

(1935) 07 CAL CK 0040
In the Calcutta High Court

Annada Charan Misra and Others

APPELLANT

Vs

Jhatu Charan Roy and Others

RESPONDENT

Date of Decision : 05-07-1935

Acts Referred:

Limitation Act, 1963 — Section 20

Citation : AIR 1935 Cal 648 : 158 Ind. Cas. 512

Hon'ble Judges : R.C. Mitter, J

Bench : Division Bench

Judgement

R.C. Mitter, J.—This appeal is on behalf of defendants 4 to 9 and is directed against a mortgage decree passed by the learned Subordinate Judge, 3rd Court, Midnapur. The suit was instituted by the plaintiff on a mortgage bond executed in favour of his predecessor-in-interest by one Hari Manna on 7th April 1914. Hari is the father of defendants 1 and 2 and grandfather of defendant 3. Hari took from the plaintiff's predecessor-in-interest on that date a loan of 40 maunds of paddy and promised the repayment thereof with interest at the rate of 11 seers per maund with annual rests within one year. He secured the repayment of the paddy lent to him by mortgage of his properties. On the death of Hari his properties were inherited by his heirs, namely his sons defendants 1 and 2 and his grandson defendant 3. Defendants 4 to 9 are the subsequent mortgagees from defendants 1 to 3 and the suit being a suit to enforce the mortgage they have been impleaded on that footing.

2. The suit was instituted on 15th January 1930 admittedly beyond 12 years of the date of the period limited in the mortgage bond for repayment and under the rules of pleading the plaintiff was required to state how limitation was saved. For the purposes of saving limitation he pleaded that on 21st January 1916 Hari delivered to him 11 maunds of paddy and the fact of the said delivery was shown by an endorsement made on the back of the mortgage bond by Hari's son, defendant 1. This part payment does not save limitation because it is beyond 12 years of the date fixed for repayment. The plaintiff further pleaded that in

February 1923 six maunds of paddy were delivered by defendant 1. Hari having died in the meantime. Defendant 1 made the delivery and endorsed the repayment on the back of the mortgage bond purporting to act both on behalf of himself and on behalf of defendants 2 and 3. He further alleged that there was delivery of eight maunds of paddy in February 1926 by way of interest by defendant 1 purporting to act on behalf of himself and on behalf of defendants 2 and 3 and he had made endorsement on the back of the mortgage bond on behalf of himself and as agent on behalf of defendants 2 and 3. The Court of first instance held that defendants 2 and 3 were not present at the time of the delivery by defendant 1 of six maunds of paddy in February 1923 nor at the date of delivery of eight maunds of paddy by defendant 1 in February 1926. It also held that there was nothing to prove that defendant 1 made the delivery of paddy on these two occasions as an authorised agent of defendants 2 and 3. In this view of the matter the suit was decreed in part by the learned Munsiff against defendant 1 to the extent of one-third share of the claim and against the mortgaged properties to that extent as against defendants 4 to 9. It further directed that in default of payment within the period of grace one-third share of the mortgage properties which admittedly belong to defendant 1 was to be sold. The suit was dismissed by the learned Munsiff as against defendants 2 and 3 on account of limitation. The plaintiff appealed to the learned Subordinate Judge. The learned Subordinate Judge first of all took up the question as to whether defendants 2 and 3 were present at the time when defendant 1 delivered the paddy to the plaintiff in February 1923 and February 1926.

3. The evidence with regard to that in his opinion was conflicting but when he says that it would be probable in the course of events that defendant 2 and 3 would also be present at the time of delivery. It is doubtful whether these observations were made on the evidence or were surmises on the part of the Subordinate Judge. But assuming that he means to find on evidence that defendants 2 and 3 were present at the time when paddy was delivered to the plaintiff in February 1923 and February 1926 that would not save limitation unless it could be proved that defendants 2 and 3 also made the delivery or defendant 1 made the delivery being authorized by defendants 2 and 3. The mere presence of defendants 2 and 3 at the place of delivery would not necessarily bring the case within Section 20, Lim. Act.

4. The learned Subordinate Judge does not decide the case on the said fact that defendants 2 and 3 were also present, for in the next paragraph the real reason is given by the learned Subordinate Judge on which he bases his decision that the suit is not barred by limitation even against defendants 2 and 3. The reason which he gives there is that defendant 1 is the eldest brother and the manager of the joint family and he says that a payment by defendant 1 under those circumstances could be a payment which would keep alive the mortgage against other members of the family, namely, his brother defendant 2 and his nephew defendant 3. If there had been any evidence on record to show that defendant 1 was a manager of the joint family nothing could be said by the appellants on the

point of limitation. It is undoubtedly the law that a payment by a managing member of a joint Hindu family saves limitation of the whole debt. A specific ground has been taken in this Court that there is no evidence on the record that defendant 1 was at the material point of time, or ever, the manager of a Hindu joint family consisting of himself, his brother defendant 2 and his nephew defendant 3 and Mr, Mukherjee who appears on behalf of the appellants has pressed that ground with great force. The evidence was placed before me by both parties but the learned advocate for the respondents could not point out any evidence to the effect that defendant 1 was at the material point of time, or ever, the manager of the joint family. This being the state of the record the finding of the learned Subordinate Judge that defendant 1 was the manager of the joint family is a finding based on no evidence and is not binding on me and must be set aside. Therefore the basis on which the learned Subordinate Judge held that the suit was in time even against defendants 2 and 3 having been kept alive by the aforesaid two payments in February 1923 and February 1926 disappears.

