
(1988) 02 BOM CK 0043
In the Bombay High Court
Case No : Second Appeal No. 522 of 1980

Babu and Another

APPELLANT

Vs

Digambar and Others

RESPONDENT

Date of Decision : 03-02-1988

Acts Referred:

Citation : (1988) 02 BOM CK 0043

Hon'ble Judges : B.N. Deshmukh, J.

Bench : Single Bench

Final Decision : Allowed

Judgement

B.N. Deshmukh, J.—This second appeal is filed by the plaintiffs who have filed a suit for redemption of property agricultural land Survey No. 57/A admeasuring 14 Acres 4 Gunthas of village Dhondrai Tq. Gevrai.

2. The case of the plaintiffs is that the suit property was mortgaged by the father of the plaintiffs with one Digambarrao-defendant No. 1 who subsequently died. This property was mortgaged by executing a mortgage-deed on 20 July, 1330 F for Rs. 1,200/-. The period of mortgage was mentioned as 10 years. The possession of the land was given to deceased Digambarrao-defendant No. 1. The father of the plaintiffs was in need of more amount. Therefore, he took another Rs. 1,000/- from deceased Digambarrao and allowed him to continue in possession as mortgagee. As the mortgage-deed was executed on 20-7-1330 F, no "document was executed after taking Rs. 1,000/- subsequently. According to plaintiffs, property was mortgaged on 20-7-1330 F and it continued to be in possession even after obtaining additional loan of Rs. 1,000/- before the expiry of period of mortgage according to the mortgage deed.

3. The defendants denied the existence of mortgage and contended that Digambarrao was himself owner of the suit land. He sold the lands to defendant Nos. 4 and 5 sold the suit lands to defendant No. 7.

4. The learned trial Judge dismissed the suit of the plaintiffs holding that the

mortgage dated 20-7-1330 F is not established. It further found that the property belongs to deceased Digambarrao.

5. The plaintiffs thereafter went in appeal before the District Court and the learned Extra Assistant Judge, who heard the appeal, dismissed the appeal of the plaintiffs. Hence, the plaintiffs have filed this second appeal.

6. The learned Counsel Shri Chapalgaonkar, appearing for the appellants-plaintiffs, contended that the suit of the plaintiffs is dismissed only on the ground of limitation. The lower appellate Court has held that plaintiffs have proved that on 20-7-1330 F, their father mortgaged the suit land with deceased defendant No. 1 Digambarrao. In view of this finding recorded by the lower appellate Court according to the learned Counsel the suit should have been treated as filed within the prescribed limitation. His contention will have to be accepted.

7. The case of the plaintiffs is unfortunately not properly appreciated by both the Courts below. The Courts proceeded to appreciate the case of the plaintiffs on the footing that there was a mortgage in the year 1330 F which came to be practically redeemed by efflux of time and a fresh mortgage had taken place in the year 1340 when the father of the plaintiffs took additional loan of Rs. 1,000/- and as there was no writing executed for second loan transaction and mortgage, the Courts proceeded to consider as if the mortgaged the suit property in favour of defendant No. 1- Digambarrao on 20-7-1330 F before the expiry of mortgage mentioned in the mortgage-deed dated 20-7-1330 F was ceased to exist and the Courts are called upon to consider the mortgage of 1340 F. This was not the case of the plaintiffs at all. The case of the plaintiffs simplicitor was that the father of plaintiffs mortgage deed, the father of the plaintiffs took additional loan of Rs. 1,000/- without executing any writing and allowed the mortgage to continue. The question of executing or creating fresh mortgage in 1340 F, therefore, did not arise. But the property which was already mortgaged continued to remain as mortgaged with possession with defendant No. 1 Digambarrao.

8. The lower appellate Court has rightly held that the plaintiffs succeeded in proving that on 20-7-1330 F the father of the plaintiffs mortgaged suit land with deceased Digambarrao. This is a finding of fact recorded by the lower appellate Court and no cross-objections are filed challenging the said finding. The finding is, therefore, allowed to become final. The lower appellate Court has further held that the plaintiffs are not entitled to redeem the oral mortgage of 1340 F. The suit for redemption of oral mortgage is, therefore, not maintainable. It is unnecessary to go into the question of 1340 F mortgage. It is not the case of the plaintiffs at all that the property was mortgaged in the year 1340 F. The case of the plaintiffs is utterly misunderstood by the Courts below. The plaintiffs have merely said that already mortgaged property in favour of Digambarrao was allowed to continue with that status even after obtaining additional loan of Rs. 1,000/- in the year 1340 F. It is, therefore, not proper to consider as if the property was mortgaged in 1340 F. In fact, merely a transaction has taken place

during the existence of mortgage.

