
(1931) 03 AHC CK 0014
In the Allahabad High Court

Banwari Singh and Others	Vs	APPELLANT
Sakhraj Singh and Others		RESPONDENT

Date of Decision : 17-03-1931

Acts Referred:

Citation : AIR 1931 All 585

Hon'ble Judges : Niamatullah, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Niamatullah, J.—This is a defendants' appeal arising out of a suit for redemption brought by the plaintiff-respondent in respect of a mortgage deed dated 28th June 1864, executed by the predecessor-in-title of the plaintiff in favour of Ram Din Singh and Basra} Singh, ancestors of the defendants. The suit, as originally instituted against defendants other than defendants 10 to 12, was admittedly within limitation. Defendants 10 to 12 were subsequently impleaded after the expiry of 60 years from the date of the mortgage. Under ordinary circumstances the suit against them would be barred by limitation. It has been found by the lower appellate Court that all the defendants form a joint Hindu family and that their interest in the mortgaged property is part of the joint family property. Defendants 10 to 12 are minors, and their respective fathers were impleaded as defendants 7, 8 and 9 in the plaint when first presented.

2. Defendants 10 to 12 pleaded limitation when they were made parties to the suit; but both the Courts below have overruled their plea and decreed the suit. Hence this second appeal. It was originally heard by a learned single Judge of this Court, who referred it to a Division Bench in view of the importance of the question involved. One of the questions argued before us is that of limitation. Having regard to the finding of the lower, appellate Court already referred to that all the defendants constitute; a joint Hindu family and that the mortgage in question was a joint family concern, we entertain no doubt; on that finding that defendants 10 to 12 were represented by their fathers in the suit as instituted. It

was held by Full Bench of this Court in *Hori Lal v. Munman Kunwar* [1912] 34 All 549 that the managing members of a joint Hindu family, who in that capacity had purchased the mortgaged property, sufficiently represented the entire family in a suit brought by them for enforcement of that mortgage. Similarly, their Lordships of the Privy Council held in *Sheo Shankar Ram v. Jaddo Kunwar* AIR 1914 PC 136 that:

There were occasions, including foreclosure actions, when the managers of a Hindu joint family so effectively represented all the other members that the family as a whole was bound, and we are of opinion that it was clear, on the facts of this case and on the findings of the Court upon them, that it was a case where that principle ought to be applied.

3. As already stated, the subject matter of the present litigation is clearly one as to which the managing members of the family, as defendants 7, 8 and 9 are, can effectively represent the whole family and, at any rate, their minor sons, defendants 10 to 12. In this view, the latter must be considered to have been made party to the suit in its inception through their fathers; and if they had not been subsequently impleaded, a decree for redemption passed in favour of the plaintiff would have entitled him to possession on payment of the mortgage money against the whole family. The subsequent addition of defendants 10 to 12 in the array of parties cannot alter their position in this respect. It was, in our opinion, quite superfluous for the plaintiff respondent to have impleaded them at a later stage.

4. Section 22, Lim. Act, which is relied on in support of the plea of limitation, provides that:

Where after the institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

5. In the circumstances already referred to and in view of the legal position of defendants 10 to 12, it is erroneous to say that a "new defendant" has been "added." If parties are effectively represented through those whose actions bind them, so that a decree passed [against them is binding on such parties, a specific mention of the name of such party subsequently made in the title of the suit cannot be regarded as the addition of a new defendant for the purposes of limitation. In *Kishan Prasad v. Harnarain Singh* [1911] 33 All 272, the facts were similar with the difference that junior members of the family had been added as plaintiffs in the array of parties after the period of limitation had expired. The contention was that the suit, so far as their interest was concerned, was barred by limitation and no relief could be granted to the remaining plaintiffs who could not represent the entire family. The Court of first instance decreed the suit, but the plea of bar prevailed in the High Court. Their Lordships of the Privy Council repelled the aforesaid contention and decreed the suit. In doing so, their Lordships observed that:

the original plaintiffs in this case were entitled, as the sole managers of the family business to make in their own names the contracts which gave rise to the claim, and that they properly sued on such contracts without joining the other members of the family.

6. It is urged before us that the judgment does not clearly indicate that the decree was passed in favour of the plaintiffs joined after the period of limitation and that it must be deemed to have been passed in favour of the original plaintiffs only. There is nothing to show that the Court of first instance had dismissed the suit so far as the subsequently joined plaintiffs were concerned or that their Lordships of the Privy Council said something which could have had that effect. They restored the decree of the first Court unconditionally. In substance it is immaterial whether the suit is decreed in favour or against, some members of the family, who are expressly declared to be representing all the members of the family, or in favour of or against all the members of the family mentioned by names, so long as it is clear that the decree is binding on the whole family.

7. The learned advocate for the appellant earnestly pleaded that though the decree passed against the fathers of defendants 10 to 12 be binding, the plaintiff's suit should be dismissed as against defendants 10 to 12 themselves as barred by limitation, even though such a course may not affect the rights of the parties. We are clearly of opinion that such a course would introduce an element of inconsistency in the decree besides being a fruitful source of future litigation.

8. Another question raised in the appeal (has reference to the plaintiff's right to recover a sum of Rs. 15 a year payable by the mortgagees to the mortgagor under the mortgage deed. The Courts below have awarded arrears for more than 12 years by setting them off against the principal sum due under the deed. It is argued that no more than three years' or, at any rate, 12 years' arrears can be allowed, the rest of the claim being barred by limitation. We cannot accede to this contention. On account being taken between the mortgagor and the mortgagee, sums due from one to the other during the continuance of the mortgage should be included. The principle in such cases is that, as money becomes due to the mortgagor at any given time, it should be deemed to have been recovered by the mortgagor by a [corresponding decrease in the amount (payable to the mortgagee. The sum of Rs. 15 a year, claimed by the plaintiff, is mentioned in the mortgage deed as revenue payable by the mortgagees to the mortgagor. The principal secured by the mortgage deed should be considered to have been reduced by Rs. 15 in every year in which the mortgagee failed to pay it to the mortgagor as agreed. The case of Muhammad Husain v. Sheodharshan Das [1907] CWN 71 seems to be in point. The result is that this appeal fails. It is accordingly dismissed with costs, including fees in this Court on the higher scale.