
(1954) 01 CAL CK 0044
In the Calcutta High Court
Case No : A.F.A.D. No. 532 of 1953

Asta Bala Dasi

APPELLANT

Vs

Bejoy Kumar Das and Others

RESPONDENT

Date of Decision : 07-01-1954

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26F(8)
Limitation Act, 1908 — Article 120, 148

Citation : AIR 1954 Cal 253 : (1956) 1 ILR (Cal) 422

Hon'ble Judges : P.N. Mookerjee, J

Bench : Single Bench

Advocate : Amaresh Chandra Roy and Prafulla Kumar Roy, Jr, for the Appellant;
Panchanon Pal and Amiya Kumar Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

P.N. Mookerjee, J.—The principal point -- or I would rather say the only point -- which requires consideration in this appeal is whether a suit by the mortgagor u/s 26-G, Sub-section (8), Clause (a), Bengal Tenancy Act is governed by Article 148, Limitation Act. The question is not one of much difficulty but it is not wholly without importance.

2. On the 12th Chaitra 1333 B. S., corresponding to 27-3-1927, the respondent No. 1 Bejoy Kumar Das and his uncle Natobar Das, the father and father-in-law respectively of respondents Nos. 2 and 3, mortgaged by an appropriate registered instrument an occupancy raiyati holding to the appellant for securing a loan of Rs. 1000/-. It was a composite mortgage combining in itself a mortgage by conditional sale and a usufructuary mortgage.

Its relevant terms were that the mortgagee would possess the mortgaged property in lieu of interest & in default of repayment of the principal money within 11 years from the date of the mortgage bond the transaction would ripen into an absolute sale in favour of the mortgagee. It was thus an anomalous mortgage usually known as mortgage usufructuary by conditional sale or a

mortgage by conditional sale with possession (vide in this connection the case of -- Mahendra Nath Sardar and Another Vs. Kalipada Haldar and Others, and there is no dispute that the transaction was in substance a mortgage by conditional sale in which possession of the land had been delivered to the mortgagee as contemplated by Sub-section (8) (a) of Section 26-G, Bengal Tenancy Act.

3. The mortgagee remained in possession all along and after the introduction of the amended Section 26-G, Bengal Tenancy Act the original mortgagor No. 1 Bejoy Kumar Das and the sons of the other mortgagor Natobar who had died in the meantime applied u/s 26-G, Sub-section (5), Bengal Tenancy Act for restoration of possession and other reliefs as provided in that sub-section and, having failed in their attempt because of the Full Bench decision of this Court in the case of -- "Badsha Mia v. Mobarak Ali Shonar" AIR 1946 Cal 348 CB), where it was held that the said sub-section was not applicable to cases of such mortgages, they instituted the present suit on 20-9-1950 for redemption or recovery of possession of the mortgaged property u/s 26-G, subsection (8) (a), Bengal Tenancy Act. The suit had been decreed by the two Courts below in a preliminary form under Sub-section (9) of the said Section 26-G. Hence this second appeal by the defendant mortgagee.

4. In the written statement various defences were taken to the suit but the issues eventually framed and pressed were of a limited character. In the lower appellate Court additional points were urged on behalf of the defendant appellant but without success and before me practically the question of limitation alone has been seriously pressed. At one stage of the hearing, a question, of defect of parties was also sought to be raised but eventually it was realised that it could only succeed if the defendant's contention as to the period of limitation for such a suit as the present was accepted and hence the attack was concentrated on the lower appellate Court's finding that the suit was governed by Article 148, Limitation Act.

5. Mr. Ray has argued that in a suit u/s 28-G, Sub-section (8) (a), Bengal Tenancy Act, Article 148, Limitation Act would not apply and that such a suit would be governed by Article 120 of the Act and as, according to him, the cause of action for the present suit arose, at the latest, even on the plaintiff's own case, on the expiry of 15 years from the date of the bond, i.e., on or about 26-3-1942, but the suit was instituted only on 20-9-1950, i.e., long beyond 6 years from the said accrual of the cause of action, it was barred under the said Article 120, Limitation Act.