9. Coming to the question of limitation, the lower appellate Court has held that the suit is filed within limitation in view of the provisions of the Limitation Act, 1963, which is applicable to the present case. By applying the provisions of Article 61 of the Act, the Court found that the period of limitation for the redemption of mortgage in the present case is of 7 years from the saving clause in the act of 1963. The period of 7 years, therefore, starts from 1st January, 1964 and the suit is filed on 20th April, 1970 i.e. within the prescribed period. But the lower appellate Court committed an error in applying the provisions of clause (b) of Article 61 of the Limitation Act, 1963, to the present case on the footing that the defendant Nos. 4 and 5 have purchased the property for valuable consideration and the period of limitation applies as provided under clause (b) of Article 61 of 12 years from the date of knowledge of this transfer. For attributing knowledge to the plaintiffs, the lower appellate Court has considered the evidence of entries in record of rights and compromise decree in RCS No. 336/1 of 1955. The Court was right in attributing knowledge to the plaintiffs on the basis of these documents. But the learned Judge lost sight of the fact that the provisions of clause (b) of Article 61 will apply in cases of transfers by the mortgagees for valuable consideration. Neither the entries in revenue record nor the compromise decree in the civil suit can be read as evidence of transfer for valuable consideration. Admittedly, defendants have not produced salededs which could have established the case of valuable consideration of a transfer. In the absence of production of salededs, it can never be said that the property was transferred by mortgagee for valuable consideration. Therefore, the contention of the learned Counsel Shri Chapalgaonkar will have to be accepted that the suit is not barred by limitation and the provisions of clause (b) of Article 61 of the Limitation Act are not applicable to the present case.

10. The learned Counsel Shri Deshmukh, appearing for the original defendants Nos. 6 and 7, contended that in view of the oral mortgage of 1340 F, the suit shall be treated to be for the redemption of 1340 F mortgage only and it cannot be treated for redemption of mortgage of 1330 F. The argument is contrary to the pleadings and the averments in the plaint. The suit is filed for redemption of the mortgage simplicitor. The consideration of the transaction of 1340 F as constituting a separate mortgage is absolutely erroneous. The property was mortgaged in the year 1330 F and some additional transaction had taken place when the property was already mortgaged and the mortgagee was in possession of the property. Such a transaction cannot be treated to be a mortgage at all. The suit is filed for redemption of mortgage executed in the year 1330 F. The lower appellate Court has rightly found that the plaintiffs have established that their father mortgaged the suit land with deceased Digambarrao. There is, therefore, no question of redemption of mortgage of 1340 F. It is neither mentioned nor pleaded by the plaintiffs in the plaint.

11. The learned Counsel further submitted that merely because the defendants

Nos. 4 and 5 have not produced saledeeds on record, it cannot be held that the transfer in their favour by the mortgagee was not for valuable consideration. It is not possible to accept this contention also because the entries in revenue record or the compromise decree cannot be taken as proof of transaction being for valuable consideration. Shri Deshmukh invited my attention to the fact that the saledeed in favour of defendant No. 7 is produced on record at Exhibit 109. Therefore, it must be held that the transfer was for valuable consideration. The production of saledeed in favour of defendant No. 7 will not help the defendants at all because defendant No. 7 is not a person in whose favour the mortgagee has transferred the property for valuable consideration. The mortgagee has transferred the property in favour of defendants Nos. 4 and 5 and not in favour of defendant No. 7. Therefore, the transaction in favour of defendant Nos. 4 and 5 must initially be for valuable consideration and in the absence of saledeed in favour of defendant Nos. 4 and 5, it will have to be presumed that the transfer by the mortgagee was not for valuable consideration. In *Nanni Bai and Others Vs. Gita Bai*, , the Supreme Court while construing the provisions of old Limitation Act under Article 134 has held that the defendants suffer from the initial difficulty that the saledeeds relied upon by them in aid of the plea of limitation under Article 134 have not been brought on record and, therefore, the Court is not in a position to know the exact terms of the saledeeds. It has further held that the saledeeds themselves were the primary evidence of the interest sold. In the absence of such a proof, the period mentioned under article 134 is held to be not available to the defendants in that suit for possession after redemption. I am of opinion that the ratio laid down by the supreme Court in this case clearly applies in the present case while considering the question of applying clause (b) of Article 61 of the Limitation Act. I, therefore, hold that the suit is filed within limitation.

12. In the result, appeal allowed. The judgments and decrees passed by the Courts below are set aside. The suit of the plaintiffs is decreed with costs.