5. Mr. Bose on behalf of the respondents has sought to support the decree made by the learned Subordinate Judge on another ground. He says that the loan was incurred by the ancestor of defendants 1 to 3 who had executed the mortgage. On the death of Hari-Manna, the ancestor, the liability for repayment devolved upon his sons and grandsons. He says that they in a body, so to say, represented the equity of redemption and a payment within the period of limitation, says he, by any of those persons, would save limitation as against all. In support of this proposition he has relied upon the decision in *Sarada Ch. Chakravarty v. Durga Ram De Singha* (1910) 37 Cal 461. The observations on which he relied upon are to be found at p. 746 and they certainly support Mr. Bose's argument. But an examination of the facts of this case would indicate that those observations were really obiter inasmuch as the learned Judges found that defendant 1, one of the heirs of the original mortgagor, and who had made the payment, was not only the guardian of some of the other defendants but also the manager of the joint Hindu family. The decision really proceeded on the ground that a payment made by a manager of a joint Hindu family would save limitation as against all the other members who are liable to pay the debt. After having based their decision on the said facts the learned Judges in that case made these observations:

The third contention therefore on behalf of the defendants-appellants must fail. But the learned vakil for the plaintiff-respondent has called our attention to the case reported in *Krishna Chandra Saha v. Bhairab Chandra Saha* (1905) 32 Cal 1077 followed in *Domi Lal Sahu v. Roshan Dobay* (1906) 33 Cal 1278 and he has argued that the mortgage debt incurred by the father of the defendants was binding on the family any member of which could acknowledge the obligation or make a payment on behalf of all. We are disposed to accept this argument in support of the judgment of the lower appellate Court. The entire equity of redemption descended to the sons of the mortgagor; they were jointly liable for the debt not as co mortgagors but as representing the sole mortgagor, their

father. There is nothing in S 20, Lim. Act, to warrant the belief that the extended period of limitation is intended to operate only against the person making the payment.

6. Now, the two cases mentioned in this part of the judgement, which I have quoted, namely the case of Krishna Chandra Saha v. Bhairab Chandra Saha (1905) 32 Cal 1077 and Domi Lal Sahu v. Roshan Dobay (1906) 33 Cal 1278 are really of a different nature and do not support the proposition laid down therein; for in both those cases the mortgagor himself made the payment within the period of limitation and the only question was whether the payment made by the mortgagor would keep the mortgage alive against certain other persons who had acquired a portion of the equity of redemption from the mortgagor. Sir Francis Maclean in both these cases relied upon the terms of Section 20, Lim. Act, which contemplates a payment by the debtor. The mortgagor was the debtor within the meaning of the Limitation Act. He was liable for the whole amount of the money borrowed.

7. Mr. Mukherjee has cited the decision of the Allahabad High Court in Collector of Jaunpur v. Jamna Prasad 1922 All 37. There the mortgage had been executed by Muhammad Ali. On his death his properties were inherited by his two sons Md. Hasan and Md. Zahur and four daughters as his heirs and the mortgage suit was instituted against all of them. One of the sons Md. Hasan had made an acknowledgment of the debt. The question was whether this acknowledgment kept alive the mortgage as against the other heirs also of Muhammad Ali. Rafiq and Lindsay, JJ., held that the acknowledgment was only operative as against Md. Hasan but did not save the suit from limitation as against the other heirs of Md. Ali. I do follow this decision of the Allahabad High Court in preference to the obiter contained in the judgment of this Court in Sarada Ch. Chakravarty v. Durga Ram De Singha (1910) 37 Cal 461).

8. I hold accordingly that the plaintiff's suit is in time so far as defendant 1 is concerned, but it is out of time so far as defendants 2 and 3 are concerned. The suit is accordingly dismissed against defendants 2 and 3. If any one of the defendants 1 and 4 to 9 repay the money found due within one month from this date, the mortgaged properties would not be brought up to sale; but in default of payment within the said time the share of defendant 1 alone in the mortgaged property will be put up to sale after the passing of the usual final decree. It is understood clearly that defendants 1 and 4 to 9 are under no personal liability to repay the sum which has been decreed against them. The appeal is accordingly allowed in part with costs of this Court as also of the lower Courts to defendants 4 to 9. Let a self contained preliminary decree be drawn up.