred on the mortgagee by the said provision accrues to the mortgagee he is bound to exercise that right in spite of a contract to the contrary, it would, we think, lead to an unreasonable if not impossible position. That is why we would prefer to construe the provisions of Section 68(1)(d) to mean that if the mortgagee has no right to sue for the mortgage money by virtue of the mortgage deed as such, he would be entitled to sue for the mortgage amount in case the mortgagor commits a default as mentioned in Section 68(1)(d). If the mortgage deed specifically provides for a personal covenant to pay, the mortgagee may either exercise his option under S, 68(1) (d) or may act under the terms of the personal covenant itself. If the option is exercised by him u/s 68(1)(d), the mortgage amount becomes due and the mortgagor will have to submit to a decree for the payment of the said amount. If the option u/s 68(1)(d) is not exercised by the mortgagee, the amount cannot be said to "be due" and the mortgagor will have to wait for the expiration of the stipulated period before he can redeem the property. In our opinion, the default of the mortgagor cannot be permitted to accelerate the period of redemption in his own favour.

6. The Courts below have taken a contrary view because of the Judgment of Mr. Justice Lokur in -- "Dnyanoba Gangaram v. Dattoba Balappa, (A)". It is undoubtedly true that Mr. Justice Lokur was dealing with the same point of limitation on facts which cannot be distinguished from those before us and he held that the effect of the provisions of Section 68(1)(d), T. P. Act was that as soon as the mortgagor committed a default in delivering possession of the mortgaged property to the mortgagee, the mortgage debt became payable immediately and the mortgagee has to sue for the mortgage amount within twelve years thereafter. With respect, we are unable to accept Mr. Justice Lokur's conclusion.

In dealing with this point Mr. Justice Lokur relied upon a decision of the Privy Council in - "Narsingh Partan v. Mahommed Yakub Khan AIR 1929 PC 139 (C). In this case, however, their Lordships of the Privy Council were not called upon to consider the question of limitation in the form in which it arose before Mr. Justice Lokur and in which it arises before us." They were dealing with a document of mortgage executed on 8-4-1923, which was a combination of a simple mortgage and an usufructuary mortgage. This deed provided that possession of the hypothecated property had been delivered to the mortgagee and it added that the principle amount was to be repaid within 35 years, and on failure of the mortgagor to so pay the amount at the appointed time, the mortgagee was empowered to realise the same by sale of the mortgaged property, it appeared that the mortgagor failed to discharge his obligation of making over possession to the mortgagee and in consequence the mortgagee sued the mortgagor on 14-5-1924, for recovery of the mortgage money, by sale of the mortgaged property. On these facts the Privy Council held, on the construction of the document, that it was a combination of a simple mortgage and an usufructuary mortgage and so it did not coalesce within the

category of an "anomalous" mortgage referred to in Section 98, T. P. Act.

They further held that in consequence of the wrongful act or default on the part of the mortgagor in not delivering possession of the hypothecated properties to the mortgagee the mortgage money became payable by virtue of Section 68, T. P. Act and the mortgagee was, therefore, entitled to an immediate enforcement of the mortgage by a decree for sale of the mortgaged property. It would be noticed that in this case the mortgagor had urged that the cause of action would accrue to the mortgagee only after the period of 35 years mentioned in the mortgage deed had expired and this contention was rejected by the Privy Council. In other words, the effect of this decision appears to be that though a larger period of limitation was available to the mortgagee to sue the mortgagor for recovery of the mortgage amount, it was open to him to sue the mortgagor earlier as soon as a default was committed by him in delivering possession of the property to the mortgagee.

With respect, we think it would not be a reasonable reading of this judgment to hold that the Privy Council took the view that the only remedy open to the mortgagee was to sue within twelve years after the mortgagor's default in question. That aspect of the matter did not fall to be considered in the said case, because in fact the mortgagee had sued immediately after the mortgagor's default took place. We are, therefore, not prepared to accept Mr. Justice Lokur's conclusion that this decision requires the mortgagee to sue in every case within twelve years after the mortgagor's default has occurred. In our opinion, this decision is consistent with the view which we are taking that the mortgagee in such a case has the option to sue the mortgagor within twelve years either from the date of the mortgagor's default or from the date of the expiration of the period mentioned in the mortgage deed. With respect, we would hesitate to hold that the right conferred on the mortgagee by Section 68(1)(d) is really in the nature of an obligation and so it must be exercised within twelve years thereafter notwithstanding the fact that a larger "period is available to him under the mortgage deed.