The point sought to be made was that the right of redemption or recovery of possession of the mortgaged property conferred by Section 28G, was a special statutory right and the suit under subsection (8) (a) of that section being a new remedy or a new type of action, provided by that special statute for enforcement of that special statutory right, Article 148, Limitation Act which provided the period of limitation for- a suit for redemption under the general law would not apply and, there being no other Article in the Limitation Act which would

specifically cover such a case, the residuary Article 120, applicable to suits, would determine the period of limitation.

In support of his argument Mr. Roy relied on the decision of this Court in the case of -- Abinash Chandra Dutta and Others Vs. Gour Chandra, (C), which applied the relevant residuary Article 181 to an application u/s 26G, Bengal Tenancy Act.

6. I am unable to accept Mr. Roy's argument. Article 148, Limitation Act is quite general in its terms. It provides a period of limitation of sixty years for a suit "to redeem or to recover possession of immovable property mortgaged", the limitation starting from the date "when the right to redeem or to recover possession accrues." Section 26-G (8) (a), Bengal Tenancy Act (read with Sub-sections 9, 10 and 11) under which the present suit has been brought authorises the institution of a suit for redemption or recovery of possession of the mortgaged property.

It is clear from the wording of Article 148, Limitation Act that it applies to a suit for redemption as well as to a suit for recovery of possession of the mortgaged property. When the mortgage debt has already been paid off or extinguished, the suit is for recovery of possession of the mortgaged property. It is, however, a suit to redeem ---and this includes recovery or restoration of possession of the mortgaged property (vide Clause (b) of Section 60, T. P. Act) -- when something remains to be paid under the mortgage. Section 26-G, Bengal Tenancy Act in its Sub-sections 8 to 11 contemplates both these types of cases (vide in particular Sections 10 and 11). Upon the plain terms of the two statutes, therefore, the suit under Sub-section (8) (a) of Section 26G, Bengal Tenancy Act is well covered by Article 148, Limitation Act and I find no adequate reason to hold that such a suit is outside that Article. Section 26-G, Bengal Tenancy Act which confers this right of redemption or recovery of possession and authorises a suit for the enforcement of that right provides for no period of limitation for such a suit nor is any such provision made by the special statute either in itself or by express reference to any other enactment. The case is thus left to be governed by the general law of Limitation and as the suit is clearly one covered by the language of Article 148, Limitation Act the application of that Article cannot be resisted.

If the special statute had prescribed a period of limitation or excluded Article 148, Limitation Act or if the language of that Article had not been wide enough to cover the suit different considerations might have arisen but, the position being clearly otherwise, the case must be held to be governed by that Article, the residuary Article 120 not applying in the face of this specific Article. That being so, the appellant's contention must fail and her plea of limitation must be rejected.

7. As to the case cited on behalf of the appellant it is enough to say that there the residuary Article 181 was applied to the application u/s 26-G (5), Bengal Tenancy Act after holding that the said application was not covered by any other Article of the Limitation Act. In the present case I have already found that Article

148 applies and, that being so, there is no occasion to go to any other Article of the Limitation Act and there is no scope also for the application of the residuary Article 120 of the Act.

8. As I have rejected the appellant's argument on the question of limitation, this appeal, as stated earlier, must fail. It is true that one of the plaintiffs (plaintiff No. 3) died during the pendency of the suit and there was no substitution in his place within time. The trial Court, however, added his widow Jamuna Dassi (the present respondent No. 3) who was his sole heiress and legal representative as a co-plaintiff in the suit. The suit was for redemption or recovery of possession of the mortgaged property and, in my opinion, the Court had, in the circumstances of the present case, ample power under Order 1, Rule 10 (2), Civil P. C. to add the said legal representative of the deceased plaintiff.

In view of my finding that Article 148, Limitation Act applies to suits u/s 26-G(8) (a), Bengal Tenancy Act, there can be no question that at the date when Jamuna Dassi was added to the suit as a co-plaintiff she and the other two plaintiffs fully retained their right of redemption or recovery of possession of the mortgaged property under the relevant provision of the said Section 26G and the addition of Jamuna Dassi was, therefore, a proper exercise of the Court's discretion under Order 1, Rule 10 (2), Civil P. C. This has also not been seriously disputed by the appellant's learned Advocate.

9. In the above view of the matter, I dismiss this appeal but I direct that the parties will bear their own costs in this Court.