7. Mr. Justice Lokur has also referred to a decision of the Calcutta High Court reported in - [Afiruddin and Others Vs. Joy Chandra Naha and Others](#), . This judgment again, with respect, does not seem to be either helpful or directly in point. The decision of the question of limitation was based substantially on the construction of the document with which the Court was dealing, because it has been held that "upon the wording of the document as it stands the plaintiff was entitled to sue for the mortgage money on his being dispossessed by the mortgagor in April 1914." It is true that Section 68 has also been mentioned by Mr. Justice Guha who delivered the judgment of the Bench; but the question as to whether the mortgagee cannot avail himself of the longer period available to him under the mortgage deed was not raised before the Court and has not been considered.

8. In our opinion, the view that Section 68(1)(d) imposes upon the mortgagee an obligation to sue forthwith for the mortgage amount even though a larger period of

limitation is available to him under the specific terms of the contract would lead to very unreasonable results. We think the language of Section 68(1)(d) permits a more reasonable and equitable construction to be put upon its provisions by holding that the statutory right conferred upon the mortgagee does not necessarily impair the contractual right where such a right is available to him by the terms of the contract and that in such a case it is for the mortgagee to decide whether for he accepts the statutory right or stands by the contractual right. The option must be his and not of the defaulting mortgagor.

9. A similar point arose for decision before the Privy Council in AIR 1932 207 (Privy Council) . The mortgage with which the Privy Council were concerned was for a period of six years and it was executed on 25-7-1912. The mortgage contained a clause by which in case of default the mortgagee was to have power before the expiration of the stipulated period to realise the principal and interest by sale of the mortgaged property. Default in the payment of interest as required "by the mortgage had been made in the very first year after the mortgage was executed and the suit was filed to recover the mortgage amount on 28-2-1928. The sole question which arose for decision on these facts was whether the mortgagee's suit was barred under Article 132, Limitation Act. If the terms of the contract were strictly enforced, then it would have been possible to hold that the mortgagee's suit was barred by limitation. On the other hand, if it was held that the option given to the mortgagee by the terms of the contract to recover the whole of the mortgage amount in case there was a default by the mortgagor was for his benefit and it was open to him either to act upon that clause or to wait for the full statutory period to recover the mortgage amount, then his suit would be in time because the mortgage itself had stipulated for a period of six years and the suit which was filed in 1928 was clearly within 12 years thereafter.

Sir George Lowndes who delivered the judgment of the Board held that the suit was within time, and he emphasised that the proviso in the mortgage bond was intended exclusively for the benefit of the mortgagee and it purports to give the mortgagee an option either to enforce his security at once, or if the security is ample, to stand by his investment for the full term of the mortgage. The learned Judge then proceeded to add that if on the default of the mortgagor the mortgage money is held to become immediately due, it would clearly defeat the intention of the parties and it would lead to this impossible result that what was agreed by them as an option in the mortgagee is in effect converted into an option in the mortgagor.

It is true as Mr. Hungund has pointed out that the option with which the Privy Council were dealing had been given to the mortgagee by a contract. But the point which has been emphasised in this judgment is that it would be unreasonable to allow the default committed by the mortgagor to impair the rights of the mortgagee, and we think this principle can be appropriately applied even while we

are dealing with the statutory right conferred upon the mortgagee by Section 68(1)(d), T. P. Act. Unfortunately, this judgment does not appear to have been cited before Mr. Justice Lokur. We might incidentally refer to the commentary in Mulla's Transfer of Property Act u/s 63(1)(d) where this point has been considered. Referring to the right accruing to the mortgagee u/s 68(1)(d) it is observed:

"This is a statutory right irrespective of any express covenant, if the mortgagee omits to sue under this clause so that his remedy under Clause (d) is time barred, then, if there is no personal covenant in the usufructuary mortgage, the mortgagee has no other cause of action."

This view clearly suggests that if there is a personal covenant in the usufructuary mortgage, the right under the said covenant would not be defeated merely because the right u/s 68(1)(d) has become time-barred.

10. We would accordingly hold that the Courts below were wrong in coming to the conclusion that the mortgagee's suit to recover the mortgage amount was barred under Article 132, Limitation Act.

11. The result is, the appeal would be allowed, the decrees passed by the Courts below set aside and the case sent back to the trial Court for disposal in accordance with law. Appellants would be entitled to their costs throughout.

12. Appeal allowed.